MICHIGAN REPORTS.

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

OCTOBER 18, TO NOVEMBER 15, 1889.

WILLIAM D. FULLER,

STATE REPORTER.

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REPORTER'S NOTE.

The text of volume 78, covering the balance of the October term, 1889, is printed, and work is progressing on volume 79, which, with volumes 80, 81, and 82, will cover the cases decided during the year 1890, all of which volumes will be printed, and most of them bound, by January 1, 1891, thus enabling the Reporter to take up the current work of the Court with the January term of that year.

The absolute necessity of publishing the written opinions and overtaking the Court has prevented my reporting the numerous oral decisions in motion and *mandamus* cases, as I had intended, and realizing the great value of these "practice cases" to the bench and bar of the State I am making the necessary arrangements to report them, commencing with the January term, 1891, and also to report and publish those decided during the four previous years.

Another feature which I had intended to have added to my work (see note to *Bush v. Wadsworth*, 60 Mich. 255; *Ball v. Busch*, 64 Id. 337), has been omitted for a like reason, but I hope to make it a permanent addition to the reports commencing with the January, 1891, cases.

W. D. FULLER,
State Reporter.

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.

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MOSES R. TAYLOR, . . .	CRIER, ...	LANSING.
††BENJAMIN W. HUSTON,	ATTORNEY GENERAL, . .	VASSAR.

*For composition of Court during period covered by Vol. 77, 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.
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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.)

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OCTOBER TERM, 1889.*

THE MICHIGAN BUILDING & SAVINGS ASSOCIATION v. JOHN MCDEVITT AND CARRIE MCDEVITT.

Savings associations—Sale of shares—Rights of members.[1]

1. A member of a co-operative savings association organized under chapter 119, How. Stat., may *sell* his shares to the corporation, or to any member, or to any other person who may be approved, in such manner and upon such terms as the by-laws may prescribe, but after a sale to the corporation in liquidation of his shares he cannot again sell the same shares to another person, nor is there any way provided by which he can again become the holder or owner of the liquidated shares.

   So *held*, where a member sold his shares to the corporation, and received the advance to which the sale entitled him, and secured the payment of his periodic payments and interest by bond and mortgage, and afterwards assumed to sell the same shares to a third person, which transfer the corporation refused to recognize, and on default being made filed a bill to foreclose the mortgage.

2. The opinion discusses and construes the statute under which co-operative savings associations are organized, holding that they are creatures of the statute, and that the rights, duties, and obligations of members are such as it prescribes.

Appeal from Jackson. (Peck, J.) Argued June 28, 1889. Decided October 18, 1889.

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

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*Continued from Vol. 76.

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

Josiah T. Hammond (Barkworth & Cobb, of counsel), for complainant.

Richard Price and *D. D. Root,* for defendants.

[The points of counsel, and authorities cited, are fully stated in the opinion.—REPORTER.]

CHAMPLIN, J. The complainant is a corporation organized under Act No. 206, Laws of 1877, being chapter 119, How. Stat. The act is entitled—

"An act to authorize the incorporation of co-operative savings associations."

Section 1 declares the purpose to be that—

"Of saving and investing among themselves, and accumulating sums to be paid at intervals of not exceeding one month, by its members, in proportion to their interests in the funds to be invested or accumulated."

By section 2 the persons associating are required to state in their articles—

"The name, location, and place of business of such corporation; the amount of each share therein, the periods for payments on the shares, and the amount of each payment thereon; the maximum number of shares; * * * the period of the corporate existence, * * * which shall not be less than three years, nor more than ten years, and be further limited to the number of periods necessary to pay in full the shares subscribed for in the manner proposed," etc.

Section 5 provides that—

"The shares of such corporation shall not be less than twenty-five dollars nor more than one hundred and twenty-five dollars each; the total nominal amount of all such shares shall not exceed three hundred thousand dollars; no person shall become the owner of more than sufficient of said shares to amount to the nominal value of two thousand and five hundred dollars."

Provision is also made for shares to be taken by a

parent or guardian, who becomes personally responsible for the shares. The right to vote is confined to the holders of one or more shares in the corporation in their own right, being of full age, and each holder is entitled to but one vote, and no voting by proxy is allowed. An initiation fee of one dollar may be charged to each member at the time of organizing, and thereafter it may be increased, in the discretion of the board of directors, so as to make the investment of new members equal to that of an original corporator.

Such corporations are by section 8 authorized to adopt by-laws for the collection of fines by way of penalty for any failure to pay periodical dues, or to carry into effect any agreement made by the corporation with a member, or any other infraction of the reasonable by-laws or articles of association; and such fines are made a lien upon the interest of the member upon whom they are imposed in the said corporation. But the amount of such unpaid fines chargeable against any member who is not an officer shall at no time exceed the annual profits of such member upon the share or shares held by him; and any member, not an officer, is entitled at any time, by making a demand in writing, and a surrender to the corporation of all accrued profits, to be repaid all moneys paid by him on his share or shares, except initiation fees, and with such interest, if any, as the by-laws shall in such case provide. Such surrender of profits cancels all fines against members who are not officers. If any member shall continuously neglect for 60 days to pay the periodic dues required of, or fines imposed upon, him, the corporation may pay or tender to him the amount which he may have actually paid as periodic dues, with interest, or such interest as the by-laws in such case provide for, and with or without initiation fee, as the by-laws provide; and thereupon all the rights and

liabilities of such member in such corporation cease and are determined.

Section 9 provides:

"Any member may dispose of any share held by him to any member holding less than the maximum number of shares, or to any other person who may be approved, in such manner and upon such conditions as the by-laws shall prescribe."

Section 13 provides:

"No member of such corporation shall receive any greater pecuniary benefit or advantage from his share therein than its payment in full, at its nominal or par value; every discount and sum of interest allowed or paid, and every fine or penalty collected, shall, equally and ratably in proportion to their shares, be for the benefit and advantage of selling and non-selling members; and every agreement which any shareholder may make in regard to payments for his share, or for additional payments in case of sale thereof, shall be construed to have been fully performed whenever he shall have contributed in dues or additional dues his ratable proportion of the sums necessary, with the profits accruing from initiation fees, discounts, dues, fines, and all other sources, after paying all expenses, to pay in full all shares in the corporation. Whenever such payments shall have been made, the said corporation shall cease and determine for all purposes, except winding up its affairs. The cancellation and discharge of a security given by a selling shareholder, to an amount equal to his share or shares, shall be deemed the payment thereof."

It is provided by section 17 of the act, among other things, as follows:

"The duties of all officers shall be prescribed by by-laws adopted by the corporators; and all powers granted by this act, not expressly devolved thereby, or by the articles of association or some by-law, upon one or more officers of the corporation, shall be exercised by the corporators only, at meetings when the quorum required by section six shall be present."

By section 6 a quorum must consist of such number,

not less than 15, as the articles of association or by-laws shall prescribe.

The law does not provide for a board of directors. The affairs of the corporation are managed by the officers, whose duties are prescribed by the articles of association and the by-laws; and, where the articles and by-laws are silent, the corporators have the sole power to control the affairs, and determine what shall and what shall not be done.

The articles of association of the complainant corporation placed the shares therein at $125. Each member was required to pay 25 cents each Wednesday night as weekly dues; and every member who has received a loan upon his share or shares was required to pay, in addition to his weekly dues, 15 cents interest on each share, weekly, for which he has received a loan, such interest to commence on the day when he receives the loan, and to continue until the dissolution of the association. Articles 7, 8, 11, 12, and 14 of the by-laws read as follows:

"Art. 7. Every shareholder who has been awarded a loan by the association shall, before receiving the money, give such security as prescribed by the constitution, to be approved of by the directors. He obligates himself to pay promptly all dues on his share, and the interest, as well as fines, if any there be; to keep the mortgaged buildings insured, to pay all taxes when due, and to obey all rules and regulations provided by the constitution and by-laws. He shall furthermore transfer and deliver up to the association the insurance policy covering such property.

"Art. 8 (as amended December 17, 1884). If a member neglects to give satisfactory security for the loan within four weeks from the date of its being awarded to him, he shall be charged with such losses as the association may sustain, and the money shall revert to the association. A member who has been awarded a loan shall have the privilege to receive a loan for as many shares as he holds at a like premium, if he designates the number of shares for which he desires a loan, immediately after such award.

After a member has been awarded a loan, his shares on which he has received a loan are not transferable until security is given and accepted."

"Art. 11. Every member shall have the privilege of transferring his share, upon which no loan has been given, to another person, but only through the financial secretary, with the consent of the board of directors. The fee for transferring to members shall be fifty cents; to others, one dollar. No share can be transferred while the original owner owes any debt, fine, or claim to the association.

"Art. 12. The board of directors may, if they deem it necessary, proceed to foreclose mortgages against members who have received loans from the association on mortgage security, and who are in arrears for sixty days with the payment of their weekly dues, interest, fines, or any part thereof; and in that event the whole of the advanced loan, together with the interest, shall become due and payable immediately."

"Art. 14. The directors and officers shall serve without pay, unless otherwise expressly provided for by these by-laws."

On October 16, 1886, John McDevitt was the holder of nine shares of the complainant corporation, and on that day he sold his said nine shares to the corporation, under the rules and regulations of the corporation, and the statute in such case made and provided, for which he received an advance to which said sale entitled him; and, to secure the payment of his periodic payments and interest, he gave his bond to the complainant, conditioned as follows:

"The condition of this obligation is such that if the above-bounden John McDevitt, his heirs, executors, or administrators, shall and do well and truly pay, or cause to be paid, unto the above-named Michigan Building & Savings Association, or to its certain attorney or assigns, the sum of twenty-five cents per week as weekly dues, and the sum of fifteen cents per week as interest on each of twenty shares of its capital stock (each share being one hundred and twenty-five dollars), on Wednesday of each and every week during its continuance, and shall

conform to all the requirements of its constitution and by-laws, and shall further keep and perform, all and singular, the covenants and agreements specified in a certain mortgage, bearing even date herewith, and collateral hereto, executed by John McDevitt and Carrie McDevitt, his wife, together with those hereinafter expressed, without fraud or delay, then the preceding obligation to be void, otherwise to remain in full force and virtue.

"And it is hereby expressly agreed that should any default be made in the payment of the said interest, taxes, assessments, or insurance, or of any part thereof, on any day when the same is made payable as above specified, and should the same remain unpaid and in arrear for the space of sixty days, then and from thenceforth—that is to say, after the lapse of the said sixty days—the aforesaid sum of twenty-five hundred dollars, with all arrearage of interest, taxes, assessment, or insurance thereon, shall, at the option of said obligee, its successors or assigns, become and be due and payable immediately thereafter, although the period above limited for the payment thereof may not then have expired, anything thereinbefore contained to the contrary thereof in any wise notwithstanding."

He also, together with his wife, Carrie McDevitt, executed a real-estate mortgage as security for said loan. The mortgage contained the following among other conditions:

"That if the said parties of the first part shall and do well and truly pay, or cause to be paid, to the said party of the second part, the sum of twenty-five cents per week as weekly dues, and the sum of fifteen cents per week as interest on each of twenty shares of its capital stock (each share being one hundred and twenty-five dollars), on Wednesday of each and every week during its continuance, and shall conform to all of the requirements of its constitution and by-laws, according to a certain bond, bearing even date herewith, executed by John McDevitt to said party of the second part, to which these presents are collateral, and shall also pay, or cause to be paid, all taxes and assessments, of whatever nature, which may be levied upon said premises above described, as soon and as often as the same may become due and payable. And the said first parties do hereby covenant and promise to

and with said second party, its representatives and assigns, that they, the said first parties, will pay to the second party the full sum of twenty-five hundred dollars, with interest, as above provided.

"And it is hereby expressly agreed that should any default be made in payment of the said interest, taxes, assessments, or insurance, or any part thereof, on any day whereon the same is made payable, as above expressed, and should the same remain unpaid and in arrear for the space of sixty days, then and from thenceforth—that is to say, after the lapse of the said sixty days—the aforesaid principal sum of twenty-five hundred dollars, with all arrearage of interest thereon, and all taxes, assessments, and insurance unpaid, shall, at the option of said obligee or assigns, become and be due and payable immediately thereafter, notice of which option is hereby expressly waived, although the period above limited for the payment thereof may not then have expired, anything thereinbefore contained to the contrary thereof in any wise notwithstanding."

It is averred in the bill, and admitted in the answer, as follows:

"And your orator further shows that by a provision of the by-laws adopted by your orator, to wit, article 10 thereof, it is provided that for non-payment of weekly dues a member shall be fined five cents for each share held by him or her; and a member who has drawn a loan from said association, and neglects to pay his weekly interest, shall pay for every such neglect a fine of five cents on each share drawn, as by reference to said provision of said by-laws, so adopted by your orator as aforesaid, will more fully appear.

"And your orator further shows unto the court that article 12 of said by-laws, so adopted, provides that the board of directors of said association may, if they deem it necessary, proceed to foreclose mortgages against members who have received loans from the association upon mortgaged security, and who are in arrears for sixty days with the payment of their weekly dues, interest, fines, or any part thereof; and in that event the whole of the advanced loan, together with the interest, shall become due and payable immediately thereafter."

The complainant avers that payment of the weekly dues

and interest was made by defendant John McDevitt until and including January 5, 1887, at which date said defendant ceased to pay such dues or interest, or any part thereof, and that they remained in arrear more than 60 days, and the board of directors declared the whole amount due and payable at once, and directed a foreclosure of the mortgage.

The bill alleges, and the answer admits, that although the bond and mortgage recite that they were given for twenty shares, and to secure the payment of $2,500, only $1,125 was borrowed upon nine shares.

The defendants, in answer to the bill, say that the security for the loan of $1,125 on said nine shares was given by said bond and mortgage, and was accepted by the board of directors; and that under by-law No. 8, and section No. 9 of the statute, he had a right to transfer any one or more of his shares to any person who should be approved by the board of directors; that on December 29, 1886, defendant John McDevitt transferred two of his shares to Dwight D. Root, of the city of Jackson, where said corporation was located, and on that day McDevitt notified the corporation complainant of such transfer, and made written application to the board of directors to have such transfer recorded upon the books of the corporation; and at a regular meeting of the association held on the same day he tendered to complainant the full amount of the weekly dues and interest due on the nine shares, namely, $2.80 for the seven shares held by him, and 80 cents for the two shares held by said Root, which complainant refused to receive, and refused to give him credit for said dues and interest, and said board of directors also refused to record the transfer of said two shares upon the books of complainant.

Defendants further aver that after the transfer of the two shares to Root they continued to pay their weekly

dues and interest upon the seven shares which were still held by John McDevitt, up to and including January 12, 1887; and on January 19, 1887, he transferred to said Dwight D. Root the seven remaining shares, and gave a written notification of such transfer to the board of directors, and requested them to record such transfer upon the books of the complainant, and at the same time tendered to them, in behalf of said Root, the weekly dues and interest then due on the said nine shares, namely, $3.60, but they refused to either record said transfer, or accept the dues and interest thus tendered. They allege that they also tendered to the complainant the proper transfer fee, and also for recording, and they deny that they are in arrears for dues or interest.

The testimony was taken in open court as in a case at law; and the court, upon pleadings and proofs, pronounced a decree in favor of complainant.

Co-operative savings associations organized under chapter 119, How. Stat., by whatever name they adopt, are creatures of the statute, and the rights, duties, and obligations of members are such as the statute prescribes. They have very few of the common-law powers of corporations, as the whole scheme is marked out and defined by the statute.

However much unincorporated associations for the same object may partake of the nature of partnerships, and be governed by the analogies afforded by the law of partnership, it is clear that, under our statutes, incorporated companies have very little, or none, of the characteristics of partnerships. Differing from some associations of a kindred nature, our statute does not contemplate or permit any profit over and above the par value of the shares taken to be made. It is not intended that these associations shall be investment companies, where capitalists may place their money as a source of profit; but the

object is to encourage habits of frugality among the laboring and industrial classes, whose weekly or monthly earnings are small, who, by laying aside a small portion periodically, are enabled to receive at the termination of the association a sum equal to the total amount subscribed for. The rate of interest allowed is not to exceed 7 per cent.; and whenever, and as soon as, the initiation fees, discounts, interest, fines, and dues, after paying all expenses, equal the value of the shares, the corporation ceases for all purposes except winding up its affairs.

The scheme of the statute, further, is to accelerate the termination of the corporation by purchasing shares of members at a discount. This benefits the member selling his shares, and the other members also. It benefits the seller by enabling him to realize the amount coming to him upon the dissolution of the corporation in advance of that time. For this benefit he discounts his shares, and also pays interest on a sum equal to the full amount of his shares; the money he receives down being considered equal in value to the shares sold. This discount and interest also benefits all the members, including the seller, because it is applied equally upon all shares, and thus accelerates the time of dissolution, when all periodic payments cease.

Under our statute, the selling member receives no more money from the corporation than the sum for which he sold his shares. The shares purchased by the corporation remain upon the books, and are recognized in ascertaining the amount to be credited to each member; but all credits to such selling member are received and credited as payments upon his obligation to pay the shares subscribed for by him. And hence it follows that, although he never receives any more money, he pays less for such shares, inasmuch as the general fund of the cor-

poration is re-inforced for initiation fees, discounts, interest, and fines, and is distributed *pro rata*, in proportion to all the shares of the corporation.

It is also the scheme of the statute that a person becoming a member of the corporation continues such until the corporation has run its course, unless his membership is sooner terminated by expulsion, or in one of the modes pointed out by section 8. He continues a member although he has sold his shares to the corporation. It is a necessary part of the scheme that membership should continue to exist, in order to exercise the jurisdiction conferred by the statute over every debtor to enforce payment of periodic dues and fines, and to compel a contribution in case of loss. The liquidation of shares referred to in section 10 has reference to the sale of shares provided for in section 11. When such shares are sold to the corporation at a certain discount, they thereby become liquidated; that is, the amount the seller consents to receive as his share in the final distribution becomes fixed and certain. It is the amount of his share at par value, less the discount offered on the sale; and this amount he receives at once, and the shares sold are *ipso facto* extinguished for all purposes, except for computing what are called "profits and losses," in the apportionment of each member's *pro rata* share.

The law permits a member to sell his shares to the corporation, or to any member, or to any other person who may be approved, in such manner and upon such terms as the by-laws shall prescribe. But a member cannot sell his shares twice. He cannot sell first to one person, and then sell the same shares to another. When he has sold to the corporation in liquidation of his shares, he cannot again sell the same shares to another person; and there is no way provided by which he can again

become the holder or owner of the liquidated shares. As soon as a share is paid for, it becomes extinguished; and it matters not whether it is paid for periodically by a member, or in a gross sum by the corporation out of the funds contributed by its members. The result is the same,—the share is wiped out of the score; and, when all the shares are paid for, the corporation ceases to exist for all purposes except winding up.

It follows that John McDevitt, after selling nine shares (which were all the shares held by him) to the corporation, could not sell two of the same shares to Dwight D. Root, and the corporation was not obliged to recognize Root as having any rights whatever.

It is claimed by defendants that section 9 of the statute authorizes a member to sell his shares to any person under such conditions as the by-laws provide; and that article 8 of the by-laws, which reads:

"After a member has been awarded a loan, his shares on which he has received a loan are not transferable until security is given and accepted,"—

Prescribes the condition upon which such shares may be transferred; and, as McDevitt's security had been given and accepted, he was at liberty to transfer such shares to Root. But the by-law is not to be so interpreted. When a member sells his shares to the corporation, under the provisions of section 12, the transaction is not complete until the security is given and accepted; and the by-law provides that, while the matter is pending, he shall not transfer the shares sold to the corporation. If his security is rejected, or he fails to give it, he retains the ownership of the shares; but, when it is accepted, he has no further control over them.

It is further claimed that both the articles of association and the by-laws call the money advanced upon the

sales of shares by a member to the corporation a "loan;" and, if a loan, then the title to the shares remains in the borrower, and he has the right to sell them, subject to the mortgage.

There is no doubt but the articles and by-laws do confound the money paid in advance by the corporation in full of the shares with the idea of a loan to the member by the corporation; and some courts recognize the transaction as a loan. *Pfeister v. Association,* 19 W. Va. 676; *Mills v. Association,* 75 N. C. 292; *Association v. Graham,* 7 Neb. 181; *Martin v. Association,* 2 Cold. 418; *Gordon v. Association,* 12 Bush, 110; *Association v. Lake,* 69 Ala. 456 (1 Amer. & Eng. Corp. Cas. 418).

It makes but little difference, however, what it is called, as our statute treats it as a sale of the shares, subject to the payment by the seller of the regular periodical dues, and the payment by him of such additional periodic sums, not exceeding the rate of 7 per cent. per annum on the nominal amount of the shares, as may be prescribed by the by-laws. Security for the payment of these periodic sums must be taken upon unincumbered real estate worth not less than twice the amount depending upon such security, upon bond and mortgage duly executed and acknowledged, or upon shares in said corporation, upon estimates according to the dues actually paid in, or upon both such real estate security and such shares. Neither the word "borrower" nor the word "loan" is mentioned in the statute. On the contrary, the transaction is called a "sale," and the members are divided into two classes, denominated "selling" and "non-selling" members.

Every member of the association, from the moment he joins, becomes a debtor to the corporation, and every member remains a debtor until the full amount of the

shares for which he subscribed or became the holder of is paid. No new relation is created by the operation of selling shares to the corporation. Some rights are relinquished, as his right to the control of the shares; and, if the sale is of the entire shares held by him, the right to vote is gone, but he remains both a member and a debtor for the amount unpaid on his shares, with the increased obligation of paying interest thereon. If it is a loan of money, then by paying the amount borrowed, and interest, he would be entitled to redeem the shares, and again become the owner and holder thereof. But this he cannot do, for the shares are extinguished by payment, and nothing remains to redeem.

The testimony shows that Root paid nothing for the shares transferred to him, and that the object of the transfer was to create Root an additional member of the association, with a view of obtaining his assistance to bring forward an investigation into the affairs of the corporation, and institute some reforms in its management.

So far as investigation was concerned, it was not necessary; for section 19 of the statute provides that every member and creditor of such corporation, whose just claim exceeds $25, shall at all reasonable times be allowed to inspect the records and securities of the corporation; and, so far as correcting abuses of the officers in voting salaries, it was alike unnecessary, as such vote for payment of salaries was void.

As the corporation was not obliged to receive or recognize a tender made by or on behalf of Mr. Root, it follows that Mr. McDevitt was in arrear; and, by the terms of the mortgage and the by-laws, the corporation was authorized to proceed to foreclose.

The decree of the court below will be affirmed, with

costs, and the sale will be made, unless the decree and all costs are paid within three months from the entry of decree in this Court. The transcript will be remanded for execution of the decree in the court below.

The other Justices concurred.

JAMES M. DARRAH v. JAMES GOW ET AL.

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121 486

Contract—Logs and logging.

One of several log-owners, having logs to be driven out of a creek into the Muskegon river, was placed in charge of the drive by said owners, as agent, under a written contract giving him power to make assessments on the several owners, as required, to pay the cost of such driving, upon an agreed basis as to mileage and amount of logs. Said contract recited that said log-owners were desirous of having their logs driven into the main Muskegon river before the main spring drive on said river of the *present* year passed said creek, but contained no definite agreement on the part of said agent to drive the logs out by that time, which he failed to do, and certain of said log-owners notified him not to drive any more logs for them, after which he completed the said drive, and made further assessments, which they refused to pay, and he brought suit therefor.

Held, that the time when the logs should be driven out of the creek is plainly limited, namely, *before* the main spring drive on the Muskegon river in the year the contract was made passed said creek. and that, whether the plaintiff was at fault or not for failing to so drive them out, the defendants had a right to say to him, as their agent, that they did not wish him to drive their logs out of the creek after that time, and that it would require a new contract to authorize him to do so. An examination of the opinion is essential to a full understanding of the case.

Error to Mecosta. (Palmer, J.) Argued July 9 and 10, 1889. Decided October 18, 1889.

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

Smith, Nims, Hoyt & Erwin, for appellants.

M. Brown and *Frank Dumon,* for plaintiff.

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

CHAMPLIN, J. On February 18, 1886, the parties named therein entered into the following agreement, namely:

"Memorandum of agreement made and entered into this eighteenth day of February, A. D. 1886, by and between James M. Darrah, of Big Rapids, Michigan, party of the first part; Layman & Elliott, of Evart, parties of the second part; Gow, Majo & Company, of Muskegon, Michigan, parties of the third part; J. & G. K. Wentworth, of Bay City, Michigan, parties of the fourth part; T. H. Lavery, of Harrison, Michigan, party of the fifth part; and A. N. Doty, of Harrison, party of the sixth part; and Ducey Lumber Co., of Muskegon, party of the seventh part.

"*Whereas,* the parties hereto are respectively the owners or in charge of various lots of pine saw-logs now on the banks of Town Line creek, in the counties of Roscommon and Clare, State of Michigan, or that will be delivered there before the spring drive of the present year, which logs they are desirous of having driven into the main Muskegon river before the main spring drive on said river of the present year passes said creek; and

"*Whereas,* the said parties hereto are desirous of entering into some arrangement whereby they may accomplish the driving of said logs with economy and with the least inconvenience to all parties:

"Now, therefore, it is hereby mutually agreed between the parties hereto:

"1. That Frank B. Wilson, of Harrison, surveyor,

shall, as soon as practicable, go and locate the various rollways of the said several parties hereto, and determine their distance by the course of the stream, as near as practicable, from the mouth of said Town Line creek, and his determination in that regard shall be binding upon the parties hereto, for the purposes hereinafter mentioned.

"2. That James M. Darrah, of Big Rapids, shall be and is hereby designated and appointed and authorized to take charge of the driving of the logs of the said several parties hereto from said creek into the main Muskegon river, and for that purpose is authorized to employ all necessary help and means, as the agent of the several parties hereto. He shall also make assessments as they may be needed upon the several parties hereto, for the cost and expense of such driving. His assessments for that purpose on the several parties hereto shall be paid to him, or his order, on demand.

"3. The liability for assessment of the said several parties hereto under this instrument shall be established and determined as follows: Each party shall pay his proportion of each assessment, which shall be ascertained in the following manner: The number of million feet of logs owned by each party shall be multiplied by the number of miles said logs are distant from the mouth of the stream; the whole number of miles thus obtained bears each assessment, and each party's proportion will be his percentage of mileage for all logs driven to the whole mileage of the entire lot of logs. It is hereby understood and agreed that the expenses of the surveyor above named shall be borne by the parties in proportion to the number of feet of logs which they own out of the whole lot.

"4. It is hereby understood and agreed that James M. Darrah, so appointed to take charge of the work and business of driving said stream, shall first execute a good and sufficient bond, in the sum of five thousand dollars, with sureties to be approved by the parties hereto, or a majority of them, for the sure and faithful performance of his duties and employment, and that he will keep accurate and correct accounts of all the expense connected with said work, which shall be subject at any time to the inspection of any of the parties hereto; such books

also to show all assessments made, by whom paid, and in what manner expended."

After the contract was entered into, and before the ice had gone out of the stream, the surveyor named measured the river, and located the distance which the logs of the respective owners were to be driven. Darrah commenced preparations for driving in March, and began the work of driving in April. In order to facilitate the work, he built two dams,—one about nine miles from the mouth of the creek, which was built after consultation with the owners of the logs, and the other was located about two and one-half miles from the mouth, and was built without consultation with all of the owners of logs. The cost of both of these dams he charged to the expense of the log-owners. He continued driving until about June 10, with a force of men gradually increased to about 125. He then stopped on account of low water in the stream, which made it impracticable to drive at that time. In the last part of June there was a rain-fall, and he resumed work, and continued for about two weeks.

The rear of the drive in the main Muskegon river was driven past the mouth of the Town Line creek about July 10. It usually passed that point from June 15 to a month later. At the time the agreement was made, Darrah had known for a number of years about the time the rear of the drive on the main Muskegon river would leave Houghton lake. It usually takes about 15 days for the rear to pass the Town Line creek after it leaves Houghton lake. He also knew where the logs he was driving were destined for, and that they would not reach their destination that season if the rear of the drive passed the mouth of the creek before the logs were driven out.

During the progress of the work three successive assessments were made before the rear of the drive in the

main Muskegon river passed the mouth of the creek, and which were paid by Gow, Majo & Co., and after the rear had passed they objected to paying any more, and notified Darrah not to drive any more logs for them. Darrah was interested in driving the logs of Lavery and of J. & G. K. Wentworth, which were further up the creek. He resumed work again the last of August or the first of September. He stopped once after that, and finally got the logs run out in October.

He made assessments upon the parties to the contract after the 3d, but Gow, Majo & Co. only paid $1,000, and Darrah claims a balance due him under the contract of $2,069.79. He made proper demand for the payment of this sum, and, payment being refused, brought this suit for its recovery in *assumpsit*, filing a declaration upon the common counts only, and filed his bill of particulars, composed of two items, the first of which was for driving 7,000,000 feet of saw-logs down Town Line creek during the months of April, May, June, July, August, September, and October, 1886, and delivering them in Muskegon river, under the above agreement, at $2 per 1,000 feet, and the other item was the same, except it omitted to mention that the driving was done under the contract.

The defendants pleaded the general issue, and gave notice that the claim of the plaintiff arose under a written contract, a copy of which was set out; being the same contract set up by plaintiff under his bill of particulars. The cause for recoupment is stated in the notice as follows:

"That the said plaintiff wholly neglected and omitted to do and perform certain works which were requisite and necessary to be done and performed under and by virtue of the said agreement, according to the tenor and effect, true intent, and meaning thereof; that is to say, to drive and deliver from said Town Line creek, men-

tioned in said contract, the logs therein belonging to said defendants into the main Muskegon river before the main spring drive on said river for the said year 1886. And the said plaintiff also thereby craftily and subtly deceived the said defendants in this, to wit, that the said plaintiff afterwards, to wit, on April 1, 1886, and on divers other days and times between said first day of April and the first day of November of the same year, did and performed certain other works which were requisite and necessary to be done and performed under and by virtue of the said agreement, in a bad, inartificial, and unworkman-like manner, contrary to the form and effect, true intent, and meaning of his said promise and undertaking."

Upon the trial of the cause the counsel for defendants offered testimony to establish their claim for recoupment; and, on the objection of the plaintiff's counsel, the court excluded the testimony offered.

Upon the trial of the cause the plaintiff relied entirely upon the written contract as the basis of his recovery, and introduced no proof upon the *quantum meruit* count of his declaration. He claimed that he had substantially performed his contract, and gave testimony of the assessments made against the defendants, and of the balance remaining unpaid by them.

It is claimed by the defendants that the testimony did not disclose that the assessments claimed as due from defendants were made in accordance with the provisions of the agreement, which is specific as to the manner in which such assessments should be made.

It appears from the testimony that at the time the first four assessments were made the quantity of logs owned or controlled by the respective parties had not been reported to the plaintiff, and he was therefore obliged to make those assessments upon estimates, from the best information he could obtain; and such assessments were not made upon the basis provided for in the

contract. At the time, however, the fifth assessment was made, the quantity of logs was known, and it was testified to by the plaintiff's book-keeper, and not disputed, that the fifth assessment showed the full amount of defendants' logs, and that there was 2,119,610 feet in the 1-mile limit, 1,573,868 feet in the 10-mile limit, and 2,100,000 in the 11-mile limit, making a total of 5,793,478 owned by and under the control of the defendants.

The method of determining the assessment each party should pay, provided for in the contract, was to multiply the number of million feet of each party by the number of miles such logs were distant from the mouth of the stream, and the whole number of miles thus obtained bears each assessment; and each party was to pay in proportion as his mileage was to the whole mileage thus obtained. The defendants' mileage would be obtained as follows, viz.:

2,119,610, multiplied by 1, equals	2,119,610
1,573,868, multiplied by 10, equals	15,738,680
2,100,000, multiplied by 11, equals	23,100,000
Total mileage	40,958,290

—Or nearly 41 miles.

The defendants insist that there was no testimony in the case showing the number of million feet of logs in the different mile limits belonging to the respective parties, and consequently there was no basis from which the jury could ascertain the amount which should be assessed to the defendants, and at the close of the case counsel for defendants requested the court to submit to the jury the following question, viz.:

"Can you find from the evidence in this case the amount of logs belonging to or controlled by either of the parties to the agreement, other than the defendants, in any particular mile of the creek in question?"

The court refused to submit the question, and exception was taken.

Counsel also contend that the assessments were not made in accordance with the contract. The testimony of the book-keeper was that the manner of making the assessments was as follows:

"We first took the distance of the logs that we were going to assess from the mouth of the creek, and multiplied the total number of feet by the mile, and then made the two, three, or five per cent. assessments upon that."

The books of Mr. Darrah, which were shown to have been kept under the requirements of the contract, were offered and received in evidence, and the witness testified that the pages of the journal containing the assessments to defendants were upon 48 and 50, and the assessments to all the parties were contained upon pages 46 and 47. As these pages are not embraced in the bill of exceptions, we cannot say that they did not show that the assessments were erroneously made.

Two assessments upon defendants were put in evidence, and show that the quantity was multiplied by the distance or number of miles from the mouth of the creek, and upon this result a per cent. was assessed. It is claimed that this was erroneous, and that the assessment should have been upon a proportion of mileage, instead of a per cent. of the expenses. But if the expense to be assessed was a certain sum, and the number of million of feet contained in all of the logs in the creek were multiplied by the distance they were from the mouth of the creek, the result could as accurately be arrived at by ascertaining the per cent. each 1,000 feet so obtained would be of the amount of the expense to be assessed as it could be by making the proportion according to the mileage. It would be a different method of arriving at

the same result. In view of the testimony introduced, we do not think the court erred in refusing to submit the question of defendants' counsel to the jury. If there was no testimony upon the point covered by the question, it should have been made to appear that it was so from the record.

The court correctly charged the jury that "the plaintiff counts expressly upon this contract, and bases his right to recover by virtue thereof," and that it was incumbent upon him, before being entitled to a verdict under the issue framed, to prove by a fair preponderance of evidence that he had complied substantially upon his part with the terms of the written agreement.

The court also, in construing the written agreement, instructed the jury that the time was not limited in the contract in which Mr. Darrah was to drive out the logs, and that the law only required him to drive them out in a reasonable time, having reference to all the facts and circumstances detailed in the testimony,—acting in good faith; and if he had done so he had complied with his contract.

It appears to me that in this the circuit judge was mistaken. We must look to the language of the contract, and to the condition of things at the time it was entered into, and the object to be accomplished, to discover the intent of the parties. These parties were lumbermen, who had logs in this creek which they wished to have driven out into the main Muskegon river in time to have them driven down that river with the spring drive. The recital in the contract speaks the language, and expresses the intent, of all the parties to the agreement. They expressly say that they are desirous of having their logs driven into the main Muskegon river before the main drive on said river *of the present year* passes said creek. It was for this purpose, as well as the matter of economy

mentioned in the second recital, that they employed Darrah as their agent to accomplish that result. The time when the logs should be driven out of the creek is plainly limited, namely, before the main spring drive on the Muskegon river that year (1886) passed said creek.

The testimony shows that the failure to get the logs out by the time specified would leave the logs, in the technical phrase of log-drivers, "hung up," so they would not reach their destination until another year. Unlimited authority was placed in the hands of Darrah, as their agent, to drive the logs out. Adequate provision was also made in the contract for means to accomplish the undertaking. The proof is uncontradicted that he failed to drive the logs out before the drive in the main Muskegon had passed. Whether he was at fault or not, the defendants had a right to say to him, as their agent,—

"We don't want you to drive our logs left in the creek after the drive in the main Muskegon river has passed the creek."

When that time was passed, plaintiff had no right to employ men during the summer and fall and drive out defendants' logs, and assess the expense to them. It would require a new contract to authorize him to do that. Doubtless, defendants would be liable to Darrah for their share of the expenses of driving such logs as were driven out, until the rear of the main drive had passed, if the failure to drive them all out were owing to circumstances beyond his control. But there was no testimony definitely showing what their share would be, if anything, over and above what they had paid; and the case was not presented to the jury by the court upon that basis.

The plea of recoupment was not full and definite enough to allow defendants to recoup for damages suffered by

plaintiff's failure to perform the contract in the time limited by it.

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

The other Justices concurred.

ELIHU L. CLARK v. CALVIN DANIELS ET AL.

Mortgage—After-acquired title—Quitclaim deed—Evidence.

1. A son contracted *verbally* for the sale to his father of 40 acres of land, subject to a $700 mortgage, which the father was to pay as the consideration for the purchase. The father, after taking possession, mortgaged the forty acres, with other lands owned by him, without covenants of warranty, to the holder of the $700 mortgage, which was paid by deducting the amount due from the amount secured by the second mortgage. The son afterwards conveyed the 40 acres to the father by *quitclaim* deed, and it is held that the lien of the second mortgage attached to the 40 acres as soon as the father *thus* acquired the legal title, and takes precedence over levies by his subsequent judgment creditors; that the transaction defrauded no one, and that a quitclaim deed, under the circumstances, was as ample to carry out the intention of the parties as a warranty deed would have been, and that the title conveyed by it inured to the benefit of the mortgagee as fully as if the mortgage had contained covenants of warranty.
2. In such a case it is competent to prove the making of said verbal agreement, and the payment for said 40 acres, by parol testimony.

Error to Lenawee. (Watts, J.) Argued July 10, 1889. Decided October 18, 1889

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

Bean & Lane (*Millard, Wood & Bird*, of counsel), for appellants, contended:

1. The objection to the admission of evidence of the verbal arrangement for the purchase of the 40 acres was well taken. The statutes prohibit a conveyance of land except by writing duly executed; citing How. Stat. §§ 6179, 6181; and this Court has said on more than one occasion that a verbal agreement for the sale of land possesses no life for any purpose; citing *Hall v. Soule*, 11 Mich. 494; *Liddle v. Needham*, 39 Id. 148; *Hillebrands v. Nibbelink*, 40 Id. 546; *Sutton v. Rowley*, 44 Id. 112; nor will part performance aid such a contract at law; citing *Dickinson v. Wright*, 56 Mich. 42.
2. The other question is whether a conveyance without covenants of any kind will carry after-acquired lands embraced within its description, but not owned at time of the conveyance, the rule of law being to the contrary; citing *Comstock v. Smith*, 13 Pick. 116; *Kimball v. Blaisdell*, 5 N. H. 533; *Doswell v. Buchanan's Ex'rs*, 3 Leigh, 365; *Clark v. Baker*, 14 Cal. 612; *McCrackin v. Wright*, 14 Johns. 193; *Brown v. Phillips*, 40 Mich. 264; *Frost v. Missionary Society*, 56 Id. 62.

Weaver & Weaver, for plaintiff, contended for the doctrine laid down in the opinion.

CHAMPLIN, J. This is an action of ejectment, and both parties claim title (to the 40 acres of land in dispute) through Warren Gilbert.

October 25, 1859, the legal title became vested in William G. Gilbert, who was a son of Warren Gilbert. November 18, 1870, William G. Gilbert executed a mortgage upon the premises to Elihu L. Clark, Sr., for $700. On March 4, 1875, and while the legal title was in William G. Gilbert, Warren Gilbert executed a mortgage, covering the land in question (and other lands), to Elihu L. Clark, Sr., for $19,000. Later, and May 18, 1875, William G. Gilbert executed to his father, Warren Gilbert, a quitclaim deed of the premises (in dispute), and on the same day the $700 mortgage was released from record.

A judgment was obtained in the circuit court for the

county of Lenawee on July 26, 1878, for $581, in a suit in which Charles Daniels was plaintiff and Warren Gilbert was defendant. Execution was issued on this judgment August 19, 1878, and levied upon the land in question, and afterwards a sale by virtue of said execution was had, and the same was struck off to Alfred L. Millard and Seth Bean on October 25, 1878, who received the sheriff's certificate therefor, and afterwards assigned the same to the defendants Calvin Daniels, Charles Daniels, and Chauncey Cooper, who have received the sheriff's deed therefor, dated November 20, 1887.

The mortgage for $19,000 was foreclosed by advertisement under the statute, and the premises were sold to Elihu L. Clark, Sr., February 17, 1879. The premises were not redeemed from the sale, and he received the sheriff's deed.

On the trial of the cause Warren Gilbert was produced as a witness for the plaintiff, and testified that in May, 1874, he made a bargain with his son, William G. Gilbert, for the purchase of the land in question, at which time said William G. owned the land. He was further permitted to testify, against the objection of defendants' counsel, duly and properly made, as follows:

"That in the month of May, 1874, his son, William G., was the owner of the land in question; that there was then a mortgage upon said premises securing a note of $700, given by said William G. to E. L. Clark, Sr. [being a mortgage given in 1870]; that he had wanted to get some money at a lower rate of interest, and he bought the land of his son, and was to pay the $700 note and take up that mortgage securing it as soon as he could get the money at a lower rate of interest, and then William G. was to deed him the land; that William G. gave him immediate possession; that was in May, 1874, and he put cattle on it at that time, and pastured it, and used it as his own, and so continued to occupy it until March 4, 1875, when the $19,000 mortgage to Clark, Sr., was given by him, and from that time until defend-

ants took possession; that he paid the note when the $19,000 mortgage was given on March 4, 1875, the amount of that note and interest being taken out of the $19,000, the amount for which the $19,000 mortgage was drawn; that the said $700 note was then given to witness; that Clark said he would keep the $700 mortgage till William G. came back from Iowa, and made the deed to him [witness], and witness told him to keep the note with it, and put it in his safe, which he did for witness' convenience; that William G. came back in May following, and executed the deed to witness at Clark's office."

On cross-examination the witness further testified as follows:

"That there was no written contract between himself and his son with reference to this land until the deed was executed in May, 1875; that it was understood between them that William G. was to have a portion of the home farm when witness had his indebtedness all paid; that there was no time fixed when William G. should deed to witness in the arrangement of May, 1874, except that it was to be when witness could get money at a low rate of interest, and mortgage the whole farm; that there was no specific price fixed upon the land in the bargain between him and his son; that witness was to pay the $700 note, and interest, and take up the mortgage, and when they got through their trouble, and their debts paid, William G. was to have a portion of the old farm; that a definite 200 acres was agreed upon which he was to have; and that this forty acres was no part of the 200 acres."

It appears from the record before us that the mortgage for $19,000 covered 712 acres of land, including the 40 acres in dispute. This mortgage contained no covenants of warranty.

The testimony introduced in behalf of the plaintiff to prove that Warren Gilbert had purchased from William G. Gilbert the premises in question, and that he paid for them in the transaction under which the $19,000 mortgage was given, was properly received. It was a completed arrangement before any rights of those through

whom defendants claim had attached to the land. It was the consummation of this parol agreement that placed the legal title in Warren Gilbert. Elihu L. Clark, Sr., the person more particularly interested, understood what the bargain was between the father and the son, and as part of the transaction took a mortgage from Warren Gilbert for $19,000, which included $700, being the consideration moving from Warren to William G. for this 40 acres upon which Clark held the note of William G., secured by mortgage. These he retained in his hands until May 18, 1875, when the legal title was conveyed to Warren, and Clark then discharged the $700 mortgage. This transaction defrauded no one, nor did it tend to defraud any one. It was a valid one between the parties, especially when fully executed, and no one of the parties to it questions its validity. Under the arrangement the legal title of Warren Gilbert to the land through the quitclaim deed from William G. inured to the benefit of Clark under his mortgage. To hold otherwise would be for the Court to turn a *bona fide* transaction between the parties, which they fully executed in good faith, into a fraudulent one, by which Clark would lose his lien by virtue of his $700, and the debt secured thereby, inasmuch as he surrendered up the note as paid. This we cannot do, at the instance of a third person not a party to the transaction, and not injured or in any way affected by it.

Whatever claims the execution creditor had by virtue of his levy accrued subsequently to the deed from William G. to Warren Gilbert, and when the rights of all parties under the agreement for the sale of the land had become vested. A quitclaim deed, under the circumstances of this case was as ample to carry out the intention of the parties as would have been a warranty deed, and it inured to the benefit of Clark, the mortgagee, as fully as if the

mortgage had contained covenants of warranty of title.

After the consummation of the oral contract of purchase by the deed to Warren Gilbert, he could not be heard to deny the validity of the Clark mortgage for $19,000, or that a sale under a foreclosure of it would convey the legal title. So neither can an execution creditor of Warren Gilbert deny the validity of the mortgage, or the binding force of a sale under it. The mortgage lien took effect as soon as Warren Gilbert acquired the legal title, and takes precedence over subsequent levies of the creditors of Warren Gilbert.

The judgment is affirmed.

The other Justices concurred.

JOHN E. BOTSFORD ET AL. v. CHARLES H. PLUMMER.

[See 67 Mich. 264.]

Shipping—Principal and agent—Ratification—Evidence.

1. Where the captain of a vessel, laden with lumber, made an *unauthorized* contract for towage, the vessel having been beached and being in a water-logged condition, which contract was carried out and the cargo delivered to the consignee, who was required to pay one-half of the contract price for towage, in addition to the freight, which the owner of the vessel received in addition to said freight, with full knowledge of the terms of the towage contract, he thereby ratifies said contract.
2. In such a case testimony to show that the voyage was injurious to the vessel is rightly excluded. There was an express bargain for the towage, or there was no claim at all, and there could be no method of getting at the proper measure of risks on the towage of a water-logged vessel and cargo, so long as towed and delivered as agreed.

Error to Saginaw. (Gage, J.) Argued July 10, 1889. Decided October 18, 1889.

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

Tarsney & Weadock, for appellant.

Avery Brothers (*Albert Trask,* of counsel), for plaintiffs.

CAMPBELL, J. This case, which as formerly before us and reported in 67 Mich. 264 (34 N. W. Rep. 569), was sent back for a new trial on a single question, resulted in a verdict for plaintiffs, and comes here again on the dispute concerning ratification. It will not be necessary, therefore, to do more than refer very generally to the nature of the controversy.

In the early part of June, 1884, defendant was owner of the lumber barge Saginaw, laden with a cargo of lumber consigned to J. H. Morley, of Cleveland, Ohio; and on June 4 it was lying beached and water-logged at Port Crescent, in Huron county. Defendant resided at East Saginaw. The boat met with a storm while loading at that point on May 24, and was water-logged, and was beached to save her from further danger. Information was sent by Mr. Helbing, the captain, to defendant, who answered by telegraph at once, and by letter on June 1, refusing to have her sent to Cleveland, as the captain had suggested, by reason of expense and danger, and directing him to bring her to Bay City or some other safe place, if it would be too expensive to leave her where she was. Notwithstanding these orders, the captain undertook to make a bargain with Capt. Hebner, commanding the Concord, a steamer belonging to plaintiffs, to tow the Saginaw to Cleveland, and turn her over to a harbor tug, for $500. On June 5 an instrument, some-

times called a "draft," and more correctly a "statement of account,"—a "due-bill,"—was given to Capt. Hebner, as follows:

"$500. PORT CRESCENT, June 4, 1884.

"To C. H. PLUMMER, Master, and Cargo of Lumber of the Towbarge SAGINAW, of East Saginaw,

"To Propeller CITY OF CONCORD, Dr.

"For towing from Port Crescent, Mich., to Cleveland, Ohio, five hundred dollars.

"Master: FRANK HEBNER.

"Correct.

"A. J. HELBING, Master.

"(Water-logged, and lying on the shore in an exposed condition.)"

This was sent for settlement or acceptance to a bank in East Saginaw. There was a dispute between Plummer and another witness whether this was or was not presented to him. The jury must have found on this issue for plaintiffs. The person presenting it put on it a memorandum to this effect:

"Refused. Captain will pay from freight money,"—

And, while not able to speak positively from memory, testified substantially that it must have been correct. Mr. Plummer's version is that he was sent for to go to the bank, and there saw Mr. Comstock, to whom he refused to pay the draft as unauthorized; that Helbing had no business to go to Cleveland; and that, among other things, defendant remarked:

"What is he doing with the freight money?"

The vessel was towed to Cleveland, and put in charge of a local tug, as agreed. Before delivering the cargo, Helbing required Mr. Morley to pay not only the freight-bill of $384, but a further sum of $250 for "extra expense on account of water-logging," as expressed in the document signed by Mr. Morley, which declared that of that aggregate sum $68 was retained to pay the tug Jennie

Sutton, which seemingly was a tug that had rendered services at Port Crescent and Bay City. Capt. Helbing testified that he told Plummer he had received $250, besides the freight, and had used some to pay expenses, and paid about $200 to Plummer, who retained it.

The only question which was properly up for consideration on the new trial was whether Plummer had done enough to ratify the otherwise unauthorized conduct of Capt. Helbing in employing plaintiffs' steamer.

An attempt was made to introduce testimony to show that the voyage was injurious to the Saginaw. But this was rightly held irrelevant. There was an express bargain, or there was no claim at all, and there could be no method of getting at the proper measure of risks on the towage of a water-logged vessel and cargo, so long as towed and delivered as agreed, concerning which no issue was really presented. It was probably an unwise, as it was unauthorized, performance, but the work was done, and, if recognized, must be paid for.

There was also an exception taken to some remarks of the court concerning the rule of division of extra expenses between the vessel and cargo. If Morley was willing to contribute, and did contribute, towards the extra expense, it to that extent relieved defendant, whether it was or was not in strictness a proper case for general average, and what was said was not prejudicial to defendant. It was actually received on that account, as found by the jury, and, as they have also found, Plummer, understanding its purpose, took it and kept it, inasmuch as what was not paid to him in cash was used with his acquiescence in the expenses of the vessel.

The charge of the court upon the only issues properly in the case followed the decision of this Court on the former hearing, and there is no occasion for reviewing it.

There was just such evidence as our former decision intimated would show a ratification. Mr. Plummer, whether he did or did not refer the payment of the account to the freight money, saw the paper, which showed not only the terms of the bargain, but, also, that the Saginaw was water-logged, and exposed to danger. Knowing this, he received from the consignee, in addition to the freight, one-half of this very bill, as the consignee's share. It would be difficult to find a more direct recognition of the whole affair; and it is certain that Morley paid the money as an expenditure called for by the peril as represented to him.

We have nothing to do with the determination of the questions of fact in the matter. We think that there was enough to go to the jury, and that there was testimony which, if believed, could not fail to justify the verdict. The charge was fair and discriminating, and nothing has been pointed out which could legally wrong defendant.

The judgment must be affirmed, with costs.

The other Justices concurred.

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WILLIAM R. JONES v. SETH LEE.

Ejectment—Riparian rights—Surveyors.

1. Plaintiff brought ejectment to recover part of a lot in the city of Muskegon, running to Muskegon lake, the real controversy being over part of a wharf in the lake entirely outside of the shore. Judgment passed for plaintiff below, and in reviewing the case it is held that there is an entire absence of legal proof of what plaintiff owns, in fact or in theory; that the maps and other testimony give no such means of adjustment as would

authorize the Court to deal with the abstract questions presented, nor would it be desirable to do so at all; in view of the clear proof, not in any way controverted, that, as a matter of fact, the possession of defendant has been under an actual, defined occupancy very much longer than would cut off any theoretical rights to the contrary if they existed. This testimony was to the effect that, between 20 and 30 years before suit, a line of piles was driven for the purpose of fixing boundaries, which would exclude from plaintiff's occupancy all of the disputed territory, which act is held to have been the most unequivocal assertion that could well be made, when followed up by the use of the line as a boundary, of such active and business possession as can be had of land under water.

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

a—No occupancy, in hindrance of free navigation, of the waters of a deep navigable lake, can be lawfully enjoyed.

b—There is no rule of law which will authorize a body of water, merely because it is a theoretical expansion of a river, to be treated as anything but a navigable lake (if so in fact), which would not put the expansions of the St. Lawrence on a similar footing.

c—A river is characterized by its confining channel banks, which give it a substantially single course throughout. A lake occupies a basin of greater or less depth, and may or may not have a single prevailing direction.

d—If this body of water (Muskegon lake) were not navigable, and if all its waters could in any way be apportioned among the riparian proprietors for any lawful purpose, it must be done by some rule of proportion, which probably could only be got at by some partition proceeding, inasmuch as such waters are common for all ordinary uses, unless placed in a different position by the public surveys, as has been done in many instances of small so-called "lakes," not navigable; citing *Clute v. Fisher*, 65 Mich. 48, and cases cited. But, as this lake is navigable and large, the riparian rights (which, for all available purposes of a possessory nature, must be confined with reference to the paramount rights of navigation) depend on those principles which apply where immediate dependence on the *filum aquae* or middle thread is impracticable; citing *Rice v. Ruddiman*, 10 Mich. 125; *Lincoln v. Davis*, 53 Id. 375; the chief value of which rights must refer to the access to navigation and use with reference to it of the space near the shore, and not to the area of deep water which cannot be

appropriated, as was indicated in those cases and others elsewhere.

e—We have had occasion, in several instances, to point out that a surveyor cannot be allowed, under any circumstances, to fix private rights or lines by any theory of his own. Before his evidence can be received at all, it must be connected with the starting points and other places or lines called for by the grants under which the parties claim. His duty is neither more nor less than to measure geometrically in accordance with those *data*, and his science goes no further. It is not his business to decide questions of law, or to pass upon facts that belong to the tribunal dealing with the decision of facts. His testimony, as a man of science, is never receivable except in connection with the *data* from which he surveys, and if he runs lines they are of no value unless the *data* are established from which they are run, and those must be distinctly proven, or there is nothing to enable any one to judge what is the proper result.

Error to Muskegon. (Russell, J.) Argued July 10, 1889. Decided October 18, 1889.

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

Blair, Kingsley & Kleinhans, for appellant, contended:

1. Where there is an honest doubt about boundary lines, the parties can settle their claim by parol agreement, and possession taken and acquiescence, for even less time than the statute of limitations, will be a bar, even in ejectment; citing *Smith v. Hamilton*, 20 Mich. 433; *Joyce v. Williams*, 26 Id. 332; *Diehl v. Zanger*, 39 Id. 601.

Smith, Nims, Hoyt & Erwin, for plaintiff, contended:

1. On all of the questions mooted there was a conflict of testimony, and the findings of fact end the question on this record; citing *Johnson v. Crispell*, 43 Mich. 261; *Farrington v. Sexton*, 43 Id. 454; *Green v. Gill*, 47 Id. 86; *Irwin v. Schlief*, 48 Id. 237; *Kane v. Stowe*, 50 Id. 317; *Neumann v. Mining Co.*, 57 Id. 104, 105.

2. If a river has a straight course, or one nearly so, every one's equity would be preserved by extending the line of division of the two parcels from the meander line to the center line of the river as nearly as possible at right angles to the general course

of the river at that point. When the stream is very crooked, and especially if there are short lines, so that the foregoing rule is incapable of strict application, it is sometimes very difficult to determine what shall be done, and in many cases the surveyor may be under the necessity of working out a rule for himself; and while such action is not conclusive, yet if he establishes a rule that follows as nearly as the circumstances will admit the general rule above indicated, so as to divide as near as may be the bed of the stream among the adjoining owners in proportion to their lines upon the shore, his division, being that of an expert made upon the ground, and with all available light, is likely to be adopted as law for the case; citing Cooley, Judicial Convictions of Surveyors, 7, 8, 9.

3. Each riparian lot-owner ought to have a line on the legal boundary, namely, a center line of the stream, proportionate to the length of his line on the shore, and the problem in each case is how this is to be given him; citing *Lorman v. Benson*, 8 Mich. 18; *Rice v. Ruddiman*, 10 Id. 126; *Clark v. Campau*, 19 Id. 328, 329; *Ryan v. Brown*, 18 Id. 196; *Backus v. Detroit*, 49 Id. 115; *Cole v. Wells*, Id. 452; *Fletcher v. Boom Co.*, 51 Id. 277, 281; *Lincoln v. Davis*, 53 Id. 375; *Deerfield v. Arms*, 17 Pick. 41; *Rust v. Corporation*, 6 Id. 158.

4. A parol agreement long acquiesced in, to settle a boundary, must be an honest attempt to determine a doubtful line; otherwise the authorities have not permitted the agreement to stand, which would operate as a violation of the statute of frauds; citing *Smith v. Hamilton*, 20 Mich. 433, 438; *Joyce v. Williams*, 26 Id. 332; *Stewart v. Carleton*, 31 Id. 370; *Cronin v. Gore*, 38 Id. 384; *Terry v. Chandler*, 16 N. Y. 354; *Jackson v. Van Corlaer*, 11 Johns. 123; *Jackson v. Ogden*, 7 Id. 238; *Kellogg v. Smith*, 7 Cush. 375.

5. The mere driving of piles with the consent of plaintiff's grantors does not preclude him from contesting this as a boundary, nor does the occupancy to the line of piles by defendant's grantors, unless adverse for the full period required by the statute of limitations; citing How. Stat. § 8698; *Bunce v. Bidwell*, 43 Mich. 542, 554; *Chapman v. Crooks*, 41 Id. 595, 597; and even a written agreement that the parties shall survey a line is not conclusive, though acted on; citing *Thayer v. Bacon*, 3 Allen, 163; *Russell v. Maloney*, 39 Vt. 580; *Vosburgh v. Teator*, 32 N. Y. 561; 3 Washb. Real Prop. 87, 88.

CAMPBELL, J. Plaintiff recovered below in an action of ejectment which purported to be brought to recover

a part, 100 feet wide, of block 1, in Muskegon, running from Water street to Muskegon lake, with its riparian rights. The real controversy was concerning part of a wharf in the lake entirely outside of the shore. The case was tried on the merits, and no question is made on the declaration. The court found certain facts, and refused to find others. Exceptions were taken to rulings on evidence and to the decision on the facts and law involved in the conclusions.

Upon the theory relied on by plaintiff, the case which he presented did not show all the facts necessary to base his claim upon, and the record does not anywhere supply the defect. The defendant, however, showed a state of facts which it was claimed made out a complete defense to any possible theory which plaintiff could make out, and this was so presented as to require us to pass upon it. A reference to the nature of the controversy is therefore important.

The city of Muskegon, succeeding the village of that name, includes a large share of the south-easterly shore of Muskegon lake, and, as we gather from the charter, nearly half of its bed. Enough appears from the maps in evidence to show, what the statutes indicate, that it is bounded by fractional sections. The maps also show, —what possibly might also be inferred otherwise,—that the lake is of considerable size, bordering on several sections, and approaching an oval or elongated shape, with more or less indentations. The Muskegon river enters it on the south-easterly side towards the north-east end. The testimony does not precisely locate its outlet, which we know, however, and possibly are bound judicially to know, leads by a short passage into Lake Michigan. The record does not show, and we have no means of knowing, whether it has always emptied in the same place.

This lake appears distinctly to be a deep, navigable lake, and it appears that deep water is found near the shore, and that the wharf in question is built and used for the purposes of lake navigation. It does not appear whether the city of Muskegon has established a dock-line, as authorized or required by its charter. But the waters are of such a nature that no occupancy in hindrance of free navigation could be lawfully enjoyed. There is no rule of law which would authorize this body of water, merely because it is a theoretical expansion of a river, to be treated as anything but a navigable lake, which would not put the expansions of the St. Lawrence on a similar footing. A river is characterized by its confining channel banks, which give it a substantially single course throughout. A lake occupies a basin of greater or less depth, and may or may not have a single prevailing direction.

It appears clearly enough in the present case that while there is a considerable frontage facing north-west or south-east, the lake being longest in that direction, there must also be large end frontages, which look up or down the lake perpendicularly, or nearly so, to any line across from bank to bank, at most places along the shores. If this body of water were not navigable, and if all its waters could in any way be apportioned among the riparian proprietors for any lawful purpose, it is evident that it could not be done by reference to any *filum aquæ* or middle thread, but must be done by some rule of proportion, which probably could only be got at by some partition proceeding, inasmuch as such waters are common for all ordinary uses, unless it may have been placed in a different position by the public surveys, as has been done in many instances of small so-called "lakes," not navigable. See *Clute v. Fisher*, 65 Mich. 48 (31 N. W. Rep. 614), and cases cited. But, as this lake is navigable and large, the riparian rights (which, for all available purposes

of a possessory nature, must be confined with reference to the paramount rights of navigation) depend on those principles which apply where immediate dependence on *filum aquæ* is impracticable. This was fully recognized in *Rice v. Ruddiman*, 10 Mich. 125, and *Lincoln v. Davis*, 53 Id. 375 (19 N. W. Rep. 103). The chief value of riparian rights, in such a case, must refer to the access to navigation and use with reference to it of the space near the shore, and not to the area of deep water which cannot be appropriated, as was indicated in those cases and others here and elsewhere.

It appears, furthermore, that the place in controversy is near the land end of an open bay of considerable size, extending across more than one government subdivision, but just how many does not positively appear. It also appears that the immediate boundary between the parties is in a subdivision of the shore end of a part of a government fraction, which is lot 1, in section 19, in township 10 N., of range 16 W. Whatever water-rights belong to any part of that subdivision must necessarily fall within those that belonged to the whole of it at the time when it was made ready for sale by the United States government, and no change, if any took place, in the shore line could enlarge that grant at the expense of any other. It is also beyond question that any owner of water-rights within that subdivision could determine for himself in what way he would subdivide and parcel out his own property. The evidence of these smaller subdivisions, although not as full as it might be, clearly indicates from the direction of the lot lines that their water-lines were to extend inward towards the curved channel bank, as is usual in all city water-lots intended to reach navigable dock-lines. While it is not necessary, or, perhaps admissible, for us to act on exhibits that are all imperfect without further proofs, there is in the case, so far as we dis-

cover, no legitimate evidence of any purpose to allow plaintiff's lot to cut off the water-front of the much larger premises westward of him, as is done by this judgment.

But when we look at the record we find an entire absence of legal proof of what plaintiff owns in fact or in theory. It has already been suggested that the first step in any such proof would be to ascertain what were the water boundaries of the whole government subdivision. But in this case the only proof of anything was evidence of the land-lines of plaintiff, and a surveyor's assumed technical knowledge of the right method of division, with no *data* of any definite character to found it on. He assumed that the general rule, in such a case, was to run perpendiculars from the thread of what he treated as a stream to the shore; that in case of a bay or similar variation of coast-line some sort of base-line should be run across, and the space on that line divided up into lengths proportionate to the respective shore-fronts of the land-lots, and each lot to have lines drawn from the shore-ends to these base-line divisions. In this case the surveyor's testimony was that he started one end of his base-line about 250 feet from shore, in deep water, at a point on a dock a considerable distance outside of lot 1, in section 19, and ran it in a direction which must have crossed what he regarded as the thread of the stream, not to the shore anywhere, but to the end of a breakwater or erection in the water, also at a considerable distance from the shore. He gave no survey or *data* from which a survey or plat might be located, so as to enable any one else to test his accuracy, or determine how far, according to his own theory, his notions were correct. He was also allowed, against objection, to give his opinion as a fact, in one or two instances, without reference, on his direct examination, to any facts at all.

We have had occasion, in several instances, to point out that a surveyor cannot be allowed, under any circumstances, to fix private rights or lines by any theory of his own. Before a surveyor's evidence can be received at all, it must be connected with the starting points and other places or lines called for by the grants under which the parties claim. His duty is neither more nor less than to measure geometrically in accordance with those *data*, and his science goes no further. It is not his business to decide questions of law, or to pass upon facts that belong to the tribunal dealing with the decision of facts. His testimony, as a man of science, is never receivable except in connection with the *data* from which he surveys, and if he runs lines they are of no value unless the *data* are established from which they are run, and those must be distinctly proven, or there is nothing to enable any one to judge what is the proper result.

The maps which plaintiff introduced did not give the *data* necessary to measure the rights of parties on any theory. They failed to identify the extent or bounds of the adjacent government subdivisions, or even those of the particular division in question. They gave no means of getting at just where the thread was supposed to be, or the shore conformation, except in a limited range, and were in other respects deficient. These defects were not made up by any other proofs in the case. The result arrived at in accordance with the surveyor's notions was practically an absurd one, and destructive of the water-rights of a large coast-line southward and westward.

The maps and other testimony give no such means of adjustment as would authorize us to deal with the abstract questions presented, and we shall not attempt, with our present want of light, to do it. Neither would it be desirable to do so at all, in view of the clear proof,

not in any way controverted, that, as a matter of fact, the possession of defendant has been under an actual, defined occupancy very much longer than would cut off any theoretical rights to the contrary if they existed.

It appears that at least as early as between 20 and 30 years before suit a line of piles was driven which would exclude from plaintiff's occupancy all of the disputed territory. It appears, and is not disproved, that this was done for the purpose of fixing boundaries, and it was in itself such an act as would have been a trespass if wrongful, and it was the most unequivocal assertion that could well be made, when followed up by the use of the line as a boundary, of such active and business possession as can be had of land under water. As the testimony stood, we cannot see on what theory these undisputed facts could be avoided, and we think the court erred in not finding in accordance with them. It may further be remarked, although we do not base any decision upon it, that if the plat of the water-lots, and its conformity to the curvature of the bay, is regarded, the line of piles is at least in very close harmony with it.

There were errors assigned on the reception and rejection of testimony which we do not wish to be regarded as treating as unfounded, but which, in the state of the record, are not necessary to be noticed.

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

The other Justices concurred.

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FRED S. KIELDSEN v. MATTHEW WILSON.

Log lien—Judgment—Evidence.

1. The log-lien law (Act No. 229) of 1887 does not apply to the case of a contractor for hauling saw-logs who performs no *personal* labor under the contract.
2. Where a contractor takes proceedings under the log-lien law of 1887 against the log-owner, with whom he claims to have made a contract for their hauling, and recovers a verdict for the amount claimed to be due on said contract, the fact that his non-performance of the labor in person deprives him of a lien under said statute will not affect said verdict; and if the verdict and judgment are in the usual form in *assumpsit*, and are silent as to such lien, it will be presumed that the jury failed to find a lien, especially where the record shows that their attention was called to the fact that if a lien was found it should be entered as a part of their verdict.
3. Evidence of the existence of a custom as to what part of a scaler's charges should be paid by a contractor with the owner for hauling saw-logs is admissible, as also proof of what the custom is, the contract being silent upon the subject.

Error to Missaukee. (Aldrich, J.) Argued July 10, 1889. Decided October 18, 1889.

Proceedings under log-lien law of 1887. Defendant brings error. Affirmed. The facts are stated in the opinion.

E. Eugene Haskins and *M. Brown,* for appellant.

Silas S. Fallas, for plaintiff.

SHERWOOD, C. J. This suit is brought by the plaintiff against defendant to establish and enforce his lien against a quantity of pine and hemlock logs under Act No. 229, Laws of 1887. On April 11, 1888, plaintiff filed his statement of lien, and on April 14 commenced his suit by writ of

attachment to enforce the same. The declaration, which is in the usual form in such cases, was duly filed after personal service of the writ, and defendant appeared and pleaded issuably in the case. The cause was tried before Judge Aldrich, in the Missaukee circuit, with a jury, and the plaintiff obtained judgment for the sum of $359.52, and defendant brings error. The record is large, and contains all the evidence in the case. Fifty-four errors are assigned upon the record.

The plaintiff's claim is that on January 20, 1888, he made a contract with defendant to haul certain logs on what was known as the "Kenneth Campbell Job," for $2.50 per thousand for pine, and $2 per thousand for hemlock; that at this time Campbell had hauled a considerable amount of logs, and defendant agreed to pay plaintiff for hauling those logs if plaintiff would pay Campbell's men who had done the work what was then due them; that it is conceded that plaintiff paid the men, and that defendant paid plaintiff for such hauling done by Campbell.

Plaintiff also claims that a subsequent agreement was made by which defendant was also to pay him for hauling what were known as the "Deucy Trespass Logs" at the rate of $4.50 per thousand feet.

Plaintiff further claims, as is conceded, that there were 1,241,143 feet of pine logs, and 247,215 feet of the hemlock, and he further claims there were 31,114 feet of the Deucy trespass logs; that the hauling of the pine and hemlock logs amounts to $3,597.29; and he concedes that he has been paid $3,300, leaving a balance due plaintiff of $297.29, and a sum amounting to $62.23 owing for hauling the Deucy logs, making the entire sum due plaintiff $359.52 on account of the above-mentioned logs; that the question of lien in the case is of but little consequence, defendant being not only the debtor but owner

of the logs; that it is not material whether the plaintiff should have a lien for the logs put in or not that have been paid for, the jury having found for plaintiff upon his theory of the case that he was to pay the men who worked for Campbell in hauling logs, and defendant was to pay him for the logs so hauled.

It is further claimed by plaintiff that the jury, in finding a verdict for the plaintiff, sustained his theory upon all the material points, and the main questions are therefore closed by the finding. Plaintiff further contends that not all the timber he hauled was scaled and reported, and that the amount omitted entitled him to have from the defendant $181.50 more under his contract, which would make his total claim against defendant, at the time of bringing suit, $541.02.

The contention of the defendant is that a contract was entered into between defendant and Campbell prior to the alleged contract with plaintiff, and by which Campbell agreed to cut, skid, haul, and bank the timber in question at the agreed price of $3.50 for the hemlock, and $4.50 for the pine; that Campbell, during the summer and fall of 1887, cut and skidded all of said timber, and that the same was ready to be hauled and banked during the ensuing winter; that under said contract it was agreed that Campbell should have from the defendant $2 per thousand for the pine, and $1.50 per thousand for the hemlock, as fast as the timber was cut and ready to be hauled; that estimates of the amounts so cut and skidded were made at various times, and that payments were made to Campbell accordingly.

Defendant further denies that any contract was ever made by him or his agent with plaintiff to haul the timber, but that plaintiff became involved with Campbell by furnishing him supplies, and to save himself from loss induced Campbell, by false representations, to

deliver over the job as it then stood to him, said plaintiff; that no contract relations whatever ever existed between plaintiff and defendant other than those which existed by reason of the plaintiff becoming successor to Campbell in the contract between him and the defendant; that the defendant never revoked his contract with Campbell, or authorized the plaintiff to take possession of the work under the same.

Defendant further contends that the amount which was due for cutting, skidding, and hauling the timber referred to upon the completion of the contract was $6,450.39, and that defendant had paid to Campbell, or to his order, thereon, $6,700; that the scaler's bill for working upon the timber was $217.55, one-half of which was to be paid by Campbell, making the total amount paid to him upon the job $6,808.77, being an overpayment of $358.38, which defendant claims Campbell or the plaintiff should repay; that the Deucy timber belonged to defendant, and was reported by the scaler as put in under the contract with Campbell, and for the putting in of which defendant has already paid.

We have now stated the theories of the respective parties, and upon which said cause was tried.

The first point made by the defendant is that the statute under which this suit is brought is not applicable to the plaintiff's case; that it was not intended by the Legislature, in giving the extraordinary remedy provided in this statute, to include within its provisions the contractor for the work and labor necessary to manufacture forest products into the various articles mentioned in the statute, but only those who actually perform such work and labor; that that class of persons were those needing the remedy provided, and which the common law failed to furnish; that the contractor for the labor could at all times protect himself sufficiently under the common law,

and by resort to the statutory remedies in force at the time of the passage of the act in question.

An examination of the title as well as the body of the act of 1887 satisfies us beyond any doubt that the position of defendant's counsel is correct upon this point. The lien created by the act is a specific one, for a particular class of claims, which are based upon the personal labor of claimant, and he can only avail himself of the benefits of the statute by making proof that he has performed personally some portion of the labor for which payment is claimed, and the record fails to show any of that kind of labor performed by the plaintiff.

The next question naturally arising upon the record is, what is the effect of such omission upon the case as presented? The plaintiff's counsel insists that the question is of no consequence in the case, and, if it was, it has been finally disposed of by this Court in *Shaw v. Bradley*, 59 Mich. 199 (26 N. W. Rep. 331).

Section 12 of the act relates to this subject, and says that—

"In all suits on attachments, prosecuted under the provisions of this act, the court, jury, or justice of the peace who shall try the same, or make an assessment of damages therein, or make an inquest therein, shall, in addition to finding the sum due the plaintiff, also find that the same is due for labor and services performed upon the products described in the declaration, and is a lien upon the same; and the court or justice of the peace, as the case may be, shall render judgment in accordance with such finding, and execution shall issue therefor; and such execution, in addition to the commands in ordinary executions, shall command that the said products, or so much thereof as shall be necessary for that purpose, be sold to satisfy such judgment, and all costs, charges, and disbursements: *Provided, however,* that if the court, jury, or justice of the peace shall find that the amount due the plaintiff is not a lien upon the property described in the declaration, the plaintiff shall not be nonsuited there-

by, but shall be entitled to judgment as in other civil actions; but in such case said plaintiff shall not recover or tax any costs arising from the filing of the statement of lien, nor for officers' fees, or expenses arising from the service of said writ of attachment, or expenses incurred relative to the property seized," etc.

And it is provided that if the amount due is found to be a lien it shall be stated also in the verdict, and for what amount. In this case the verdict and judgment are in the usual form in *assumpsit*, where the same is for the plaintiff, and are silent as to the lien, and in such case we think it should be presumed that the jury found no lien, and especially should it be so where their attention was called to the fact that if they found otherwise it should be entered as part of their verdict.

Under the section referred to, and the circumstances of this case, we can see no reason why the verdict should not be allowed to stand, unless it shall be found that error was committed on the trial in the rulings in receiving or rejecting testimony or in the charge by the court.

Defendant claims that the agreement relied upon for pay for hauling the Deucy trespass logs was in writing, and that the court submitted the construction of the claimed contract to the jury, when he should have charged that the written agreement was not a contract to pay for hauling them. We think, however, that the letters relating to this subject were properly submitted, together with the other facts and circumstances in the case, to the jury, to show what the understanding really was between the parties, and for them to give such effect as they saw fit to the testimony.

We see no objection to the testimony given under the first assignment of error. It related to the situation of the account, at the time plaintiff made his claimed contract with defendant, between Campbell and Wilson, and

a part of which plaintiff was to perform, and this was proper.

Assignments of error from and including 2 to 16 all relate to the contracts made by plaintiff with defendant for hauling the logs, including the Deucy logs, and to the alleged action taken by each party under and in pursuance of said contracts; and an examination of the record discloses no error in any of the testimony offered prejudicial to the rights of the defendant, and it is unnecessary to take further or more particular notice of these.

The seventeenth and eighteenth assignments relate to the testimony offered showing the probabilities of plaintiff's engaging to do the work for less compensation than he claimed under the contracts with defendant.

The nineteenth assignment covers an objection by defendant to Campbell's statement upon the stand, when examined, as to what amount Wilson owed him, and the amount due from Campbell to his men at the time plaintiff assumed Campbell's indebtedness to the men. We see no objection to this testimony. This subject had been under consideration from the beginning, more or less, and certainly was a competent fact, as bearing upon the contract as claimed by the plaintiff.

There is nothing objectionable in the rulings complained of in the next 17 assignments of error, and only those relating to the custom as to what part of the amount of the scaler's charges should be paid by the plaintiff, under such a contract as he insists he did the work charged, when the contract is silent upon the subject, as this was, require mention under the theory of either party. If such a custom existed, it was proper for either party to show it, as it would very clearly affect the amount of the recovery, if a recovery was had; and it was a subject upon which it would be reasonable to

suppose a custom might exist, and evidence to show it did exist, and what it was, was properly admitted. Whether or not it was properly rebutting was a matter under the control of the trial judge, and we do not think, as the record presents the question, his discretion should be interfered with.

Counsel for defendant, at the close of the trial, presented eight requests to charge. The first was given by the court. In the second request counsel for the defendant asks the court to state to the jury the theory of plaintiff as given in the request. The request does not state properly and correctly that theory, and the court's ruling was correct in refusing to give it. The third request was substantially given. The fourth relates to the claimed lien of plaintiff, which, under the findings of the jury, is of no materiality; and the same is true of the fifth request. The sixth request asks the court to pass upon a portion of the facts which ought not to be considered except in connection with the rest of the testimony upon the same subject, and was therefore properly rejected. The seventh asks for a conclusion which cannot be reached without passing upon the facts, and the eighth request is subject to the same infirmity.

The remaining 18 assignments of error all relate to the charge as given by the court. A careful reading of the charge and the brief of defendant's counsel fails to convince us that any error was committed by the learned circuit judge, and the judgment must be affirmed.

The other Justices concurred.

77	53
81	34
81	404
77	53
86	429
77	53
101	487
77	53
107	252
77	53
111	485
77	53
c153	10296
c153	10297

THE PEOPLE v. JENNIE M. SWETLAND.

Forgery—Discharge of mortgage—Evidence.

1. Leaving a *forged* discharge of a mortgage collateral to notes, which it secures, in the proper office for record, is an uttering and publishing of an acquittance and discharge for *money*.
2. How. Stat. § 5685, making the record of conveyances, and other instruments authorized to be recorded, *prima facie* evidence, does not apply when the question of the forgery of the original instrument is in issue either in a criminal or civil suit.[1]
3. On the trial of a respondent for the alleged forgery of a discharge of a mortgage, the original instrument is the best evidence, and ought, if possible, to be produced.
4. When an alleged forged instrument is last shown in the hands of the person accused of forging or uttering it, secondary evidence may be given of its contents without notice to the accused to produce it.
5. It is the duty of the prosecuting attorney to furnish all the evidence within his power bearing upon the issue of guilt or innocence, in relation to the main issue, or to give some good excuse for not doing so.

   So *held*, where on a trial for uttering an alleged forged instrument the persons whose names purported to be affixed as witnesses were not produced, nor their names indorsed on the information, and no showing was made that the names were fictitious, and it is held that their testimony was a necessary part of the people's case, which cannot be omitted without good excuse.
6. The record of a mortgage, admitted to be genuine, for the forgery of a discharge of which a respondent is on trial, is admissible as evidence of the mortgage.
7. The fact that a person arrested for a crime may of his own accord tell the truth or a lie to screen himself or gain favor with the officers of the law does not prevent such statements from being used against him.
8. It is only where statements are drawn from a prisoner by some artifice, promise, or threat which induces the hope of benefit,

[1] See *Shelden v. Merrill*, 69 Mich. 156, holding that How. Stat. § 7504, does not apply in cases where the original paper will not prove itself.

or acts upon his fears, or are made under compulsion, that the law precludes their being used as admissions. If they are free and voluntary, then the motive or intent of the accused in making such statements is not material, as regards their admission in evidence.

9. On the trial of a respondent for uttering a forged discharge of a mortgage, evidence of the execution of a mortgage upon part of the mortgaged premises a year after the date of the discharge; and of the presentation to the mortgagee of an abstract of title showing the discharge of the first mortgage, is competent as presenting a motive for the commission of the crime charged, and also tending to prove that the respondent knowingly uttered the forged discharge.

10. Where the *corpus delicti* depends entirely for its existence upon the acts and intent of the respondent, such acts and his admissions, if admisssible at all, are admissible at any stage of the proceedings upon the trial.

Exceptions before judgment from Kalamazoo. (Buck, J.) Argued July 11, 1889. Decided October 18, 1889.

Respondent was convicted of forgery. Conviction reversed and new trial granted. The facts are stated in the opinion.

William Shakespeare and *E. M. Irish,* for respondent.

S. V. R. Trowbridge, Attorney General, *George P. Hopkins,* Prosecuting Attorney, and *William G. Howard,* for the people.

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

MORSE, J. On July 25, 1885, the defendant bought of George W. Parker a piece of land in Kalamazoo county. On the same day she executed a mortgage for $700 to him upon the said land. The theory of the prosecution in this case, as developed on the trial, was that the respondent or some one else forged a discharge of this mortgage, and that she put it on rec-

ord, or caused it to be recorded, and afterwards used the abstract showing said mortgage to be discharged to effect two other loans,—one from D. T. Allen, and the other from Mrs. Amy E. Day.

The respondent was tried and convicted in the Kalamazoo circuit court for uttering this forged discharge. The case is brought here on exceptions before sentence. The respondent was charged with uttering and publishing—

"As true, a certain false, forged, and counterfeited acquittance and discharge for *money* of a certain real-estate mortgage,"—

And the alleged forged discharge is set out in full in the information.

It is contended that there was no evidence of uttering, as charged in the information. The evidence showed that either the respondent or her sister took the false discharge to the office of the register of deeds, and had it recorded, and took it away again. It is claimed that the mere taking of it to be recorded was not an uttering; that it certainly was not the uttering of it as an "acquittance and discharge for *money*." It is said the mortgage was collateral to the notes which represented the debt, and that these notes were still held by Parker, and the only effect of putting the discharge on record was to show the real estate apparently clear of the lien. There may be some ingenuity in this argument, but there is no merit in it. If this false discharge had been genuine, as it purported to be, it would have been an acquittance and discharge, not only of the lien upon the real estate, but of the notes as well, and would therefore have been an acquittance and discharge *for money*. It would have been the voucher or receipt for the payment of $700, the amount secured by the mortgage.

But we think error was committed upon the trial.

This discharge purported to be signed by George W. Parker, the mortgagee, and to have been acknowledged before James H. Kinnane, an attorney and notary public at Kalamazoo, and witnessed by C. W. Swetland and M. A. Hascall. Parker testified that he never signed any such discharge, and Kinnane was quite certain that he never took any such acknowledgment. The discharge itself was not produced, nor was its absence fully accounted for. The record of the instrument was produced by the register of deeds, Mr. Simmons. He could not remember who left it for record, or who took it away, except that either the respondent or her sister brought it to his office, and the same person that brought it took it away. When the record of the discharge was offered in evidence, it was objected to by the defense, on the ground that it was secondary evidence, and that it did not yet appear that the original instrument was lost, and no notice to produce it had been given.

Mr. Howard, of the prosecution, then said:

"If you prefer the original discharge, we ask you to produce it here in court."

Mr. Irish (for the defense). "We have received no notice to produce it."

Mr. Howard. "I give you notice now."

Mr. Irish. "We have nothing to say about the proposition, because it does not come in the proper form, or at the proper time."

The court declined to pass upon the question finally at that time, but admitted the record of the instrument, as he stated, *pro forma.* Upon other evidence being introduced, the record was permitted to stand in lieu of the original instrument.

The counsel for the people in this Court claim that this record, under the statutes of this State, was original evidence, and could be used as such, without reference to the original; that it was neither necessary to produce

the original false discharge, nor account for its loss. See How. Stat. § 5685. We do not think this statute applies when the question of the forgery of the original instrument is in issue either in a criminal or civil suit. When the main issue is whether a deed, mortgage, or discharge of mortgage has been forged, the original instrument is the best evidence, and ought to be produced, if it can be.

But it is further claimed by the counsel for the people that, if this be so, when the original discharge was traced into the hands of the respondent it was sufficient; that the instrument was then satisfactorily accounted for, and that no notice to produce it was necessary; that such a notice would be, in effect, compelling the respondent to give evidence against herself. We agree with counsel that when an instrument claimed to be forged is last shown in the hands of the person accused of forging or uttering it, then secondary evidence may be given of its contents, and without notice to the accused to produce it. But it never became by any means certain in this case that it was last in the hands of respondent. The proof showed it to be quite as likely in the hands of her sister as herself. No attempt appears to have been made to find the original instrument, or to secure the testimony of the sister, whose name does not appear in the record.

Another thing. It is the duty of the prosecuting attorney to furnish all the evidence within his power bearing upon the issue of guilt or innocence, in relation to the main issue, or to give some good excuse for not doing so. This rule has been frequently applied to the eye-witnesses of a transaction, unless the number were so great as to make the testimony merely cumulative. But in this case the main issue was whether or not this discharge was a false one,—a forgery. The uttering of it,

unless it were forged, could not be a crime. There were the names of four persons attached to this instrument, the alleged maker, Parker; the notary, Kinnane; and two witnesses, who were necessary, if it was a valid discharge and to be recorded, M. A. Hascall and C. W. Swetland. They were eye-witnesses of the execution of this paper, if it was genuine; they were all material witnesses as to its truth or falsity. Parker and Kinnane were sworn, but no mention is made in the record of the two witnesses save as their names appear upon the record of the discharge as being witnesses to its execution by Parker. Their names were not put upon the information, and there is no showing made why they were not called as witnesses. It is not claimed that these names are fictitious, and that no such persons are in existence, or do not live in Kalamazoo. It is very clear to my mind that, in the absence of this original discharge, it was the duty of the prosecuting attorney, under repeated decisions of this Court, to bring the four persons, and all of them, if they could be found, into court as witnesses in behalf of the people.

As this case stands upon the record before us, the falsity of this discharge rests entirely upon oral testimony, without the instrument itself, with which to test the genuineness or falsity of the signatures, or to aid the recollection of the witnesses. Parker, who is certainly interested financially in the issue, swears absolutely that he never made the paper. Kinnane thinks, and is almost certain, that he never took the purported acknowledgment, but he has taken too many acknowledgments, in too many different places, to swear positively that he did not take it. Simmons, the register of deeds, the only person sworn who testifies to having seen the original discharge, swears that he believes the acknowledgment to have been in the handwriting of Kinnane. Now, it will

readily be seen that the evidence of these two purported witnesses, Hascall and Swetland, becomes most important. If these persons exist, and can be found, the people and the respondent are both entitled to their testimony, and as a part of the direct evidence on behalf of the prosecution. Unless they are mere myths, or cannot be procured, the people could not well ask the jury to find beyond a reasonable doubt that this instrument was a forgery. If the names were fictitious, that fact alone would be strong, if not conclusive, evidence that the instrument was forged, and it appears strange that this was not shown, if it be true. If the persons named as witnesses exist, their names should be placed on the information before the next trial, and they must be produced on such trial, and sworn as witnesses on behalf of the people, if their attendance can be procured. Their testimony is a necessary part of the people's case, under the rules, and cannot be omitted without good excuse.

The record of the mortgage given by respondent to Parker was admitted in evidence against the objection of the counsel for respondent. There was no error in this. There was no question as to the genuineness of the instrument, and the record of it was authorized to be read in evidence under the statute. How. Stat. § 5685.

The original mortgage was afterwards introduced, for the apparent purpose of proving that it had never been paid. The notes accompanying the instrument—one for $200 and the other for $500—were also offered in evidence. Upon these notes indorsements of interest appeared as having been paid since the recording of the discharge. Mr. Parker was permitted to testify that this interest had been received by him from Mr. Coleman, to whom it was paid; Coleman having the notes and mortgage most of the time in his office. Coleman was not sworn. This evidence should not have been allowed to stand in the

case, unless supplemented by Coleman's testimony. It could have been used, and probably was, as a circumstance tending to show that the discharge was a false paper. And yet there was no evidence but this hearsay testimony of Parker that any interest had been paid on this mortgage by the respondent or any one in her behalf.

Frank E. Knappen, who was prosecuting attorney at the time respondent was arrested, testified to certain admissions made to him by her. His evidence was to the effect that the respondent came to him of her own accord, and voluntarily made her statement to him, without any inducement or hope being held out to her in any manner. The respondent gave testimony tending to show the contrary. The court very properly left this conflict of testimony with the jury, and instructed them that, in order to use or take into consideration the respondent's statement to Knappen, they must find beyond a reasonable doubt that the statement was purely voluntary, and—

"Made freely, of the respondent's free will, without any hope of favor or fear of the consequences."

This was certainly as favorable to the respondent as the law permits, if not more so. For if no inducements of any kind are held out by an officer to an accused person, nor any threats made, the accused may make a statement to such officer, hoping thereby to gain favor or escape punishment; but for that reason it will not be rejected, if it is voluntarily made, without any influence being exerted by the officer. The fact that a person arrested for a crime may of his own accord tell the truth or a lie to screen himself or gain favor with the officers of the law does not prevent his statements so made from being used against him. It is only when statements are drawn out by some artifice, promise, or threat which induces the hope of benefit, or acts upon the fears of the

accused, or made under compulsion, that the law precludes their being used as admissions. If they are free and voluntary, without the influence of threats or promises, artifices or duress, then the motive or intent of the accused in making the statements is not material, as regards the question of their admissibility in evidence. The court also instructed the jury that the burden of proof was upon the people to show the statements to have been voluntary.

The testimony of D. T. Allen was material and admissible. The discharge was dated August 10, 1886. August 8, 1887, the respondent executed a mortgage for $350 to Allen upon part of the lands embraced in the Parker mortgage. Allen testified that the respondent when she negotiated the loan furnished him with an abstract of the title of the land. This abstract he identified, and it was introduced in evidence, showing the Parker mortgage as discharged. It is claimed by respondent's counsel that, while this might have a tendency to show her guilty of obtaining money of Allen under false pretenses, it had no bearing upon her guilt or innocence of the offense for which she was being tried, and it was therefore prejudicial as well as incompetent evidence in this case. We think it had a direct bearing upon the issue in this case. It not only presented a motive upon respondent's part for the commission of the crime charged against her, but it had a tendency to prove that she uttered this alleged false discharge knowing it was forged. She must have known what the abstract contained, and she uses it knowing it to be false, if it were forged, for one of the purposes which may have been, and probably was, the object of uttering this forged discharge by placing it upon record. Such placing upon record must have been either for the purpose of selling the land apparently free from any lien, or obtaining a loan upon it under

the same appearance of the title, or for the purpose of defrauding the mortgagee. The fact that she deliberately uses this discharge, by means of this abstract, to obtain a loan, knowing that the mortgage is undischarged, is a most weighty circumstance, tending to show that she recorded this discharge, or directed its record, knowing it to be forged. Indeed, the presenting of this abstract, when she knew it to be false, was an uttering of this discharge with intent to defraud.

But the court erred in permitting the record of a mortgage executed by respondent upon some of the lands covered by the Parker mortgage to Mrs. Amy E. Day to be admitted in evidence. The mortgage was for $200, and on other lands than those embraced in the mortgage to Allen, and dated September 16, 1887. Mrs. Day was not called as a witness, and none of the circumstances of the inception of this instrument were laid before the jury. When the record was offered, objection was interposed to its admission by respondent's counsel as being irrelevant and immaterial.

The Court. "How is it proposed to connect it with this transaction?"

Mr. Howard. "Only showing that this is a mortgage covering the same land, put on shortly after this discharge was recorded."

If this mortgage had been obtained in the same way as the Allen mortgage, by the showing of the same or a similar abstract of title, such fact would have been admissible, but the name of the witness testifying to such fact ought to be on the information, for the benefit of the respondent. By the admission of this record of the mortgage the jury might infer these facts without proof, because of the Allen transaction, or be prejudiced against the respondent, because it would look as if she had also wronged Mrs. Day. This mortgage had no business in

the case, unless it was connected by some evidence, as in the case of the Allen mortgage, with the issue, to wit, the falsity of the discharge, and the respondent's knowledge of such falsity.

We find no other errors in the trial, and no error in the order of the admission of the proof, save as heretofore noted.

It is claimed that, until the *corpus delicti* was proven, the statements of the respondent to Knappen were not admissible. There are some cases where the *corpus delicti* —generally in homicide—is clearly separated and distinct from the question as to who committed the offense, if any is found to have been committed. In such cases the evidence to establish the *corpus delicti* must first be given, before acts or admissions of the accused can be put in evidence. But the present case is one where the body of the offense—the uttering of a forged instrument, knowing it to be false—is so intimately connected with the question whether or not the respondent is guilty of the crime that there can be no such separation. The *corpus delicti* in this case depends entirely for its existence upon the acts and intent of the respondent, so that her acts and admissions, if admissible at all, were admissible at any stage of the proceedings upon the trial.

The conviction of the respondent must be set aside, and a new trial granted.

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

AMANDA L. FRENCH, BY HER NEXT FRIEND AND GUARDIAN, THOMAS C. HOWARD, v. ALBERT CASE ET AL.

Mortgage—Fraud—Equity.

This case involves the construction of a bond and mortgage given for the purchase price of a farm, and it is held that the whole context of the papers in the case, and all the circumstances surrounding the sale of the farm, and the situation of the parties when it was made, show that the grantors and mortgagees never contemplated parting with the title to their property, except upon the understanding upon their part that a good, comfortable living and maintenance was to be provided for them so long as they should both live, and, if such was not the understanding on the part of the mortgagor, then the minds of the parties never met, and no valid agreement between them was ever made. The case involves questions of fact purely, and reference is had to the opinion for a full understanding of the same.

Appeal from Washtenaw. (Kinne, J.) Argued April 9 and 10, 1889. Decided October 25, 1889.

Foreclosure of mortgage. Complainant appeals from decree dismissing bill. Reversed, and circuit judge directed to enter decree for foreclosure, etc. The facts are stated in the opinion.

E. Baldwin and *Willis Baldwin,* for complainant.

Sawyer & Knowlton, for defendant Case.

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

SHERWOOD, C. J. This action is brought to foreclose a mortgage given by Albert Case and Mary Case, his wife, on about 52 acres of land lying in the county of

Washtenaw, to Harvey French and Amanda, his wife, on October 15, 1875, which mortgage is accompanied by a bond as collateral security thereto.

The bond was as follows:

"Know all men by these presents, that I, Albert Case, am held and firmly bound unto Harvey French and Amanda French in the sum of two thousand dollars, lawful money of the United States of America, to be paid to the said Harvey French and Amanda French, or their certain attorney, executors, administrators, or assigns, to which payment well and truly to be made I, Albert Case, hereby bind myself, my heirs, executors, and administrators, firmly by these presents.

"Sealed with my seal. Dated the fifteenth day of October, in the year of our Lord one thousand eight hundred and seventy-five.

"The condition of this obligation is such that if the above-bounden Albert Case, his heirs, executors, administrators, or assigns, or any of them, shall and do well and truly pay, or cause to be paid, unto the above-named Harvey French and Amanda French, their certain attorney, executors, administrators, or assigns, the just sum of two thousand dollars, and interest at seven per cent. (said interest to be paid annually), within eight years from the first day of May, A. D. 1875, without any fraud or further delay, then the above obligation to be void, or else to be and remain in full force and virtue.

"The further condition of this obligation is such that if the above-bounden Albert Case shall and does well and truly pay or cause to be paid unto the above-named Harvey French and Amanda French the said sum of two thousand dollars, and the interest annually, at 7 per cent., according to the specifications hereinafter mentioned, to wit: So much of the above-mentioned two thousand dollars, aside from the interest, as the said Harvey and Amanda French, or either of them, may need for their support and comfort during their life-time, or within eight years after the 1st day of May, A. D. 1875, at which time the said sum of two thousand dollars, and interest to commence on the said 1st day of May, A. D. 1875, is to be paid in manner and form as follows: The balance due on the said sum of two thousand dollars, with the interest due thereon at the expiration of the said eight years (commencing on the 1st day of May aforesaid), to be paid as follows, to wit: To Royal French, Joel W. French, twenty per cent.; to Mary Case, twenty per cent.; to Alice Bird, ten per cent.; and to Harmony Russell, ten per cent.; the above-bounden Albert Case having paid Avery Case twenty per cent.; and that the receipt of

said Royal French and Joel W. French, Mary Case, Alice Bird, and Harmony Russell, or either of them, for such proportion of the above-mentioned two thousand dollars as they may receive from the said Albert Case, shall be, and is hereby, declared and acknowledged to be a payment on this bond; but no interest on the said payment to be allowed to the said Case for any moneys he may pay to any of the said payees above mentioned.

"The said sum of two thousand dollars and interest, as before mentioned, that may be due at the death of the said Harvey and Amanda French (after paying the funeral expenses), may be paid, at any time within one year after the death of the said Harvey and Amanda French, to the said parties in the manner and form aforesaid: Provided, the said Harvey and Amanda French should live beyond the said period of eight years from the said 1st of May, A. D. 1875, the said payments to the said Royal French, Joel W. French, Mary Case, Alice Bird, and Harmony Russell shall be made within one year after the death of both Harvey and Amanda French, and not before, unless desired by the said Albert Case; and it is further expressly understood that upon the payment of the aforementioned sums to the said Royal French, Joel W. French, Mary Case, Alice Bird, and Harmony Russell by the said Albert Case, in the manner and form heretofore mentioned, or the majority of them, they shall discharge from record a certain mortgage bearing even date herewith, and executed by Albert Case to Harvey French and Amanda French, and given as collateral security for the payments heretofore mentioned in this obligation."

The mortgage was as follows:

"This indenture, made this fifteenth day of October, in the year of our Lord one thousand eight hundred and seventy-five, between Albert Case and Mary Case, his wife, of the township of York, Washtenaw county, Michigan, of the first part, and Harvey French and Amanda French, of the same place, of the second part, witnesseth:

"That the said parties of the first part, for and in consideration of the sum of two thousand dollars, to them in hand paid by the said parties of the second part, the receipt whereof is hereby confessed and acknowledged, have granted, bargained, sold, released, enfeoffed, and confirmed, and by these presents do grant, bargain, sell, release, enfeoff, and confirm, unto the said parties of the second part, and to their heirs and assigns, forever, all that certain piece or parcel of land known, bounded, and described as follows, to wit: The east half of the east half of the north-east quarter of section thirty-four (34); also the west half of the west half of the west half of the south-west quarter of section thirty-five (35), in township No. four (4) south, of range No. six (6) east, containing

sixty (60) acres of land, more or less,—all lying in the township of York, county of Washtenaw, and State of Michigan, excepting eight (8) acres off from the north end of the first described forty (40) acres, being heretofore deeded by Albert Case and Mary Case to James Delaforce. To have and to hold the above-bargained premises unto the said parties of the second part, their heirs or assigns, for the sole and only proper use, benefit, and behoof of the said parties of the second part, their heirs and assigns, forever.

"Provided, always, and these presents are upon express conditions, that if the said parties of the first part pay to the said parties of the second part the sum of two thousand dollars, and interest at seven per cent., in eight years from the first day of May, A. D. 1875, the interest thereof to be paid annually, and so much of the principal as is necessary and desired for the support and comfort of the said parties of the second part during their life-time, and at the time of the death of the said Harvey and Amanda French, the said parties of the second part, or within one year thereafter, the balance due on the said sum of two thousand dollars, and interest, if any shall be due, to be paid as follows: To Royal French, twenty per cent.; to Joel W. French, twenty per cent.; to Mary Case, twenty per cent.; to Alice Bird, ten per cent.; to Harmony Russell, ten per cent.,—the above-bounden Albert Case having paid Avery French twenty per cent. before the execution of this obligation. The said several payments to be made within eight years, and not until one year after the death of the said Harvey and Amanda French: Provided they, the said Harvey and Amanda French, or either of them, shall live more than eight years, the said balance due on this instrument is not to be paid until one year after the death of the said Harvey and Amanda French, parties of the second part herein.

"It is expressly understood and agreed that the payment of the said percentage to the before-mentioned parties may be made by the said Albert Case at any time, and sums receipted to the said Albert Case by the said parties, or either of them, shall be deducted from the amount due the said parties at the time of the death of the said Harvey and Amanda French; and upon the payments of the said several sums to the said several parties they shall, or a majority of them shall, discharge this mortgage from record,—according to the conditions of a certain bond bearing even date with this mortgage, executed by Albert Case to Harvey French and Amanda French, parties of the second part, as collateral security, then these presents and the said bond shall cease and be null and void; and the said parties of the first part hereby covenant and agree to pay to the said parties of the second part the money aforesaid.

"But in case of the non-payment of the sum of money and interest, or any or either part thereof, at the time and in the manner and at the place above limited and specified for the payment thereof, then the interest thereon shall become principal, and draw interest at the rate aforesaid until paid; and, in case of non-payment of said principal or interest or either at the time limited therefor, it shall and may be lawful for the said parties of the second part, their heirs, executors, administrators, or assigns, to grant, bargain, sell, release, and convey the said premises, with the appurtenances, at public auction or vendue, and on such sale to make and execute to the purchaser or purchasers, their heirs and assigns, forever, good, ample, and sufficient deed or deeds of conveyance in law, pursuant to the statute in such case made and provided, rendering the surplus money (if any there should be) to the said parties of the first part, their heirs, executors, or administrators, after deducting the costs, fees, and charges of such proceedings, vendue, and sale aforesaid. And the said parties of the first part covenant and agree to pay the said parties of the second part, and their assigns, the costs and charges aforesaid, and also twenty-five dollars as an attorney fee should any proceedings be taken to foreclose this indenture.

"In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written."

Said mortgage was given to secure the payment of $2,000, and complainant claims the principal and interest are both due and unpaid, except the sum of $126, which was paid in small sums, at 12 different times, during the years 1882 and 1883.

The bill asks for an accounting as to the amount due upon the bond and mortgage, and that Albert Case be decreed to pay such amount into court, to abide the further order of the court, within a reasonable time after the accounting; and, on making default in so doing, that the mortgaged premises be sold, and that from such payment of the moneys into court, or from the amount arising from such sale when paid into court, so much thereof as shall be necessary for her support during her life-time, and the expenses of suit, may by the order of the court be set aside and applied to that purpose.

Personal service of the subpœna was obtained upon all of the defendants. Defendants Albert Case and Harmony Russell each filed a separate answer. The other defendants were all defaulted. The testimony in the case was taken in open court, in the Washtenaw circuit. Complainant's bill was dismissed, with costs, at the hearing.

The facts in the case are little contested, except that defendant Case denies that he owes anything upon the bond or mortgage. They are substantially as follows: On May 1, 1873, defendant Albert Case purchased of Harvey French his farm for $2,000, and the stock upon the farm for $500. He gave his note for the stock, and gave his note, secured by a mortgage on the farm, for the $2,000. He sold the stock, and with the proceeds paid the $500 note. The note and mortgage were given to Harvey French and Amanda, his wife, jointly, and were made payable in installments, the last falling due in ten years. Two years later the parties made a new arrangement, by which this note was given up, and the mortgage discharged, and in place thereof the bond and mortgage referred to, and which mortgage is now being foreclosed, were given.

It is conceded that when the first mortgage was given Harvey French was 86 years old, and his wife, Amanda, the complainant ward, was 71 years of age; that Albert Case was their son-in-law; that defendants French and Alice Bird and Harmony Russell were their children; and that Charles Case and Dalton Richards, defendants, are children of Mary Case, who since the mortgage was made, and in 1880, died. Complainant alleges that no cause is apparent for making the change in the mortgages. Defendant Case, however, charges it was to keep Royal from obtaining the entire property, and thereby depriving the other children of their just share of the estate, and was brought about through Avery French, who was

a son of the old people, and who shortly thereafter died.

After the making of the first mortgage the old people lived in rooms furnished for them on the farm of their son Royal, and remained there until 1875, not far from the time the second mortgage was made. They then removed to a small house on Case's farm, which they paid Case for building for them. There were two payments of interest upon the bond, indorsed by Harvey French when he died, in 1877, and after his death there appears upon the mortgage an indorsement of $140 as of May 1, 1878, the interest then due. This was not signed by any one. Also there was paid to the complainant, as guardian for Amanda, the $126 heretofore noticed.

Case's wife, Mary, and daughter of the old lady, had been an invalid since 1867, and Amanda, the complainant ward, spent much of her time with Mrs. Case until she died, in 1880. Some time after her daughter's death the old lady became insane, losing her capacity and memory, and in 1881 complainant was duly appointed her guardian, and took the old lady back to her son Royal for care and keeping; and that her care has become great and expensive no one questions, and complainant shows he has not the means in his hands and cannot obtain them necessary for her support, except from said bond and mortgage. It further appears that Case has acquired all the interests of the children in said mortgage except that of Alice Bird.

It is a little difficult to see, on an inspection of this record, why the old people should have made such an arrangement and sale of their farm as they did, so far as their needs, wants, or comforts were concerned. This farm, with a small pension the old gentleman was receiving, appears to have been keeping them comfortably. At any rate, if anything usually desirable for aged and infirm parents, such as the society of children, their

home under the same roof with such children, and the solace and enjoyment which the filial relations ought always to bring to aged and feeble parents from kind and dutiful sons and daughters, was intended to be secured, it was not secured to these parents by the arrangement made; and what seems worse than even this is the fact that, by the arrangement entered into between this son-in-law and these old people, the little property they had —the last means they could resort to to command the attention and secure the respect and services of others to administer to the wants, necessities, and infirmities of age—was taken from their control, and after the lapse of eight years they were to be absolutely deprived of the same, if they or either of them should live so long. And we are asked by the defendant to give these instruments such a construction as will accomplish this result; and no one of all these children or grandchildren appears to protest against such a result being consummated.

That I may not misstate the position of Mr. Case, the defendant, I give him his position in the language of his own learned counsel. Here it is:

"We submit that a fair rendering of this bond and mortgage, construed in the light of surrounding circumstances, is that it becomes due absolutely eight years from its date, but that Case had the right to pay it at any time before it became due. * * * He [Case] entered into no agreement to support the old people. * * * So far as Case is concerned, he was simply paying a debt. * * * He simply recognized the right of the old people and children to agree among themselves to whom and in what manner he should pay his debt, reserving the right to himself to make the payment provided for at any time, within certain limits, at his convenience.

"Whether the old people had any other estate or not we do not know, nor is it material. If they saw fit to give it all to their children, Mr. Case was not to blame for it, nor ought he to be punished for it; and if any or

all of the children saw fit to relinquish their interest in the mortgage to him for less than might ultimately come to them, in consideration for his advancing it to them before he was forced to, it was not a matter that this complainant can complain of. The children to whom the payments were made were satisfied then, and, so far as appears, are now satisfied with the amounts they received, except possibly Mrs. Russell; * * and Case swears he paid her in full, and when she answers the bill, instead of her answering that there was something due on the mortgage to her mother, she claims it is due to her, * * * and it also appears that on the trial settlement was made with Alice."

Then, as to the law governing the agreement, Case's counsel say:

"We submit, in conclusion, that whatever the purpose of the heirs of Harvey and Amanda French might have been, or of Harvey and Amanda French themselves, it is certain defendant Case was giving a security for the payment of his debt, and not a security for the support of the old people. And when he paid the amount of his debt, in the manner provided for in the instrument evidencing his debt, he was discharged. And a proper construction of all the papers in the case establishes that:

"1. The debt became due absolutely eight years from the date of the bond.

"2. If either Harvey or Amanda lived beyond the period of eight years, Case could retain the principal until the death of the survivor by paying the interest, and so much of the principal as was needed for the support of the survivor, if any; but none of the parties could force Case to retain the money, nor pay interest thereon, beyond the eight years.

"3. Case had the right to pay the entire $2,000 to the children at any time before it became due, by paying them, respectively, the per cent. of the $2,000 mentioned in the bond, or any less amount the parties might agree upon, and a payment to them discharged the bond *pro tanto;* but if he paid before the eight years he would still be liable to pay to Harvey and Amanda—

"*First.* The interest; and, *second,* so much of the principal as they should need during said eight years.

"4. At the expiration of the eight years so much of

the principal and interest as should then remain unpaid belonged to the children, and became payable to them, and not to Harvey and Amanda. If Harvey and Amanda should live beyond the period of eight years, the balance due at the expiration of eight years, if any, need not be paid to the children until one year after the death of the survivor, unless defendant Case desired to pay it sooner.

"5. During the period between the expiration of the eight years and the death of Harvey and Amanda, defendant Case might, in case the survivor needed it, pay whatever balance was found to be due at the expiration of the eight years, if any, to the survivor. Therefore whatever was left unpaid, if any, at the expiration of eight years, whether for principal or interest, became due to the children, and this complainant had no interest whatever in the matter, and could not, therefore, maintain this or any other suit on that bond, after her interest in it had ceased.

"Nor can this suit be maintained by the guardian for the benefit of Royal H. French or anybody else to recover the amount they or either of them may have expended for the support of Amanda or Harvey French during the life of said bond and mortgage. It will be seen that the bond provides that, at the expiration of the eight years, 'the balance due on the said sum of $2,000, *with the interest due thereon* at the expiration of the said eight years, commencing May 1, aforesaid, to be paid as follows,' etc. It is manifest this includes all arrears of interest as much as it does the principal still unpaid, and it is all made payable, at the expiration of eight years, to the children absolutely. Not only so, but the bond provides that, upon the payment to Royal French, Joel French, Mary Case, Alice Bird, and Harmony Russell, they, or the majority of them, shall discharge the mortgage from record."

Here we have the defendant Case's position, both upon the law and upon the facts, as his views of the morality and equity of the case. Case himself says he bought the property of these old people upon speculation, and that at the expiration of eight years he had a right to pay off the children, if he so elected, all that might be due on the mortgage, including unpaid back interest, and entirely

cut off the old lady from further support from the mortgage fund, as well as the accrued interest thereon, even before the expiration of the eight years. It is the claim of the complainant:

"1. That in construing the bond and mortgage together no such election can be maintained by Case.

"2. If the literal construction is so held, the testimony shows that no such election was made by Case as would in any way bind the complainant ward or affect her interest.

"3. That the claimed election, under the circumstances, was so inequitable and unjust that no court of equity would allow it to be resorted to in defeating the rights of Mrs. French.

"4. That, in any event, the complainant would be entitled to the back interest accruing before May 1, 1883."

I think the third point of complainant is all that is necessary to consider further in this case. The whole context of the papers in this case, and all the circumstances surrounding the sale of this farm, and the situation of the parties when it was made, show clearly, to my mind, that these old people who made the deed never contemplated parting with the title to their property, except upon the understanding upon their part that a good, comfortable living and maintenance was to be provided for them so long as they both should live, and, if such was not the understanding on the part of the defendant Case, then the minds of the parties never met, and no valid agreement between them was ever made.

This record, I think, very clearly presents a case where the children have become impatient of the delay, caused by the longevity of the parents, in coming into possession of an anticipated inheritance, of which their treatment of the ancestors would seem to show them utterly unworthy. The only interests apparently consulted in all the treaties had between these children and kindred

has been that pertaining to themselves, and really without any regard to the welfare of these aged parents.

The old gentleman, Harvey French, is gone, but his wife, for whose welfare he undoubtedly in all the property arrangements he made had the greatest solicitude, still remains and is comparatively helpless, and the time has come when it has become necessary to use the property for the purpose for which he unquestionably supposed he had it safely secured and appropriated when he died, viz., for the taking care of and supporting his wife when she was no longer able to do it herself; and I think that is the fair construction of the provisions of this bond and mortgage when read, as counsel for defendant Case desire them read, in the light of all the circumstances existing at the time they were made, as understood by the old people, and as I have no question they were understood by the defendant Case; that he at least knew how the old people understood them, and knowing this, after executing the papers, a court of conscience will not allow him to urge any other understanding or construction of them, when neither of them can speak for themselves.

This requires that the decree at the circuit should be reversed, and that the circuit judge be directed to enter a decree of foreclosure in the case for the purposes prayed in the bill of complaint, with costs of both courts to complainant. The sum for which decree should be taken is $2,000, and interest thereon, less the sums indorsed upon said bond and mortgage hereinbefore mentioned and referred to.

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

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WISCONSIN MARINE & FIRE INSURANCE COMPANY BANK v. THE MANISTEE SALT & LUMBER COMPANY ET AL.

Assignment for benefit of creditors—Trust fund—Equity.

1. The assignee, under our voluntary assignment law, gets no better or greater title to the property coming into his hands by virtue of the assignment than the assignor had before the assignment was made; and a receiver has no better or greater rights in the property than the assignee would have had if he had qualified under the trust to him in the assignment. *Farrington v. Sexton*, 43 Mich. 454; *Lentz v. Railway Co.*, 53 Id. 444; *Byles v. Kellogg*, 67 Id. 318.
2. Where a corporation purchased land subject to the payment of a mortgage, which payment was a condition precedent to the vesting of title under said purchase, after which it conveyed the land by warranty deed, subject to said mortgage, which the grantee agreed to pay as a part of the purchase price, and to that end gave a note to the grantor for the amount of the mortgage debt, and received an agreement for its payment by the grantor, which note was sold by the president of the grantor and the proceeds used in the business, but the mortgage was not paid, after which the grantor made an assignment for the benefit of its creditors, and on the failure of the assignee to qualify a receiver was appointed, the proper equity court will order the payment of said mortgage by the receiver on the petition of the grantee, of whom such payment has been demanded.

Appeal from Manistee. (Judkins, J.) Submitted on briefs April 11, 1889. Decided October 25, 1889.

Petitioner applied for an order that the receiver of The Manistee Salt & Lumber Company pay to petitioner a sum of money held as a trust fund, or that he pay a mortgage and secure its discharge, and appeals from a decree denying such relief. Decree set aside, and one

entered granting relief prayed for. The facts are stated in the opinion.

Dovel, Smith & Smurthwaite, for petitioner.

Ramsdell & Benedict and *Uhl & Crane,* for respondents.

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

MORSE, J. On February 29, 1888, the Manistee Salt & Lumber Company, a corporation organized and existing under the laws of this State, made a voluntary assignment, without preference, for the benefit of its creditors, naming E. Golden Filer as its assignee. Filer neglected to file his bond within the statutory limit, and refused the trust. The complainant filed its bill for the enforcement of the trust, and asked that a receiver be appointed. Other creditors joined in the prayer for the appointment of a receiver. March 10, 1888, this prayer was granted by the circuit court for the county of Manistee, in chancery, and Otto Kitzinger, president of the defendant corporation, was appointed receiver, and soon thereafter entered upon the discharge of his duties as such receiver.

The petitioner, the Charles Reitz & Bros. Lumber & Salt Company, made application to said court for an order that said receiver pay over to it the sum of $10,000, held, as it claimed, by the Manistee Salt & Lumber Company as a trust fund, or that the said receiver be required to pay a mortgage of the same amount, held by John Canfield, and procure a discharge of the same. The petition, on hearing, was denied. The petitioner appeals to this Court.

The facts upon which the application was grounded are substantially these: October 10, 1887, the petitioner purchased of the Manistee Salt & Lumber Company a quantity of pine lands, the purchase price for the same being

$35,000. At the time of the purchase there was a mortgage for $10,000 upon the land, held by John Canfield. The Charles Reitz & Bros. Lumber & Salt Company paid at the time of the purchase the sum of $25,000 in cash and paper, and assumed the payment of this mortgage to Canfield, making in all the full consideration for the premises purchased. This mortgage was given by S. Babcock & Co., to secure their note to said Canfield. The Manistee Salt & Lumber Company purchased these lands of S. Babcock & Co. before its sale of the same to petitioner, and by a contract agreed to pay the mortgage to Canfield, and, in the event of its failure to pay the same, it was not to be entitled to a conveyance of the lands.

In the deed from the Manistee Salt & Lumber Company to the petitioner the said company warranted the lands to be free from all incumbrances whatever; that it was well seized in fee-simple of the premises; and that—

"It will, and its heirs, executors, successors, and assigns shall, warrant and defend the same against all lawful claims whatsoever, except a mortgage of ten thousand dollars to John Canfield, which is a part of the consideration herein named, and is assumed by said party of the second part."

But a further arrangement was made upon the same day of the making of this deed, October 10, 1887, by which the petitioner gave its note or acceptance for $10,000 to the Manistee Salt & Lumber Company, and received therefor the following receipt and agreement:

"MANISTEE, MICH., Oct. 10, 1887.

"Received of the Chas. Reitz & Bros. Lumber & Salt Company their note for ten thousand dollars, payable on or before June 1st after date, which is given to pay mortgage of John Canfield on land in Lake Co., this day sold to said company; and in consideration of said note we hereby agree to pay said mortgage, and to procure

the same to be discharged of record by the first of January, 1888.

"THE MANISTEE SALT & LUMBER COMPANY,
"M. Engleman, President."

Engleman, the principal man of the defendant corporation, died in January, 1888. The mortgage was not paid when he died, nor when the petition was filed, but payment had been demanded by Canfield of the petitioner, who, by the deed, was made responsible for its payment, and upon whose lands it was a lien. When the receiver, Otto Kitzinger, made his schedules of the assets and liabilities of the defendant corporation, he named this mortgage of Canfield as among the secured liabilities of the Manistee Salt & Lumber Company.

A. J. Dovel, upon the hearing, gave testimony in behalf of the petitioner to the effect that this note was put in the hands of the defendant corporation for a specific purpose, to wit, the payment and discharge of the Canfield mortgage. He testifies that the business relating to the purchase of these lands was carried on for the Manistee Salt & Lumber Company by Michael Engleman, who was then its president; that, after the deed was made, Engleman stated that he could procure a discharge of the mortgage; that he could get Canfield to discharge it. He said to Reitz—

"I'll tell you what to do, Charlie. You give me your paper, and I'll get John to take it and discharge that mortgage."

And thereupon the acceptance for $10,000 was made and delivered to Engleman, and the receipt executed by Engleman and handed to petitioner. Engleman, it appears, sold the acceptance to Canfield, and received the money upon it, which passed into the hands of the defendant corporation. The testimony of Dovel was objected to on two grounds:

1. That Engleman was dead, and his admissions could not be shown against the corporation of which he was president.

2. It tended to vary the written contract, and to change the contract relations which existed between the insolvent corporation and the petitioner.

There is no showing in the record that Mr. Dovel was a member of the Charles Reitz & Bros. Lumber & Salt Company, or sustained any relation which prevented his testimony from being received upon this point.

We do not think the second objection tenable, for the reason that it did not, in our view of the receipt or agreement, tend in any way to vary or contradict the effect of the writing, and for the further reason that the circumstances attending the giving of the note and receipt were admissible to show the whole transaction, inasmuch as only a part of it appeared from the written documents. The evidence did not alter, vary, or change the obligation of the defendant corporation as it appeared upon the face of the receipt or contract.

This note, by the terms of the writing, was to be used to pay the mortgage of Canfield and for no other purpose. The mortgage was to be paid and a discharge procured by Jan. 1, 1888. It is clear that this note was received by the Manistee Salt & Lumber Company in trust, and that it has violated its trust. But it is argued by the counsel for the defendant corporation that the proof is that the Manistee Salt & Lumber Company has not now the note in its possession; that it was discounted to Canfield, and the money received for it was passed over by Engleman to the defendant corporation, and expended in its business, and that none of the funds in the hands of the receiver have been shown to be the identical money, or any part thereof, received from the avails of this note; that, as against the other creditors of a bankrupt or insolvent, a trust creditor is not entitled

to a preference over such general creditors merely on the ground of the nature of his claim, that is, that he is a trust creditor as distinguished from a general creditor, unless he can identify the property or the avails of it, belonging to the trust, and lay his hand upon it; and that, as the petitioner has not pointed out a single article of property or a single dollar of money included in the assignment, which was either the original proceeds of the note or the product of it, it follows that it has no right to any part of the assigned estate, and is not entitled to have its claim paid as a preferred claim. The following cases are cited to support this contention: *Cavin v. Gleason,* 105 N. Y. 256 (11 N. E. Rep. 504); *Thompson's Appeal,* 22 Penn. St. 16; *In re Manufacturing Co.,* 12 N. B. Reg. 203; *In re Hosie,* 7 Id. 601; *In re Janeway,* 4 Id. 100.

The principle followed by these cases is stated by Nixon, J., *In re Janeway,*[1] as follows:

"Where the trust property does not remain *in specie,* but has been made way with by the trustee, the *cestui que trusts* have no longer any specific remedy against any part of his estate in bankruptcy or insolvency, but they must come in *pari passu* with the other creditors, and prove against the trustee's estate for the amount due them."

I do not think this principle is applicable to the present case. We have often held that the assignee, under our voluntary assignment law, gets no better or greater title to the property coming into his hands by virtue of the assignment than the assignor had before the assignment was made; and the receiver in this case has no better or greater rights in the property than the assignee would have had if he had qualified under the trust to him in the assignment. *Lentz v. Railway Co.,*

[1] This language is taken from Hill on Trustees.

53 Mich. 444 (19 N. W. Rep. 138); *Byles v. Kellogg*, 67 Id. 318 (34 N. W. Rep. 671); *Farrington v. Sexton*, 43 Id. 454 (5 N. W. Rep. 654).

When the note came due in this case, in the hands of a *bona fide* holder, the petitioner was obliged to pay and did pay it. If the mortgage is not paid by the receiver, the petitioner must pay it, it being a valid lien upon its lands. There is no doubt, had the defendant corporation remained solvent, and made no assignment, but that a court of equity, under the circumstances of this case, would have compelled it to pay and discharge the mortgage to Canfield, and thereby perform its trust, had it neglected or refused to do so. Is there any good and equitable reason why an assignment for the benefit of creditors should prevent the enforcement of this trust? I can see none.

In re Janeway, supra, the money sought to be taken in full out of the bankrupt's estate was intrusted to the bankrupt to invest, and he failed to do it.

In re Hosie, supra, the money ($800) was delivered to the bankrupt to pay a certain note and mortgage owing by the petitioner to a third party, when it should be sent to him. The bankrupt credited the money on his books to the petitioner, and used it in his general business. The assignees showed that none of this identical money came into their hands. Nothing was said by the petitioner to Hosie, or between them, whether Hosie should receive the money as a special deposit, and hold the same as such while awaiting the arrival of the note and mortgage, and until paid over to the holder thereof, or whether the same should be placed to the credit of petitioner upon Hosie's books, and then be charged to the petitioner when the note and mortgage were paid.

In re Manufacturing Co., supra, the bankrupt had sold

carriages on consignment for petitioners. There was no consigned property in the hands of the assignee, nor any distinct fund which could be recognized or traced as the specific proceeds of the consigned property.

In *Thompson's Appeal, supra,* an executor had converted the assets of his testator into money, and used it in his business. Upon his assignment for the benefit of creditors the heirs of the testator claimed that the indebtedness to his estate should be first paid in full. It was held that, as it was impossible for the chancellor to lay his hand upon a single article of property, or a single dollar of money, included in the assignment as the property of the testator's estate or the product of it, the heirs must share *pro rata* with the other creditors. In *Cavin v. Gleason, supra,* $3,000 was placed in the hands of the assignor—

"To be invested by him, for their benefit, in a bond and mortgage to be given by J. B. Gould."

White, the assignor, used the entire fund, except $30, which came to the hands of the assignee, in paying his personal debts and liabilities. The court only permitted the $30 to be paid by the assignee in full.

It will be noticed that none of these cases rest upon the same ground as the one at bar, and none of them are in any wise similar except that of *In re Hosie.*

But that case lacks one element of this case. The petitioner here was fastened with the payment of the Canfield mortgage, and it was made a lien upon its lands by the act of the defendant corporation, and such corporation, upon the same day, took upon itself, for its own advantage, presumably, the trust of discharging such mortgage, and received the note for the purposes of such trust,—

"To pay mortgage of John Canfield on land in Lake

county, this day sold to said company" (Reitz & Bros. Lumber & Salt Company).

And it must be remembered that under the contract with S. Babcock & Co. the title of this land did not pass to the Manistee Salt & Lumber Company until this mortgage was paid, so that the title to this land, so far as the record shows, was not assured in the petitioner until the mortgage was paid.

To deny the equitable relief prayed, to wit, that the receiver of the defendant corporation shall pay and procure the discharge of this mortgage or return to the petitioner the proceeds of this note, with interest, which will accomplish the same result, would be a denial of the clearest equitable right, as well as of justice. Suppose this mortgage had been held by the Manistee Salt & Lumber Company upon the lands of the petitioner, and that company had received this note to pay the mortgage, and promised to discharge it by January 1, 1888, would not a court of equity have compelled the receiver to discharge the mortgage, whether or not the proceeds of the note were in his hands? The same principle ought to govern in this case. The defendant corporation put this mortgage on the lands of the petitioner, in effect, and the mortgage was paid when the note was passed to it. Its duty now, in equity, is to discharge it. The other creditors have no more concern in this matter than they would have had in the case supposed. As well might they come in, in that case, and say the note was not applied on the mortgage,—it was used in the business, and none of its proceeds are now on hand to pay the mortgage,—as to step in here and make the plea that is entered here, and which we have been considering. In both cases it was the duty of the company to pay the mortgage with the note or its proceeds, and to procure its discharge. In both cases a court of equity would

have compelled the company, if no assignment had been made, to discharge it, and other creditors could not have intervened. The receiver must, in both cases, stand in the shoes of his assignor, and must move as the assignor would have been forced to move in case no assignment had ever been executed. See *People v. Bank*, 96 N. Y. 32; *Libby v. Hopkins*, 104 U. S. 303, 308; *Peak v. Ellicott*, 30 Kan. 156 (1 Pac. Rep. 499); *McLeod v. Evans*, 66 Wis. 401 (28 N. W. Rep. 173).

The record shows here, as in the latter case, that the money was used by the defendant company in its general business. "It was used either to pay its debts or increase its assets." In either case it went to the benefit of the insolvent's estate.

The order and decree of the court below must be set aside and vacated, and a decree will be entered here authorizing and directing the receiver to pay and procure a discharge of the said mortgage in accordance with the prayer of the petitioner. Costs of both courts will be allowed the petitioner, to be paid out of the estate of the insolvent corporation.

The other Justices concurred.

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WILLIAM L. R. A. ANDRES v. DAN J. ARNOLD, JUDGE OF THE CIRCUIT COURT FOR OTTAWA COUNTY.

Elections—Naturalization laws—Declaration of intention.

1. Declarations of intention are not required to be made before the clerk of a court in his office or in open court.
2. The following propositions are summarized from the opinion of Mr. Justice CAMPBELL:

a—The fact that this or any other state may extend privileges to aliens, who have merely declared their intention to become citizens, can have no weight in determining how such declarations are to be made.

b—A declaration on oath of an intention to become a citizen in no way differs in its nature from any other oath or affidavit, and in the very many cases of such oaths, whether before judges, justices, notaries, commissioners, or clerks, the only inquiry recognized is whether the oath is administered within the officer's jurisdiction, and not in what particular building or place it may be administered; and, unless there is some statutory intimation to the contrary, there is no reason why this case should form an exception.

c—The history and construction of the naturalization laws show that this declaration confers no privileges, and fixes no rights, and is not jurisdictional, but is in several cases dispensed with. The United States Supreme Court has repeatedly held that no inquiry can be made in any controversy to attack the sufficiency of the final admission to citizenship, by showing a want of conformity to the previous requirements of the statutes.

d—If the declaration of intention was a proceeding on which witnesses were sworn or inquiries made, there would be, perhaps, some reason for formality. But it is a purely *ex parte* oath, which in no way dispenses with the inquiry made on final admission, and which Congress has not made of any particular value. The final application is not required to be made to the same court, or within the same jurisdiction, where the original declaration is made; and the inquiries made at the time of admission need not, and generally cannot, go into the *minutiæ* or circumstances of such declaration of intention, and are complete in themselves.

e—The fact that our laws give more force to these declarations than Congress has done cannot have any weight in construing congressional action, which must speak for itself, and lay down its own conditions.

Mandamus. Submitted April 12, 1889. Denied October 25, 1889.

Relator applies for *mandamus* to compel respondent to allow an information in the nature of a *quo warranto* to be filed in the circuit court for Ottawa county. The facts are stated in the opinion.

Godwin, Adsit & Dunham, for relator.

George A. Farr, for respondent.

CAMPBELL, J. The only serious question involved in the inquiry which relator seeks to make concerning the validity of the declared result of the election in this case is whether declarations of intention can be made before a clerk of a court anywhere but in his office, or in open court. If those declarations were valid, the other questions need not be considered, whether relating to the remedy or otherwise.

The statutes of the United States are all that we can be governed by, inasmuch as Congress has exclusive power over naturalization. The fact that this or any other state may extend privileges to aliens, who have merely declared their intention to become citizens, can have no weight in determining how such declarations are to be made.

The amendment of 1876 to the Revised Statutes of the United States (section 2165) is made to qualify a section that had required such declarations to be made before a court of record. It declares that not only for the future, but also for the past, such declarations "before the clerk" of any of such courts shall be as legal and valid as if made before the court.

This language, in its natural sense, makes the person before whom the declaration is made, and only the person, material. A declaration on oath for this purpose in no way differs in its nature from any other oath or affidavit, and in the very many cases of such oaths, whether before judges, justices, notaries, commissioners, or clerks, the only inquiry recognized is whether the oath is administered within the officer's jurisdiction, and not in what particular building or place it may be administered; and, unless there is some statutory intimation to the con-

trary, there is no reason why this case should form an exception. On the contrary, the history and construction of the naturalization laws show that this declaration confers no privileges, and fixes no rights, and is not jurisdictional, but is in several cases dispensed with. The United States Supreme Court has repeatedly held that no inquiry can be made in any controversy to attack the sufficiency of the final admission to citizenship by showing a want of conformity to the previous requirements of the statutes. *Campbell v. Gordon,* 6 Cranch, 176; *Stark v. Insurance Co.,* 7 Id. 420; *Spratt v. Spratt,* 4 Pet. 393.

The naturalization laws originally required no preliminary declaration, but allowed citizenship on two years' residence. 1 U. S. Stat. 103. In 1795 the rule now generally in force was established, requiring a declaration in advance three years (and not two, as now required), but fixing five years' residence as necessary for admission. Id. 414. By that law, as by all subsequent ones, the declaration of intention was merely on the *ex parte* oath of the applicant, and no inquiry was made in any formal way until he applied for his last papers, when evidence was taken, and the facts looked into. The alien law of 1798, which covers other matters than naturalization, contained some stringent provisions, and required a declaration five years before admission and fourteen years' residence, saving, however, cases of aliens residing here before the law was passed. In 1802 the old rule was restored. 2 U. S. Stat. 153. In 1804 declarations of intention were dispensed with in all cases where residence dated back of the law of 1802, and only final papers required in such cases. Id. 292.

In 1824, it having been found that the law had been carelessly administered, instead of adopting more stringent rules the door was opened still wider. It was provided that declarations of intention might be made two years,

instead of three, before admission. It was also provided that minors residing three years during minority need not make any declaration; that declarations theretofore as well as thereafter made before clerks, instead of courts, should be valid; and that final admission, made without any declaration at all, should not be invalid. 4 U. S. Stat. 69. On page 310 of the same volume is a law exempting persons coming into the country between 1802 and 1812 from making such declarations. In 1848 the old law requiring not only residence, but unbroken continuance in the country, was repealed. 9 U. S. Stat. 240.

This was the state of the law, subject to some further dispensation concerning declarations of intention, and some shortening of residence in particular cases, when the Revised Statutes of 1872 were adopted. It is well known that the compilers of that revision, which was not meant to change the laws, were no more exempt from mistakes than others, and numerous amendments have been required to place the law where they should have found it. That revision, while it retained the several exemptions from declaration of intention which had been brought in from time to time, did not embody the change of 1824, which validated and authorized clerks to take the first declaration. In 1876 this portion was restored, and is now in force.

If the declaration of intention was a proceeding on which witnesses were sworn or inquiries made, there would be, perhaps, some reason for formality. But it is a purely *ex parte* oath, which in no way dispenses with the inquiry made on final admission, and which Congress has not made of any particular value. It is difficult to see for what purpose it was devised, unless possibly as a reminder that a man should not become a citizen without two years' deliberation. Even this is dispensed with in quite a number of instances; and when Congress, by the

act of 1824, adopted its present policy, it was evidently for the reason that the declaration was not deemed of any special importance. The final application is not required to be made to the same court, or within the same jurisdiction, where the original declaration is made; and the inquiries made at the time of his admission need not, and generally cannot, go into the *minutiæ* or circumstances of his declaration of intention, and are complete in themselves.

There is no substantial reason why a clerk must be in his office or in court for this purpose, any more than for any other ministerial act not pertaining to court business. There is no law requiring him to be in any particular place to administer affidavits. As shown in *Whallon v. Judge*, 51 Mich. 503 (16 N. W. Rep. 876), the clerk's movements are not fixed within any one room or set of rooms, or any one place. By our Constitution, until amended, the county clerk was clerk of both circuit and supreme courts held in his county, though not held in the same building, or in the same town. He is clerk *ex officio* of more or less other bodies, and may or must have different places of action, either of which is his official place. There is no reason why an oath may not be taken before him at any place where he happens to be, as well as before a judge, or justice, or notary, or commissioner. He is the person indicated by the law. When it dispenses with his action in open court, it dispenses with the only locality which is universally known for clerical action; and we cannot require his action under the naturalization laws to be had in any particular spot or room or building without adding to the law a qualification of our own not indicated by its language, and not required by any of its purposes.

The fact that our laws give more force to these declarations than Congress has done cannot have any weight

in construing congressional action. That must speak for itself, and lay down its own conditions.

The writ should be denied.

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

MORSE, J., *(dissenting)*. I cannot agree with the conclusion reached by my brethren in this case.

The naturalization laws which govern the method of procedure in transforming an alien into a citizen of the United States, are the acts of the Congress of the United States, which is given exclusive jurisdiction over the subject of naturalization. By the act of Congress of May 26, 1824, aliens were permitted to declare their intentions to become citizens of the United States before "the clerk" of any court of record, and such clerks were authorized to take such declarations. 4 U. S. Stat. 69. This provision was changed by the revision of the laws by Congress of 1873–74, which required the declaration to be made in open court. Rev. Stat. U. S. 1873–74, § 2165. By an act of Congress approved February 1, 1876, it was again enacted that—

"The declaration of intention to become a citizen of the United States * * * may be made by an alien before *the clerk* of any of the courts named," etc.

It was further enacted that—

"All such declarations heretofore made before any such clerk are hereby declared as legal and valid as if made before one of the courts named in said section." 19 U. S. Stat. 2.

The proceeding is necessarily one of record, as no officer but the clerk of a court of record is authorized to take the declarations. The making of this declaration of intention is the first step in the proceeding to become a citizen. And he cannot be clothed with full citizenship,

except by the action of a court of record in open court.

The court wherein the proceedings were commenced, in the case of the persons voting in Ottawa county last fall, and claimed by the relator not to be voters, was the circuit court for the county of Ottawa, which court must be holden at the county seat, Grand Haven; and there and nowhere else must be the office of the clerk of said court. There is kept the seal of the court. It is claimed by the counsel for the relator that the county clerk of Ottawa county, who, by virtue of such office, is clerk of said circuit court, cannot act as clerk of the circuit court for the county of Ottawa except in his office at Grand Haven, or in open court. That outside of his office,—

"Of the places where his official duties are authorized to be performed, he is simply a citizen, and no more; simply the person who is designated by law to perform the duties of *clerk of the court* at the proper time and place."

It is also urged that when an alien declares his intention to become a citizen he is entitled to a certificate, a certified copy of such declaration, duly attested by the clerk and the seal of the court; that this could not be done at places away from the office and the city of Grand Haven, as the clerk has no authority to go about the county carrying the seal of the court with him. It is therefore contended that proceedings to become a citizen could not be commenced by a declaration of intention made, for instance, at Jamestown, 20 or 30 miles from the county seat, or at any other place than the office of the clerk of the circuit court. There seems to be no limit to the number of deputies the clerk may appoint, and there might be, if this method is lawful, a deputy in each township in the county on the same day taking these declarations. In such case the opportunities for

fraud would also seem to be limitless. The declarations in these cases—81 of them—were commenced, as shown by the records,—

"In the circuit court for the county of Ottawa, at Holland, on the 30th day of April, 1888, before one Chas. T. Pagelson, deputy-clerk."

On April 27, 1888, 73 were made before said Pagelson, at Zeeland; and on May 3, 1888, 30 were made before "Chas. E. Soule, deputy-clerk," at Polkton and Tallmadge. It is shown that each of these persons, except those who made their declarations before Soule, signed his declaration on the record-book of the court. The record-book was taken from the clerk's office, and carried around the county for that purpose. Soule took the declarations before him on blanks, which declarations were afterwards copied upon the record-book. While this book was out of the clerk's office it is claimed that declarations were taken on blanks in the clerk's office. This is certainly a loose way of doing business. The question arises, is it a legal method?

I think the objection made to the taking of these declarations by a deputy-clerk is not well founded. In this State deputy-clerks may perform the duties of the clerk. How. Stat. § 573; *Calender v. Olcott*, 1 Mich. 344; *Dorr v. Clark*, 7 Id. 310. But I think no man can legally declare his intention to become a citizen of the United States outside of the clerk's office, unless it is in open court.

We have on record what the views of one Justice of the Supreme Court of the United States are as to the practice prevailing in Ottawa county.

On June 28, 1887, Emilie Charlotte Langtry, a subject of the Queen of Great Britain, made application to become a citizen of the United States, and a bound volume of declarations by aliens, in which some of the blanks

had not been used, was taken from the clerk's office of the United States circuit court for the district of California, at San Francisco, by a deputy-clerk, and carried to the private residence of Mrs. Langtry, and there her declaration was made and oath taken by the deputy-clerk. This fact coming to the knowledge of Mr. Justice Field, of the Supreme Court of the United States, then holding with Circuit Judge Sawyer the circuit court at San Francisco, the attention of Mr. Barnes, the counsel for Mrs. Langtry, was called by Mr. Justice Field to the manner of taking of her declaration, and he was advised that the court had doubts of the legality of her declaration. Mr. Justice Field said:

"He did not think that the statutes furnished any authority for the clerk of the court to take a declaration of one to become a citizen out of his (the clerk's) office, except in open court, and for that purpose to carry the records of the court to the private residence of the party. To permit the proceeding to pass without comment would be to establish a dangerous precedent, and one calculated to give rise to gross abuses. The Justice observed that to be an American citizen was a great privilege; that citizenship should be regarded as a sacred trust; and that persons seeking to take upon themselves its responsibilities ought to consider it of sufficient value to attend where the records of the court are held in proper legal custody. In some states a man is allowed to vote as soon as he makes his declaration of intention to become a citizen; and if the clerk of the court, or his deputy, can go around the country taking declarations of intention and administering oaths, it is evident that dangerous consequences might follow, especially as there is no limit to the number of deputies which a clerk may appoint." See *In re Langtry*, 31 Fed. Rep. 879, 880.

The record in this case shows that it has been the custom for some years in Ottawa county to naturalize people in this way, and it is contended that such custom has almost, if not quite, ripened into law. But the fact that an unlawful custom has prevailed for even 30 years can-

not change the naturalization laws of the United States, nor is it a good reason for continuing a bad practice.

The record in this case also shows on the part of the relator, and is substantially admitted in the affidavits attached to the showing of the respondent, that about seven months before the general election a number of deputies were appointed by the county clerk of Ottawa county for the sole purpose of going about the county, with the necessary blanks or court records, to hunt up persons who were aliens, and to take their declarations of intention to become citizens. This was also manifestly, if the relator's showing be true, to make voters who otherwise would not have become so, men who, if left to their own motion, would never take any steps to become citizens.

It is a matter of common notoriety that all over the land these men, aliens, are waited upon by partisan committees, and their naturalization fees paid out of party funds in order to make them voters. And some of these persons have so little desire of their own to become citizens that they never go any further than the declaration of their intention. The man who is worthy to become a citizen of the United States, and to share in the privileges of the government, to take part in the making of its laws, and who in good faith desires to do so, will find ways and means of his own to declare his intention, and to take all necessary steps to be clothed in time with full citizenship. It is not necessary, nor is it desirable, that about six months before election the political partisan should be scouring the county, going into every highway and alley, for aliens, who, if the expense is paid, will become voters and recruits in his party. Here lies the great incentive to fraud, and the easy opportunity for it. If the alien must himself go to the office of the clerk of the court, and pay the expenses of his own advancement

to citizenship, fraud in declarations of intention to become a citizen will seldom occur; and the citizen, thus acquired, will be in the future, as in the past, a welcome and desirable addition to our voting population. If our naturalization laws had been rigidly enforced in the past, our large cities would not have been cursed, as some of them now are, with a large number of voters who openly avow that the only object they have in casting the ballot is to destroy not only our government, but all government and all law, that anarchy may reign in its stead.

I do not believe in this kind of business of carrying the records and books of the courts from town to town, and from place to place, to manufacture voters, or even to accommodate an alien, who considers the privilege of American citizenship of too little value to seek it at the county seat or at the court-room. And, in my opinion, it is neither required by good policy, nor sanctioned by the law. On the contrary, as I have shown, we have the highest judicial condemnation of it.

I think the writ should issue.

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MYRON E. THURSTON v. CHARLES T. WRIGHT.

False imprisonment—Malicious prosecution—Evidence.

1. In an action for false imprisonment and malicious prosecution, it is competent for the justice of the peace who issued the warrant to state fully what took place when the parties first appeared before him, and what proceedings were had; and he may be asked, on cross-examination by the defendant, "what conduct before him in the proceedings, or in his presence or hearing, on the part of the defendant, disclosed to him any maliciousness or over-anxiety to prosecute the criminal case, if any."

2. In such a case a letter from the prosecuting attorney, authorizing the commencement of the prosecution, is admissible as tending to show motive, and probable cause that an offense had been committed, and that the usual course was taken in such cases.
3. Where in a false imprisonment case the plaintiff is allowed, in proving damages, to show that he had subpœnaed witnesses, and the amount he had paid them, he may be asked on cross-examination to state the *specific* amount paid a given witness.
4. In a suit for false imprisonment and malicious prosecution the plaintiff may show exhibition of feeling on the part of the defendant after the suit was brought, as having some tendency to show motive, if connected with the matter in controversy.
5. While it is true that every kind of ill feeling is not necessarily indicative of malice, yet malice may be proved by evidence of defendant's conduct and declarations; and if such conduct resulted in a wrong done to plaintiff, statements indicating ill feeling towards the plaintiff may be introduced in evidence, as bearing upon the intent with which the wrongful act was committed. Malice may be inferred by the jury from all the facts and circumstances given in evidence, and expressions of ill feeling are circumstances which are proper to be submitted to the jury. Mere expressions of dislike or ill will by one towards another, unaccompanied by acts, do not constitute malice in the legal sense. But where an act has been done,—such as instituting a prosecution,—then such expressions become relevant upon the question of malice.
6. Defendant's requests to charge were properly refused, for the reason that two important elements were omitted necessary to be shown in an action for malicious prosecution for commencing a criminal suit, namely, that defendant made a full and fair statement of all the facts known to him to the prosecuting attorney, who authorized the issuance of the warrant, and to his private attorney, who advised him in the premises, and that he acted upon such advice in good faith.

Error to Benzie. (Aldrich, J.) Argued April 18, 1889. Decided October 25, 1889.

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

McAlvay & Grant, for appellant.

Pratt & Davis, for plaintiff.

SHERWOOD, C. J. This action was brought by the plaintiff to recover of the defendant damages for an alleged false imprisonment and malicious prosecution, procured by the defendant. A trial was had in the Benzie circuit, before Judge Aldrich and a jury, and the plaintiff obtained a verdict for the sum of $300. The defendant brings error.

Twenty-five assignments of error are offered for our review, 17 of which relate to the admission of the testimony, and the others to the charge and requests to charge.

The controversy leading to the arrest of Thurston grew out of a dispute as to the legal existence of a highway running across Mrs. Thurston's land, claimed to have been established by user for a period of 10 years or more by Wright, and which was denied by Thurston. Thurston, while Wright was using the road in hauling logs from the woods to manufacture into lumber, in common with others, went along the road, and with his hired men slashed and felled large trees across the track, standing beside the road, with the intent to prevent its use, and this completely obstructed it for the passage of teams and loads.

The defendant, after consulting with attorneys, and the prosecuting attorney, and the justice, and on being informed that the facts furnished a proper case for the plaintiff's arrest, made an affidavit, drawn by the justice, and applied for the issuance of a warrant against Thurston for obstructing the alleged highway. He was arrested, brought before the magistrate, and arraigned upon the charge, and pleaded thereto "Not guilty." The prosecuting attorney was present, and conducted the proceedings on the part of the people, and on motion of the respondent, after a jury had been struck to try the case,

the cause was adjourned for trial ten days. But before that time the prosecuting attorney notified the court and parties interested that the case would not be tried, and did not appear before the justice on the adjourned day, when the case was dismissed. The plaintiff, when arrested, went before the court, and, when the adjournment was had, no bail was required for his appearance on the adjourned day, and he returned to his home.

The plaintiff claims there was no road established by user; that defendant caused his arrest through malice, and his imprisonment was false, and without any reasonable cause; that the defendant, instigated by his malicious feelings towards plaintiff, urged the prosecution, and his arrest upon the warrant; that the whole proceeding was illegal; and that the court was without jurisdiction in the matter.

On the part of the defendant it was claimed by him that he had no malice against plaintiff, and that he took no improper part in instituting the proceedings against plaintiff, of which he complains, and was no more active, and took no more part, in their prosecution than should have been taken by any complaining witness believing that an offense had been committed, and in good faith desiring the offender to be brought to justice in the premises; and whatever he did he did in good faith, and under the advice of counsel and the prosecuting attorney of the county.

The cause was tried in the Benzie circuit, and the jury, under the evidence and charge of the court, returned a verdict against the defendant for $300. The case is now before us for review upon all the proceedings had therein.

It is undisputed that when Wright went before the magistrate to make the complaint he made a statement of the facts, presenting four affidavits from as many of the citizens in the vicinity of the road, stating that the road

had been used as a public highway for 10 years or more, and that the justice drafted the complaint and warrant, and delivered the latter to the officer for service. There was some testimony given tending to show that there had been some difficulty between the parties, and that ill feeling existed between them towards each other. It was, however, very slight, and not of a character to generate malice.

There was no error in allowing the justice to state fully what took place when the parties first appeared before him, and what proceedings were had. The justice was asked when upon the stand:

"What conduct before you in these proceedings, or in your presence or hearing, on the part of Wright, disclosed to you any maliciousness or over-anxiety to prosecute this case, if any?"

This was not allowed to be answered. We think the witness should have been allowed to make his answer. The question was asked upon the cross-examination of the justice. No ground was stated for the objection when made. The subject was an important one in the case.

The letter of the prosecuting attorney, authorizing the commencement of the prosecution, was, upon the objection of plaintiff's counsel, excluded by the court. This was error. It tended to show motive, and probable cause that an offense had been committed, and that the usual course was taken in such cases.

We think the testimony of plaintiff as to his having difficulty with the defendant, given upon his direct examination, was proper. It had a bearing upon the question of malice.

The plaintiff was allowed, in proving damages, to show that he had subpœnaed witnesses, and the amount that he had paid to them. He was asked for the specific amount he paid one Morgan, whom he had stated he had

paid. This was upon cross-examination. Upon objection being made, he was not allowed to answer. The respondent had the right to his testimony as to the exact amount, and his answer was erroneously excluded.

The plaintiff was allowed to show, upon the trial, exhibition of feeling on the part of defendant after the suit was brought. This was objected to. We think this was proper, as having some tendency to show motive, if connected with the matter in controversy, though not without it was so connected.

Witness Shea had made an arrangement, about the time this controversy arose, with Thurston, for the right to haul a quantity of logs across Mrs. Thurston's land, and pay him in an order on Wright, which Wright would not afterwards pay; and this was introduced in evidence, with all the attendant circumstances, against objection of defendant's counsel that it was irrelevant and immaterial. This was error, and the objection should have been sustained.

We find no other error than those noticed relating to the taking of the testimony.

It was substantially conceded that the complaint and warrant did not state an offense, and the question of damages was the principal one in the case. The court charged the jury that they should find the plaintiff was falsely imprisoned. We think the court went too far, when he unqualifiedly charged the jury, upon the subject of malice, that they might take into consideration—

"Any statements you may find which he has made in which he has expressed ill feeling against the plaintiff, if you find he has made such statements."

It is not every kind of ill feeling towards another that indicates malice in the person expressing them, and the jury should have been told they could only take into

consideration such statements as gave expression to such feeling.

The defendant's counsel asked the court to charge the jury as follows:

"1. That if the jury find that the defendant merely stated the facts and circumstances of which he complained to Mr. Betts, the justice of the peace, after having been advised by Frank B. Case, his attorney, and after having received the letter in evidence from the prosecuting attorney for this county, and these facts were submitted to the justice, and were by him reduced to writing, and sworn to by defendant, Wright, and that on such complaint, which was afterwards approved by the prosecuting attorney, the warrant was made by the justice, the defendant is not liable in this action for false imprisonment.

"2. If the jury find that Wright simply laid the facts and affidavits before the justice, and left all determination to the unbiased and unsolicited conduct of that officer, then he is not liable in trespass for false imprisonment."

We think these requests should have been given; that they were very proper under the circumstances of the case, and their refusal by the court was error. *Lock v. Ashton*, 12 Q. B. (64 Eng. Com. Law) 871; *Munns v. Dupont*, 1 Amer. Lead. Cas. 220; *West v. Smallwood*, 3 Mees. & W. 418; *Josselyn v. McAllister*, 22 Mich. 300; *Livingston v. Burroughs*, 33 Id. 511; *Murphy v. Walters*, 34 Id. 180.

The judgment at the circuit must be set aside, and a new trial granted.

CAMPBELL, J., concurred with SHERWOOD, C. J.

CHAMPLIN, J. I cannot concur in the opinion of the Chief Justice that the court went too far when he charged the jury upon the subject of malice that they might consider—

"Any statements you may find which he has made in which he has expressed ill feeling against the plaintiff, if you find he has made such statements."

While it is true that every kind of ill feeling is not necessarily indicative of malice, yet malice may be proved by evidence of the defendant's conduct and declarations; and if such conduct resulted in a wrong done to plaintiff, statements indicating ill feeling towards the plaintiff may be introduced in evidence, as bearing upon the intent with which the wrongful act was committed. Malice may be inferred by the jury from all the facts and circumstances given in evidence, and expressions of ill feeling are circumstances which are proper to be submitted to the jury. Mere expressions of dislike or ill will by one towards another, unaccompanied by acts, do not constitute malice in the legal sense. But where an act has been done,—such as instituting a prosecution,—then such expressions become relevant upon the question of malice.

Neither can I agree in the opinion that the requests to charge the jury, made by the defendant, and embodied in the opinion of the Chief Justice, should have been given. They omit two important elements:

1. That defendant made a full and fair statement of all the facts known to him to the prosecuting attorney, and to Frank B. Case, his attorney.

2. That he acted upon such advice in good faith. *Mesher v. Iddings,* 72 Iowa, 553 (34 N. W. Rep. 328); *Donnelly v. Daggett,* 145 Mass. 314 (14 N. E. Rep. 161); *Jones v. Jones,* 71 Cal. 89 (11 Pac. Rep. 817); *Schippel v. Norton,* 38 Kan. 567 (16 Pac. Rep. 804); *Chambers v. Upton,* 34 Fed. Rep. 473; *Johnson v. Miller,* 69 Iowa, 562 (29 N. W. Rep. 743); *Josselyn v. McAllister,* 22 Mich. 309; *Stanton v. Hart,* 27 Id. 541.

The case of *Murphy v. Walters,* 34 Mich. 180, is cited as sustaining the requests to charge. Had this case been an action for false imprisonment merely, and not for malicious prosecution, the case would have been in point. But this case proceeded upon the theory that the prosecution was malicious. There was a count in the

declaration for that cause of action, and under this count the authority cited is not in point, and to have given the charge as requested would have been erroneous.

I concur in reversing the judgment upon the other points stated in the opinion of the Chief Justice.

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

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THE GRAND RAPIDS CHAIR COMPANY v. ALLICK G. RUNNELS, SHERIFF OF NEWAYGO COUNTY.

Replevin—Log lien—Service of process—Return of officer—Constitutional law—Illegal taxation of attorney fee invalidates judgment only in that amount—Justices of the peace—Effect of failure to wait one hour after return-hour for appearance of defendant—Docket entries—Log-lien law of 1887—Affidavit for attachment under—Irregularities in execution under.

1. Where a purchaser of standing timber, the title to which was retained by the land-owner until the purchase price was paid, sold the logs to a corporation, which acquired all of his interest in the same before the logs were attached at the suit of his workmen under the log-lien law, and notice was served on the corporation, but not upon the land-owner, who had not *then* been paid for the timber, and, after making such payment, the corporation replevied the logs from the sheriff, the failure to serve notice upon the land-owner will not defeat such lien proceedings in the replevin suit.
2. A return of service of process upon "Charles C. Comstock, as president of the Grand Rapids Chair Company [a corporation], *who* is the owner of said goods and chattels described in within writ," sufficiently shows a service upon the corporation, to which the word "who" may be treated as relating, and not to Comstock.

3. Act No. 147, Laws of 1887, which provides for the taxation of a $5 attorney fee in favor of the plaintiff in a suit to recover for personal services, as a part of his costs, is unconstitutional and void. *Wilder v. Railway Co.*, 70 Mich. 382 (head-note 3).

4. The illegal taxation of an attorney fee in a log-lien suit, under Act No. 147, Laws of 1887, will not invalidate the judgment, nor interfere with the lien, except in so far as the illegal excess of costs may reduce it in amount.

5. An affidavit for an attachment under the log-lien law (Act No. 229) of 1887 need not state who is the owner of the logs upon which a lien is claimed. *Babcock v. Cook*, 55 Mich. 7; *Shaw v. Bradley*, 59 Id. 199; *Reilly v. Stephenson*, 62 Id. 509, 515.

6. It was not decided in *Mudge v. Yaples*, 58 Mich. 307, *Post v. Harper*, 61 Id. 434, *Noyes v. Hillier*, 65 Id. 636, or *Wedel v. Green*, 70 Id. 642, that the failure of a justice of the peace to wait one hour after the return-hour of process for the appearance of the defendant would void a judgment in favor of the plaintiff where sufficient service had been made or notice given, and the docket showed due appearance by the plaintiff.

7. In *Bossence v. Jones*, 46 Mich. 492, which was a *direct* proceeding to review a judgment, it was held that a justice of the peace must wait one hour for the appearance of the defendant after the time fixed for hearing, in all cases in which the plaintiff was allowed that time by statute. But it had been held in *Smith v. Brown*, 34 Mich. 455, that, as there was no statutory requirement for such waiting, a failure to do so was at most but an *irregularity*, and not open to collateral attack.

8. Where due service of attachments in 19 log-lien suits against the same debtor and logs was made upon the debtor, who appeared at the return-hour,—which was the same in each case,—and joined issue in each suit, and the log-owner did not appear, although duly served with notice of such attachments, the failure of the justice to wait one hour after the return-hour before proceeding in said suits will not invalidate the judgments rendered therein, in a replevin suit by the log-owner against the sheriff who had levied upon the logs under executions issued on said judgments.

9. An attachment issued by a justice of the peace in a "log-lien suit" brought under Act No. 229, Laws of 1887, may be served by the sheriff of the county where the attachment is issued upon the log-owner in any county in the State, and where such log-owner is a corporation, service upon its president is sufficient notice to the corporation.

10. An affidavit under the "log-lien law" of 1887 which alleges that the labor was performed in "cutting, skidding, hauling,

chopping, sawing, *swamping*, *loading*, and falling the logs (timber) upon which a lien is claimed, is sufficient; "chopping" being included n "cutting," and "loading" being a necessary part of "hauling," and "swamping" belonging to the work of "skidding" said logs.

11. An affidavit in a "log-lien suit" under Act No. 229, Laws of 1887, which fails to state by whom the labor was performed for which the recovery is sought, is defective; but such defect will not invalidate a judgment for a return of the logs in favor of the sheriff, who had also levied upon them under executions issued upon judgments in favor of several other lien-holders, whose affidavits were not so defective, but it will reduce the amount of his lien in the amount of the judgment in the case where the affidavit is so defective.
12. We are not prepared to hold that the failure of a justice of the peace to note on his docket the time of issuing an execution, and to whom delivered, or the fact that it was issued, will vitiate an execution actually and properly issued by the justice, and delivered to the sheriff.
13. After the levy of an execution issued upon a judgment in a log-lien suit brought under Act No. 229, Laws of 1887, upon the logs, and the posting of notices of sale, the officer holds the property under such levy, and not under the prior attachment.
14. An execution issued under the log-lien law of 1887, and delivered to the same officer who served the writ of attachment, which recites the fact of the rendition of the judgment, and that it is for work and labor performed upon "a certain lot of red and white oak saw-logs, as mentioned in plaintiff's declaration," and commanding the officer to levy the damages, etc., of the goods and chattels of the *debtor*, naming him, "namely, the above described logs," sufficiently points out to the officer the logs held under the attachment levy.
15. Where in *such* a case the officer levied said execution upon the identical logs he had attached in said log-lien suit, and was proceeding to a sale to satisfy said judgment when the owner of the logs replevied them, the omission from the execution of a command to make such sale is an irregularity which cannot be taken advantage of in said replevin suit

Error to Newaygo. (Palmer, J.) Submitted on briefs April 19, 1889. Decided October 25, 1889.

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

Butterfield & Keeney, for appellant, contended as stated in the opinion, citing the authorities therein referred to and reviewed.

Andrew Hanson, for defendant.

MORSE, J. The questions in this case to be determined grow out of proceedings under Act No. 229, Laws of 1887, known as the "Log-lien Law." It was agreed by the contending parties in the court below that there were no issues of fact to be submitted to the jury, and thereupon the circuit judge of the Newaygo circuit directed a verdict in favor of the defendant. The action was in replevin, and the defendant took judgment for the return of the property, which consisted of 898 red oak and white oak logs, valued by the appraisers at $750.

The facts developed on the trial were these: At the time this suit was commenced, and at the time the logs were cut, Lyman T. Kinney, of Grand Rapids, Michigan, owned the lands upon which they grew. On September 17, 1887, he entered into an agreement in writing with one John G. Gunsolus, by which he sold all the red oak and white oak timber upon these lands to Gunsolus, said timber to be removed on or before April 1, 1888. The timber was to be paid for before it was loaded on the cars for shipment, at the rate of $4 per 1,000 feet stumpage, Doyle's scale. It was agreed that the title to the timber should remain in said Kinney until it was paid for.

Gunsolus contracted the logs to be cut upon these lands to the Grand Rapids Chair Company, and made a contract with one Willard B. Lyons to cut and put them in. The logs in issue here were cut in the winter of 1887 and 1888, and, when taken under the writ, were at or near Field station, so called, on the east side of the spur or side track of the Chicago & West Michigan Rail-

way Company, in the township of Wilcox, in the county of Newaygo.

Lyons became unable to pay all his men in full, and, on March 6, 1888, William Clark and eighteen other men, who had been employed by Lyons in getting out these logs, filed their liens with the county clerk of Newaygo county, and on the same day each made an affidavit before Samuel M. Reed, a justice of the peace of said county, and thereby commenced under the statute nineteen different suits against the logs and Willard B. Lyons. The writs of attachment were put in the hands of the defendant, Runnels, sheriff of Newaygo county, who on the same day levied upon the logs and served a certified copy of each writ upon Lyons. He also returns in each case that on March 9, 1888, he—

"Served at the city of Grand Rapids, Mich., a certified copy of within writ on Charles C. Comstock, as president of the Grand Rapids Chair Company, who is the owner of said goods and chattels described in within writ."

The justice's docket shows in each case that the writ was returnable March 14, 1888, at 9 o'clock A. M., at his office in the township of Wilcox. After reciting the substance of the sheriff's return as above, the docket proceeds:

"Case called at 9 o'clock A. M. Plaintiff appeared in person, and by A. Hanson, as his attorney, and filed a written declaration. Defendant appeared in person, and pleaded the general issue. Both parties announced themselves ready for trial, and proceeded to try the cause. After hearing the testimony, and after due deliberation, I, Samuel M. Reed, as justice, say that there is due the plaintiff the sum of" (being in each case the amount due from Lyons to the plaintiff for labor performed in getting out the logs) "from said defendant; and that the same is due for work and labor performed by the plaintiff in skidding, cutting, hauling, loading, and chopping a certain lot of red and white oak saw-logs, as mentioned

in plaintiff's declaration; and that the plaintiff has a lien upon said described property for said amount."

The judgment in each case was for the amount of labor so found, and $15.05 costs; $5 of such costs being for the attorney fee authorized by such act. Executions upon each of these judgments were issued and placed in the hands of said sheriff March 19, 1888. Levy was made on the logs under these executions.

The secretary of the plaintiff company demanded these logs of the sheriff, and upon his refusal to deliver them the plaintiff brought this action in replevin.

For the consideration of one dollar, "to him in hand paid," Lyman T. Kinney, on March 29, 1888, assigned his title in and claim to said logs to the plaintiff. It seems also that the company had acquired Gunsolus' interest in the logs before the lien proceedings were instituted. The secretary of the chair company testified that Kinney had not been paid in full for the logs on March 6, 1888, when the lien proceedings were instituted, and Kinney testified that he was the owner of them on that day. No notice of the lien proceedings were given to Mr. Kinney.

It is urged, as the first and most serious objection to the judgments in these lien cases, that Kinney, being the owner of the logs at the time these suits were commenced, was entitled to notice of the proceedings, and as he had none, either actual or constructive, the judgments, as far as the logs are concerned, are invalid and void for want of jurisdiction, and therefore, there being no valid lien upon them, the plaintiff, at the time of the commencement of the replevin suit, being the owner of them, was entitled to the possession of them, and the verdict and judgment should have passed in its favor. To this the defendant replies that the Grand Rapids Chair Company was the owner of these logs, and that

notice was given such corporation by service upon its president.

I think, under the circumstances of this case, that Mr. Kinney was not entitled to notice. If the proper notice was given to the Grand Rapids Chair Company it was sufficient. This plaintiff corporation was in reality the owner of these logs. It hired Gunsolus to put them in, and had acquired all his interest before the lien proceedings were commenced. It is true that Kinney reserved the title to them until they were paid for; but he was paid for them before this replevin suit was instituted, and no rights of his appear to ever have been jeopardized by the attachment and seizure of the logs under the attachment. The Grand Rapids Chair Company claimed that the logs were in transit to them at the time the sheriff seized them, and their secretary so testifies. They had notice of the proceedings, as there is no dispute but Comstock was the president of the corporation when service was made upon him. There can be no good reason for defeating these liens upon a mere technicality which injures no one. The title which Kinney had in these logs, if he had any that he could assert, was one depending on a contingency which did not happen, or rather held as a security against the happening of non-payment. As the matter stands Kinney has no concern, and never had, with these liens. The real party affected now, and at all times heretofore, by them is the plaintiff in this suit.

It is claimed, however, by plaintiff's counsel that the return of the sheriff does not show the service of any process upon plaintiff. It shows a service on—

"Charles C. Comstock, as president of the Grand Rapids Chair Company, who is the owner of said goods and chattels described in within writ."

It is argued that by the word "who" a service is shown

on Comstock personally, not on the company. We think the return sufficient. It shows that it was served upon him "as president," etc., and the word "who" can well be treated, as it was no doubt intended, as relating back to the chair company, and not to Comstock. It is not best to void the sheriff's return and thereby nullify the whole proceedings in 19 suits by hair-splitting.

The judgments in the lien cases are next attacked. It is claimed that they are illegal and void for the following reasons:

1. Because of the taxing in each case of an attorney fee of five dollars.
2. There are no allegations in the affidavits for the writs as to the ownership of the logs.
3. The docket of the justice shows that he proceeded to trial at the return-hour of the writs, without waiting one hour for the owner of the logs to appear.
4. The sheriff was not authorized to serve the process outside of Newaygo county.
5. The proceedings were brought for labor and services not mentioned in or contemplated by the statute.

In relation to the first objection, it must be held that the taxing of the attorney fee of five dollars in each of these cases was illegal. Such attorney fee is unauthorized, for the reason stated in *Wilder v. Railway Co.*, 70 Mich. 382 (38 N. W. Rep. 289); *Schut v. Railway Co.*, Id. 433 (38 N. W. Rep. 291); *Lafferty v. Railway Co.*, 71 Id. 35 (38 N. W. Rep. 660). It was imposed in the lien cases under the authority of Act No. 147, Laws of 1887, p. 160, which is an act amending the Laws of 1883. Whether or not the attorney fee given by this Act No. 147 would apply to lien proceedings is not material, as the act itself, under the decisions above cited, must be considered as unconstitutional and void. But this illegal taxation of costs does not invalidate the judgments, nor interfere with the liens, except in so far as the illegal excess of costs may reduce the amount of such liens.

I do not think the second objection is tenable. As well said by COOLEY, C. J., in *Babcock v. Cook*, 55 Mich. at page 7 (20 N. W. Rep. 692), the statute neither expressly nor by implication requires that the affidavit shall show who is the owner of the logs.

"On the contrary, it supposes there may be cases in which the owner will be unknown, and the form given for the writ contains a command to the officer to make service upon the owner, if he is known to the sheriff and resides in the State." See Laws of 1887, pp. 283, 284; *Reilly v. Stephenson*, 62 Mich. 509, 515 (29 N. W. Rep. 99); *Shaw v. Bradley*, 59 Id. 199 (26 N. W. Rep. 331).

In support of the third objection the following cases are cited and relied upon by counsel for plaintiff: *Noyes v. Hillier*, 65 Mich. 636 (32 N. W. Rep. 872); *Post v. Harper*, 61 Id. 434 (28 N. W. Rep. 161); *Mudge v. Yaples*, 58 Id. 307 (25 N. W. Rep. 297); *Wedel v. Green*, 70 Id. 642 (38 N. W. Rep. 638).

We do not think these cases applicable to the case at bar. In *Mudge v. Yaples*, it did not appear from the docket entry what day or hour the plaintiff appeared and took his judgment. While in that case it was held that it might be inferred from the docket that the judgment was taken on the return day of the writ, yet the hour did not appear, and it was said:

"The statute specifically requires the time of the appearance of the parties to be entered, and for good and obvious reasons, and such an omission is a jurisdictional defect. See *Redman v. White*, 25 Mich. 523. We consider the hour of the appearance as necessary to be entered as the day. A judgment rendered by a justice in favor of the plaintiff before the return-hour of the summons, without the consent or appearance of the defendant, or when the plaintiff has failed to appear within one hour thereafter, is void."

In *Post v. Harper* the docket did not show at what hour the plaintiff appeared, and, while it showed that the

plaintiff appeared on the adjourned day, and waited one hour, and the defendant did not appear, the hour of plaintiff's appearing not being stated in the docket, it did not therefore show that the plaintiff appeared *within one hour* after the time to which the case was adjourned, to wit, 1 o'clock P. M. For aught that the docket showed, he might have appeared at any hour in the forenoon of the adjourned day and waited one hour.

In *Wedel v. Green* it did not appear at what hour the plaintiff appeared and took judgment, and the case was governed by *Mudge v. Yaples* and *Post v. Harper*.

In *Noyes v. Hillier*, which was a log-lien case, one Wright H. Obear was named as defendant in the affidavit for the writ. Service was made upon him the day after the writ issued. Service was also made upon one Edwin C. Beecher as agent of Noyes, who was the owner of the logs, on the return-day of the writ. On the same day the plaintiff filed a written declaration against Obear, and at the return-hour, 10 o'clock in the forenoon, the justice called the suit, and proceeded at once to trial, and rendered judgment in the absence of both Obear and Noyes, and without the appearance of either. His docket did not show that he waited one hour, although he returned that he did. We held that it appeared presumptively that he did not wait, but proceeded at once to trial, and that his return could not aid his docket entry, nor remove the presumption of the entries in his docket. We did not hold, however, that the judgment was not good as against Obear, who had proper service of notice, but as against the owner of the logs, or as affecting the logs, we held the judgment invalid for the reason that when the service was made on the owner on the return-day of the writ the justice could not proceed at once, at 10 o'clock in the morning, to trial, as it did not

give the owner reasonable notice and reasonable opportunity to appear and defend the cause.

In none of these cases, as will be seen by this review of them, has it been decided that the failure to wait one hour after the return-hour for the defendant, in a case where sufficient service had been made or notice given would void a judgment in favor of the plaintiff. But in *Bossence v. Jones,* 46 Mich. 492 (9 N. W. Rep. 531), it was decided that a justice must wait for a full hour for the appearance of the defendant after the time fixed for hearing, in all cases in which the plaintiff is allowed that time by the statute. This was upon a direct review of the judgment, in this Court, upon writ of error from the Lapeer circuit. It was, however, held in *Smith v. Brown,* 34 Mich. 455, that, as there was no statutory requirement that the justice should wait an hour, or any time after the return or adjourned hour, for the defendant, a failure to so wait was at most but an irregularity, and not a jurisdictional defect,—not open to collateral attack. In that case it was said:

"Granting, however, but not deciding, that regularly the justice ought to wait an hour for the defendant to appear, still, his omission to do so, if shown or assumed, could at most amount to error. It would not be a fault affecting jurisdiction, and hence not one subject to be taken advantage of collaterally."

In the case at bar the attack upon these judgments is a collateral one, and therefore would seem to come within the ruling in *Smith v. Brown, supra.* It must also be remembered that in this case the defendant, Lyons, appeared and was ready for trial, and that after the case was called the pleadings were filed, which of course consumed some time. The Grand Rapids Chair Company was notified on March 9, 1888, by service of a certified

copy of the writ of attachment upon its president, five days before the return-day,—a reasonable notice. Only one of the judgment or docket entries is given in the printed record, but it is stated that the whole of the docket entries in the 19 cases are annexed to the bill of exceptions; that—

"The nineteen suits were contemporaneous in point of time, and were identical as respects the conduct thereof, and, inasmuch as the papers in the various suits are intended to pursue the same form, and do pursue the same form, so far as all the questions raised at the trial are concerned, we print only one set, the papers in the suit of William H. Clark, which is the first suit appearing on the docket of the justice."

An examination of the copy of the docket entries in each case, as they appear in the manuscript record, shows that all of them were called at 9 o'clock A. M., declaration filed in each by A. Hanson, attorney for plaintiff, and a plea by the defendant, Lyons, and testimony then taken in each on the issue thus made. Before all or many of these cases could have been disposed of an hour must have elapsed. It would therefore seem that the Grand Rapids Chair Company, if it had put in an appearance at the justice's office within the hour, would have had a chance, had it so desired, to have defended some of these nineteen suits. It is evident that the fact that the justice did not wait until 10 o'clock A. M. before trying any of these suits did not prejudice the plaintiff in this case at all, because it did not appear, and would not have appeared, within the hour, had the justice so waited.

The fourth objection is that the sheriff had no authority to go out of Newaygo county to make service upon the plaintiff or upon Comstock, its president. It is claimed that the sheriff had no greater power in this respect than a constable, and that a constable is a local officer, whose

authority to serve process does not extend beyond the limits of his own bailiwick. How. Stat. § 765. The act of 1887, § 6, at page 280, expressly provides that—

"Such attachment or other process issued out of said courts [circuit or justice courts] of this State, in pursuance of the provisions of this act, may be served in any county of this State, and, if the defendant in said attachment is not the owner of the property or products described in said writ, then the officer executing said writ shall serve, or cause to be served, a copy of said attachment on or before the return-day mentioned in said writ upon the owner of said products, or any of them, their proper agent or attorney, if such owner, agent, or attorney be known to him, and residing in this State."

It is also intimated in *Babcock v. Cook*, 55 Mich. at page 7 (20 N. W. Rep. 692), that the command in the writ to the officer to make service on the owner, if he is known to the sheriff and resides in the State, is a proper one. We have no doubt of the right of the sheriff to serve a copy of the writ upon Comstock at Grand Rapids; and such service was sufficient notice, under the law, to plaintiff.

Under the fifth objection, it is claimed that the docket of the justice and the other proceedings show that the actions under the lien law in this case were brought to recover for swamping, loading, and other services not mentioned in the statute. The affidavits were objected to on the ground that the services mentioned therein were not the kind of services mentioned in the statute. The same objection was made to the declarations, and it was also objected that the justice did not find that the services performed were of the kind stated in the law. These objections were overruled, and error is assigned thereon. The statute gives a lien to laborers "cutting, skidding, falling, hauling, scaling, banking, driving, running, rafting, or booming any logs," etc. The affidavits allege that the labor was performed "in cutting, skidding,

hauling, *chopping, sawing, swamping, loading*, and falling." It would seem that "chopping" was included in "cutting," and "loading" would be a necessary part of the "hauling," and "swamping" belongs to "skidding," it being the cutting out of brush and removal of rubbish in the way of getting the logs to the skidways. There is no merit in this objection.

There are other assignments of error, directed against some of the affidavits, and also to the admission and rejection of certain testimony; but there is not enough in any of them to warrant discussion. We think the affidavit in one of the cases defective,—that of Marion B. Mills,—as it does not state by whom the labor was performed for which recovery is sought. But this does not invalidate the judgment, which was for a return of the property. It, however, lessens the lien upon the logs in the amount of the judgment in Mills' favor.

The executions in the hands of the sheriff are claimed to be void—

First. Because there is no showing that the justice ever issued them; and,—

Second. Because they are not in the form contemplated by the statute.

The justice before whom the causes were tried, and who rendered the judgments, testified that he issued the executions, and he identified them; but it is averred by the plaintiff's counsel that it does not appear from the docket that he authorized the issuing of them. The statute provides (How. Stat. § 7053, subds. 12, 13) that the justice shall enter upon his docket the time of issuing execution, and the name of the officer to whom delivered, and the return of such execution when made. No such entries appear on the copies of the docket attached to the bill of exceptions. We are not prepared to hold that the failure to note on the docket the time of issuing the execution,

and to whom it was delivered, or the fact that it was issued, would vitiate an execution actually and properly issued by the justice, and delivered to the sheriff.

The act of 1877, at page 285, § 12, provides that execution shall issue on the judgment rendered,—

"And such execution, in addition to the commands in ordinary executions, shall command that the said products, or so much thereof as shall be necessary for that purpose, be sold to satisfy such judgment, and all costs, charges, and disbursements."

No such command was inserted in these executions in the words of the statute. The following is a copy of the execution issued in the case of William H. Clark (the others are similar, except in name of plaintiff and in amount of damages):

"STATE OF MICHIGAN, } ss.
County of Newaygo, }

"*To any Constable of said County:*

"Whereas, judgment against Willard B. Lyons, defendant, for the sum of twenty-four dollars and forty-seven cents damages, and fifteen dollars and five cents costs, in favor of William H. Clark, plaintiff, for work and labor performed by the said plaintiff in cutting, skidding, loading, and hauling a certain lot of red and white oak sawlogs, as mentioned in plaintiff's declaration, was rendered by and before me, the undersigned, a justice of the peace of the township of Wilcox, in said county, on the 14th day of March, A. D. 1888, at the township aforesaid.

"You are therefore commanded, in the name of the people of the State of Michigan, to levy the said damages, with interest from said 14th day of March, 1888, and costs, of the goods and chattels of the said Willard B. Lyons, excepting such goods and chattels as are by law exempt from execution, namely, the above-described logs, upon which the plaintiff has a lien for said amount, and to bring the money before me, at my office in said township, in sixty days from the date hereof, to render to the said William H. Clark, the said plaintiff; and have you then and there this writ."

The counsel for plaintiff claim that the property to be

levied upon in this execution is not sufficiently described, as it only describes them as the logs mentioned in plaintiff's declaration, and that there is no specific command to sell the logs; that therefore the executions are defective and void, and the sheriff had no right, at the time of the demand of the property by the plaintiff, and at the date of commencement of suit, to hold the property, or any part of it. The counsel for defendant admits that the executions are defective in this last respect, but contends that the officer had the right to hold the property, if the executions were void, under the authority of *Vanneter v. Crossman*, 39 Mich. 610. But that case does not apply to the one at bar. In that case the attachment suits had not gone to judgment, and were pending. True, the writer of the opinion in that case says, in the course of his reasoning, that if the plaintiffs in attachment allowed their suit to go down the officer would still hold the property under their writ until he was notified of the discontinuance, but it was the plaintiffs in attachment who were seeking to bring replevin against the officer who obtained his possession of the property by their own writ of attachment.

That is not this case. Here, judgments had been obtained on March 14, 1888, and the proceedings in attachment closed, save the issuing of executions, and the collecting of the judgments by a sale of the property under such executions. The executions were issued at the expiration of five days, on March 19, 1888. This suit in replevin was commenced March 30, 1888, 11 days after the issuing of the executions. By what authority was the sheriff then holding the property? Under the original attachment, or under his levies on the executions? And, if the executions were invalid, and he was holding under them, could he fall back upon the writs of attachment, and retain possession under them?

This act of 1887 repealed the then existing log-lien law of 1881. It is particular in giving forms to be used in the statement of lien, affidavit to be filed, and writ of attachment to be issued, in the filing of declaration, and finding of the justice. It also states, as before shown, what command, other than the ones found in ordinary executions, shall appear in the execution, but is silent as to the time the execution shall issue, or as to the result in case none is issued or served within any given time. Laws of 1887, pp. 280, 283–285. Section 11 of the act provides that—

"All writs of attachment issued under the provisions of this act * * * shall be served and returned as ordinary writs of attachment are served and returned, * * * except as herein otherwise provided; and the pleadings and all subsequent proceedings shall be the same as in other cases of attachment, except as herein otherwise provided."

Therefore we must look at the course of proceeding in ordinary attachments in order to answer these questions. The lien of the attachment continues until the levy of execution, if such levy was in a reasonable time. It appears from the evidence of the defendant that he made a levy under these executions, and before the replevin of the logs had posted notices of sale under such levies. There is no doubt, in fact or in law, but that he was holding the logs at the time of the issuing of the writ under the execution levies, and not under the attachment.

But we do not think the executions were so defective as to be void. They were handed to the same officer who held the logs under the attachment levies. When the logs were described in the execution as those mentioned in the plaintiff's declaration, they were sufficiently pointed out to the officer, who knew therefrom what logs were meant just as well as he would if the logs had been

specifically named in the execution. The command in the execution is that the officer levy upon these logs, and make the money out of them. This could not be done without a sale; and the conceded fact is that the officer, at the time the suit was brought, had levied upon these identical logs, and on no other property, and was proceeding to sell the same, under such levy, precisely as he would have done had there been an express and specific command in the execution so to do.

We find a case clearly in point on this subject, and which we think holds the true doctrine in such a case as this. In an attachment suit (*Merwin v. Hawker,* 31 Kan. 222, 1 Pac. Rep. 640), the command in the execution was as follows:

"We command you that of the goods and chattels of the said Charles W. Bates and John F. Randolph you cause to be made the debt, damages, and costs aforesaid, and for want of goods and chattels you cause the same to be made out of the lands and tenements of the said Charles W. Bates and John F. Randolph, to wit, the real property heretofore attached in this action, to wit:" (describing the property).

The court say that the first part of the command, to make the debt out of the goods and chattels of the defendant, must be held as a mere surplusage; and, in relation to the last part of the command:

"It is true the form of the last command should properly have been to sell the property attached and apply the proceeds in satisfaction of the judgment, whereas it in fact read to make the debt, damages, and costs out of such property. * * * * * * * * *

"We think the difference is only an irregularity, which cannot be taken advantage of in any collateral proceeding. There was at the time of the levy a perfect lien upon the attached property, and the execution commanded the officer to subject such attached property to the payment of such lien. It may be laid down as a general rule that where the process contains the specific

command which it ought to contain, and where the thing specifically commanded is the only thing done by the officer, such process will be sustained, although it contains other and improper commands. Such other commands, not being obeyed by the officer, will be treated as surplusage." See, also, *Pracht v. Pister*, 30 Kan. 568 (1 Pac. Rep. 638).

In the case before us the execution plainly commands the officer to subject the attached property to the payment of the lien. This the officer was proceeding to do when the property was taken from him under the writ in replevin. It amounts—the command—in effect to the command of the statute, and the defendant so understood and acted upon it. The irregularity, consisting in the fact that there was no express command to sell, cannot be taken advantage of in this collateral proceeding.

The judgment below is affirmed, with costs.

LONG, J., concurred with MORSE, J.

CAMPBELL, J., *(dissenting)*. There are several defects in the proceedings to establish the liens set up in this case, but as one is essentially complete it is hardly necessary to discuss the rest, which would in my judgment be answers to the defense, if considered.

The facts found show that until a considerable time after the judgments Lyman T. Kinney was owner of the logs in question in fact and in law, and had not been paid for them. The title of plaintiff was not acquired from him until 15 days after the judgments. Up to that time, plaintiff could not have disregarded his ownership. Assuming, which is not clear, that the plaintiff was notified of the proceedings, plaintiff was not then the owner, and had a right to assume that if Mr. Kinney, who was the only legal owner, was served, he could defend his title. If his title was not bound by the judgments, they were void; and the fact that others were served can-

not make good a judgment *in rem,* to which the legal owner was a stranger.

I think the judgment of the circuit court is erroneous, and should be reversed.

SHERWOOD, C. J., and CHAMPLIN, J., did not sit.

ISRAEL H. WRIGHT, ADMINISTRATOR, v. THE DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY COMPANY.

Contributory negligence—Rule as to infants—Charge to jury.

In determining the question of contributory negligence the same degree of caution is not required of an infant as of an adult; and, when such negligence is sought to be charged against a lad of less than 15 years of age, this rule clearly applies, and the charge of the court is erroneously defective which fails to state said rule, and challenge the attention of the jury to it, in applying the law to the facts and circumstances disclosed by the evidence in the case.

Error to Shiawassee. (Newton, J.) Argued June 11, 1889. Decided October 25, 1889.

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

S. S. Miner (Howard & Gold, of counsel), for appellant.

L. C. Stanley and *George Jerome,* for defendant.

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

SHERWOOD, C. J. This action is brought by plaintiff for personal injury resulting in the death of plaintiff's infant intestate.

From the record it appears that plaintiff's intestate, an infant under the age of 15 years, while riding in a sleigh driven by a boy of the same age, on the highway, was struck by defendant's passing train, and killed, on a crossing. The testimony on the part of the plaintiff tended to show that no warning was given of the approach of the train, and that the view of the train was obstructed. Contributory negligence was urged by defendant on the part of plaintiff's intestate. The cause was tried before a jury in the Shiawassee circuit, and verdict and judgment were given for defendant. The plaintiff now asks for a review of the case.

The conflict in the testimony upon the subjects of obstructed view of the train, and want of proper signals, were settled against the plaintiff by the verdict. There remains, however, one question, made upon the charge, to be passed upon. It is in the record, and is presented sharply in the plaintiff's brief.

Plaintiff's counsel claim, and the charge shows, that the circuit judge held the boy who was killed to the same degree of diligence in his efforts to avoid the accident which overtook him as would be required of an adult with greater experience and more matured judgment. In no part of the charge is it intimated that any considerations which would be proper in the one case might not be in the other; and in this, it is insisted by counsel for plaintiff, there is error which was fatal to the defendant's case. It is the claim of plaintiff's counsel that the diligence to be used and required to enable a plaintiff to recover is such diligence as he is able to understand and have the capacity to use; and that it is

neither the rule of law nor of good common sense to hold that a boy at 14 years of age has as much ability and capacity to comprehend and avoid the perils and dangers at a railroad crossing as at the age of 45 years; and that a failure to exercise care and caution at the age of 45 years might constitute gross negligence, which at the age of 14 years could not be regarded as negligence in any degree. And plaintiff further contends that when it is sought to hold a minor of not over 14 years of age guilty of contributory negligence, and thereby deprive him of his right to recover for personal injury received from the wrongful act of another, such negligence should be shown to contain all the elements necessary to place him in the wrong; and in such a case it is the duty of the court, in submitting the facts to the jury, to especially call their attention to the circumstance of his youth, and the rules which should govern them in passing upon the age and inexperience, and what allowance should be made in consequence thereof; and that in such case it is the clear duty of the court to do this, whether the party has the aid of counsel or not,—that it is a part of his statutory duty,—and not wait to have his attention directed to it by request of party or his counsel, and the omission so to do is error.

I have no doubt of the right of the plaintiff to have the instructions given to the jury he contends for in his position, and the duty of the court in that regard as his counsel claim it to be. And I think, both upon reason and the authority of this Court, the rule contended for by Judge Gold in his argument before us in this case is the correct one, and I believe it is safe to say that it is generally supported by the best-considered cases in this country upon the subject. The rule is this:

"That the care and discretion to be used by children, and for which they must be held chargeable, must be

proportioned to their age and capacity; and, while it must be ordinary care, it is not the ordinary care required of an adult under the same circumstances."

Mr. Justice COOLEY, in speaking upon the subject of contributory negligence of a minor, says:

"Duty can only be predicated of one who has capacity to understand, and ability to perform, it."

In the case referred to, the injured boy was riding upon the platform of a street-car. He was but 4 years old, and was in charge of a brother, 13 years of age; and, in speaking of the alleged negligence of the brother, the learned Judge further said:

"In judging of the measure of responsibility to which the older boy should be held, something more must be considered than merely his age. Some dangers the youngest persons shrink from instinctively, while an appreciation of others only comes from extended observation and experience. A child of four will shudder at the proximity of a precipice; when one of thirteen, to whose knowledge an injury from careless riding upon a street-car has never come, will not anticipate danger from anything apparently so safe. It is within the observation of all travelers, and all persons having the management of railway trains, that boys of from eight to fourteen years of age are much more ready to place themselves in exposed positions upon cars, and to jump off and on recklessly, than are persons of mature years. It is not necessarily to be assumed that they purpose subjecting themselves to danger, but they lack the experience and observation which teach the danger, and without which a man in the full maturity of his intellect might be guilty of a recklessness equal to theirs. * * It would be unreasonable and cruel in the extreme to hold such a child responsible for a prudence and foresight beyond his years, and for a perception and comprehension of dangers which are only learned by experience, or by observation and reflection." *East Saginaw City Ry. Co. v. Bohn*, 27 Mich. 503; *Daniels v. Clegg*, 28 Id. 32; *Swoboda v. Ward*, 40 Id. 420; *Hassenyer v. Railroad Co.*, 48 Id. 205 (12 N. W. Rep. 155). See, also, *Snow v. Provincetown*, 120 Mass. 580; *Kay v. Railroad Co.*, 65 Penn. St. 269; *Plumley v. Birge*,

124 Mass. 57; *Lynch v. Smith*, 104 Id. 52; *Thurber v. Railroad Co.*, 60 N. Y. 326; *Byrne v. Railroad Co.*, 83 Id. 620; *Railroad Co. v. Murray*, 71 Ill. 601; *Hund v. Geier*, 72 Id. 393; *Railroad Co. v. Delaney*, 82 Id. 198; *McGovern v. Railroad Co.*, 67 N. Y. 417; *Ewen v. Railway Co.*, 38 Wis. 613; *Railroad Co. v. Gladmon*, 15 Wall. 401; *Birge v. Gardner*, 50 Amer. Dec. 261; *Kerr v. Forgue*, 5 Amer. Rep. 146; *Railroad Co. v. Stout*, 17 Wall. 657. See, also, *Freer v. Cameron*, 55 Amer. Dec. 677, and cases cited in the note.

As is said by Mr. Justice COOLEY in *Hassenyer v. Railroad Co., supra*, I think the law may be regarded as well settled in this State that, in determining the question of contributory negligence, not the same degree of caution is required of an infant, as in the case of an adult, and, when such negligence is sought to be charged against a lad of less than 15 years of age, the rule clearly applies; and the charge of the court is erroneously defective which fails to state the rule, and challenge the attention of the jury to it, in applying the law to the facts and circumstances such as are disclosed by the evidence in this case.

The circuit judge, in his charge, failed to do this, and it was error, for which I think the judgment should be reversed, and a new trial granted.

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

CAMPBELL, J., *(dissenting)*. I do not agree that the charge of the circuit judge was open to the criticism expressed upon it by my brethren. It is not claimed he did not lay down the law correctly. It is claimed that he did not call the attention of the jury to the age of deceased as one of the elements in computing care or negligence. There are, no doubt, cases where peculiar knowledge is an element to be considered aside from ordinary sense and ordinary experience, and where the lack

of such knowledge is more likely to exist in minors or youths than in persons of experience. But the particular risk in this case was one which would be as palpable to a boy of 15 as to a man. A much younger boy would comprehend the danger of slowly crossing a railroad when a train is approaching, or likely to approach. And as the jury, who are to judge of negligence by their own good sense, knew the age of the boy, as well as all the surroundings, I do not think, in the absence of any request on the subject, that the court could be held in error for not refining on the subject further. The plaintiff was not a child or a minor, but a person suing, as all ordinary litigants sue, by an attorney of his choice, presumed to look after his interests. There was no more reason in this than there would be in any other case for the court to suppose a plain question of human experience would not be dealt with by the jury in accordance with it, or to assume that plaintiff's counsel could not look after his affairs. No complaint or exception was taken at the time, and no indication given that further instructions were desired. I do not think that the statute which allows exceptions to the charge to be made after verdict should be so liberally construed as to make a perfectly correct charge erroneous because not further qualified on a matter which the jury must necessarily take into the account if proper to do so. I think there is no error in the record.

MORSE, J., did not sit.

FRANKLIN WELLS, EXECUTOR, ETC., v. HOMER F. HUTTON ET AL.

Construction of will—Distribution of assets.

A will devising the testator's estate to her son, and to five grandchildren, naming them, to be divided as follows: One third to the son, and two thirds to the said grandchildren, is construed as giving to each grandchild one fifth of the two thirds so devised to them.

Appeal from St. Joseph. (Loveridge, J.) Argued June 12, 1889. Decided October 25, 1889.

Bill to obtain construction of will. Defendants Ransom Gibson and Ada Baxter appeal. Affirmed. The facts are stated in the opinion.

F. W. Knowlen, for complainant.

Orris P. Coffinberry, for defendants appealing.

Hugh P. Stewart, for defendants Hutton.

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

SHERWOOD, C. J. The following are the several clauses of Catharine Voorhees' last will disposing of her estate:

"1. It is my desire that all my just debts be paid.

"2. I devise and bequeath all my estate, both real and personal, of every name and nature, of which I may die possessed, to my son, James H. Voorhees, Homer F. Hutton, Charles W. Hutton, Emma Catharine Hutton, and Hattie E. Hutton, sons and daughters of my deceased daughter Emeline Hutton, and to Ransom Gibson, son of my deceased daughter Caroline Nash, to be divided as

follows: One-third thereof to my son James H. Voorhees, and two-thirds to the said children of my said deceased daughters, Emeline Hutton and Caroline Nash.

"3. I devise and bequeath to my granddaughter Ada Baxter, daughter of Caroline Nash, the sum of five dollars.

"4. I hereby appoint Franklin Wells executor of this my last will and testament, with full power to make sale and execute deeds upon real estate that I may leave at my death, and to account for the proceeds thereof as a part of my estate; also to assign any mortgages, and to do any other thing or things necessary for the speedy settlement of the same."

The bill in this case is filed to obtain a construction of the second and third clauses of the will. In addition to the pleadings, the record contains the following stipulation of facts:

"It is conceded by all the solicitors in said suit that the above-named James H. Voorhees was the only living child that said Catharine Voorhees had living when she made her last will and testament, or when she died, and that the several above-named Huttons were the children, and only children, of decedent's daughter Emeline Hutton, mentioned in said will, when said will was made, and when said deceased died; that the above-named Ransom Gibson and Ada Baxter were the children, and only children, of deceased daughter Caroline Nash, mentioned in said will, when said will was made, and when said deceased died; that said Catharine Voorhees, when she made said will, and when she died, had no living descendants, of any child or children of hers, except those above named."

The complainant, by his bill of complaint, shows that he has, as executor, about $7,500, after paying debts and expenses of the estate and administration, and wishes to make a partial distribution, and further shows that—

"Conflicting claims have now arisen concerning the true meaning of said provision of said will above quoted, the true intent of the testatrix therein, the proper and legal construction thereof, the rights and shares of said

devisee defendants therein, and their legal distributive shares in said estate thereunder, devisee defendants Homer F., Chas. W., Emma, and Hattie E. Hutton claiming that by virtue of the above quoted devise the intent of testatrix, and the true and legal construction thereof, is that two-thirds of said estate shall be equally divided between said Homer F., Chas. W., Emma C., and Hattie E. Hutton, and said Ransom Gibson; that under said quoted provisions they, said Homer F., Chas. W., Emma C., and Hattie E. Hutton, take, not by right of representation, but *per capita*, and that said Ransom Gibson takes likewise *per capita*, and not by right of representation; and they, said Homer F., Chas. W., Emma C., and Hattie E. Hutton, and he, said Ransom Gibson, are entitled to share two-thirds of said estate, and share alike. Whereas, said Ransom Gibson claims that, by virtue of said quoted provision, the true and legal construction thereof, and the true intent of testatrix therein, is that said four named Hutton devisees take by right of representation under their deceased mother, Emeline Hutton, and not *per capita*, and that he, said Ransom Gibson, also so takes under his said deceased mother, Caroline Nash, and not *per capita*, and that consequently the said four named Hutton heirs are entitled to equally share one-third of said estate, and that he, Ransom Gibson, is entitled alone to one-third of said estate."

Complainant in his bill further says that—

"Said four named Hutton devisees and said Ransom Gibson now demand to receive from your orator the respective sums which they would be entitled to upon the rule of construction and distribution which they respectively contend for as stated, and they insist that your orator is not authorized to make distribution upon any other basis;"—

And complainant asks that defendants may be required to interplead, that a proper construction of the will may be obtained, and he permitted to make distribution accordingly.

The several defendants in their answer admit that their claims as to the construction of the will and the amounts to which they claim to be entitled are properly

and correctly set out in the bill.

Ransom Gibson and Ada Baxter make their joint and several answer, wherein they say that they—

"Deny that there is any basis in the language of said will to warrant the claim of the heirs of Emeline Hutton, deceased, as it is averred in said bill they do claim, that they should share in testatrix's estate *per capita*, and not by representation, each equally with said Ransom Gibson, and to the exclusion of Ada Baxter. But these defendants claim that it is clear, from the terms of said will and testament, that the children of Emeline Hutton, deceased, should take as legatees under said will *per stirpes;* that is, such share, and only such share, as said Emeline Hutton would have taken under the statute of descent and distribution, had testatrix died intestate in the life-time of said Emeline. In the first place, these defendants claim that by a proper and legal construction of said will they are each entitled to claim, and to have in equal part, one-third of the distributive share of testatrix's estate; that they are entitled to such share by representation, *per stirpes,* as their mother, Caroline Nash, deceased, would have taken under the statute, had testatrix died intestate, leaving said Caroline Nash, deceased, surviving her.

"These defendants further claim that if, as contended for, by implication, at least, by the children of said Emeline Hutton in said bill, the defendant, Ada Baxter, is not entitled to a distributive share, one-third of said testatrix's estate under said will, *per stirpes,* then, by a proper construction of said will, said Ransom Gibson should receive one-third of the distributive share of said estate, as the representative of his mother, Caroline Nash, deceased."

The case was heard before Judge Loveridge upon the pleadings and said stipulation, in the St. Joseph circuit, who made the following decree:

"The court doth order, adjudge, and decree that the bill in this cause is properly filed, and the will of Catharine Voorhees, deceased, is properly before the court for construction.

"It is further ordered, adjudged, and decreed that the proper construction of said will of Catharine Voorhees,

deceased, is as follows, viz.: That by said will Ada Baxter, daughter of Caroline Nash, takes the sum of five dollars; that James H. Voorhees, son of Catharine Voorhees, takes one-third of the residue of said estate; and that Homer F. Hutton, Charles W. Hutton, Emma Catharine Hutton, and Hattie E. Hutton, sons and daughters of Emeline Hutton, deceased, and Ransom Gibson, son of Caroline Nash, deceased, and grandchildren of Catharine Voorhees, deceased, take each one-fifth of the remaining two-thirds of said estate.

"It is further ordered that costs be paid out of the funds in the hands of the executor to the respective parties, as follows: A solicitor's fee of $30 to the complainant; a solicitor's fee of $15 to defendants Homer F. Hutton, Charles W. Hutton, Emma Catharine Hutton, and Hattie E. Hutton; and a solicitor's fee of $15 to James H. Voorhees and Ransom Gibson; and that the executor pay the costs of this court, being register and sheriff's costs, to be taxed by the register of this court."

After a careful review of this case, and the arguments of the learned counsel, we are satisfied that the construction given to this will by the circuit judge is the correct one. There can be no question but that the sum Ada Baxter is to receive is fixed and definite. This legacy paid, it is equally certain what share of the remainder James H. Voorhees is entitled to have. It is one-third of the same. These two legatees' shares disposed of, there is nothing remaining indicating in any way that the testatrix intended the balance of her property to go to the legatees except *per capita*. The persons are all named to whom she intended the legacies to go, and no circumstance has occurred since she made the will which could have possibly changed the evidences of her intention, or that would suggest any other disposition could have been contemplated by the testatrix. When these elements are all lacking, there is no room left for doubt as to the direction the legacies must take, or the amount thereof, and where such is the case the authorities cited

by the learned counsel for the appellants have no application whatever, and the rules of construction contended for by them, though entirely sound, fail to have any pertinency to the facts stated in the record.

The decree of Judge Loveridge will therefore be affirmed, with costs.

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

DONALD L. THOMPSON v. JOHN F. HOMAN.

Findings of fact—Weight of evidence.

In this case it is held that there was testimony supporting or tending to support each and all of the findings of fact, and that it is for the trial judge to weigh the evidence. No questions of law are involved, except as stated.

Error to Kent. (Grove, J.) Submitted on briefs June 12, 1889. Decided October 25, 1889.

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

C. C. Howell, for appellant

Ward & Ward, for plaintiff.

SHERWOOD, C. J. This suit was an action in *assumpsit* for work and labor of the plaintiff alleged to have been performed for the defendant, a portion of which was charged for by the hour, at 40 cents per hour, and the other service is charged for by the week, at $25 per week, and for which the plaintiff claimed he had such an agree-

ment with the defendant. A set-off was noticed under the general issue pleaded by the defendant.

The cause came to the Kent circuit by appeal from a justice's court. Upon the trial in the circuit, which was had before the court without a jury, the plaintiff obtained judgment for $141.92. The defendant presents the case in this Court upon a record containing all the testimony for review.

The circuit judge, after hearing the evidence in the case, made the following findings of fact:

"1. That on the seventh day of November, 1887, the plaintiff, at the request of the defendant, commenced to work in the defendant's store, in the city of Grand Rapids, and continued to work in said store each day until the thirteenth day of November, 1887, and that the number of hours of labor performed by him during that time was 57, for which the plaintiff charged the defendant 40 cents an hour, or $22.80, under an agreement between the said parties that the said defendant should pay the plaintiff that price for said work, and that the court finds that the services so performed were of the value of $22.80, which the plaintiff is entitled to recover from the said defendant in this court.

"2. The court further finds that on the fourteenth day of November, 1887, at the special instance and request of the defendant, the plaintiff commenced to work in the defendant's store by the week, under an agreement between the plaintiff and the defendant that the plaintiff should receive the sum of $25 per week for such services, and work continuously by the week until the fourth day of June, 1888, for which he charged the defendant $25 per week under said agreement.

"3. The court further finds from the evidence that the plaintiff's said services were worth the sum of $25 a week, and that the plaintiff is entitled to receive in this case the sum of $25 per week from the seventh day of November, 1887, to the fourth day of June, 1888, less the payments which were made by the defendant to the plaintiff from time to time, to apply upon this account. And, after deducting the payments which were so made, there remained on June 5, 1888, a balance due to plaintiff from the defendant of $141.92."

It is claimed by counsel for the defendant that the evidence does not support these findings. There was testimony in the case supporting, or tending to support, each and all of the findings, and that is as far as we can go upon that point, however much we might feel disposed to differ with the learned circuit judge. The weight of the evidence was for him, and not for us, to determine. This assignment of error cannot be sustained upon the record.

Four exceptions were taken to rulings of the court in admitting the testimony. We have examined each of these, and have been unable to perceive that any error was committed by the court, under these exceptions, which could have prejudiced the rights of the defendant.

The judgment must therefore be affirmed.

The other Justices concurred.

77 136
87 401
87 421

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130 s180

77 136
154 s430

77 136
d157 s353

ARTHUR SCHINDLER v. THE MILWAUKEE, LAKE SHORE & WESTERN RAILWAY COMPANY.

Negligence—Charge to jury—Construction of pleadings—Declaration—Statement of cause of action—Failure to demur.

1. In this case Mr. Justice CAMPBELL filed an opinion reviewing the legal questions raised, and holding that plaintiff made no case for the jury, no negligence on the part of the defendant being shown.

2. CHAMPLIN, J., filed an opinion, concurred in by LONG, J., concurring in reversing the judgment and in sending the case back for a new trial, with leave to the plaintiff to apply to the court for leave to amend his declaration, but reserved his opinion upon the question of defendant's negligence until the declaration shall properly allege the defendant's duty in the premises, and its neglect to observe the same.

3. The following propositions are summarized from the opinion of Mr. Justice CAMPBELL:

a—While there are some courts which seem to have assumed that any damage done, or any collision between a train and things on the track, is presumably a trespass, so that an allegation of it amounts to an allegation of wrong which requires a defense by way of justification, that is not the general doctrine, and it has been positively denied by this Court, citing *Mitchell v. Railway Co.*, 51 Mich. 236, citing other cases.

b—Under our decisions, a railroad is entitled to the use of its track, subject to such conditions as the law lays down, and the use of it is at all times lawful unless these conditions are broken. A collision may be due to pure accident, or to the wrong of the person injured, just as well as to the fault of the company. No fault is presumed, and none can be relied on, until alleged and proved. It is the violation of duty which is the cause of action, and it must be such that if the duty had been performed there would have been no harm done. The duty is to do no willful wrong, and to use such methods as the law has required as likely to prevent them.

c—The law has never lost sight of the difference between *trespass*, where the act is presumptively wrong, until justified, and *case*, where the liability springs from the facts of the case as stated, and where a charge of what is a mere result from facts, and not itself a statement of facts, cannot be held good pleading. The court must be able to draw but one inference from the facts, as stated, and not from the pleader's inferences.

d—There are many simple cases where, when certain facts are shown, a general allegation of negligence or want of care gives all the information needed; and in such cases the whole, taken together, makes a good declaration. But a naked charge that a person negligently hurt another, with nothing more, cannot be sufficient.

e—This Court has several times expressed disapproval of the general propriety of leaving questions that may be better raised by demurrer to be passed on at the trial or hearing; but it has not held that such an omission was in all cases a waiver, or made a bad declaration good without amendment, so as to make a good cause of action where none is alleged.

f—The statute of amendments is the basis of all the modern relaxation of rules of practice; and its manifest object is to give parties who are met with such objections on a trial the right of amendment on reasonable terms, and to make a verdict, where no point has been previously made at all, valid to rectify all defects that are not so radical as to leave nothing

to amend, and to treat the record as if it had been actually amended. If there is a possibility of making such amendments as will present a good case, they will be permitted, when the declaration is objected to, on the most favorable terms; and, in a majority of cases, with no need of any, or of any long, delay. It is only where the record itself shows what the amendment should be that it need not actually be made. An imperfect statement cannot be enlarged beyond what it means or fairly implies. But no statement is good that does not indicate the nature, at least, of the wrong complained of.

g—The decisions of this Court have been uniform that no proof of negligence can be received, beyond what is alleged, and that allegations of the wrong are necessary.

h—In *Batterson v. Railway Co.*, 49 Mich. 185, it was held that no proof could be a ground of recovery, not within what was alleged with reasonable certainty, and the same rule was laid down in *Henry v. Railway Co.*, 49 Id. 495, and in *Railroad Co. v. Marcott*, 41 Id. 433.

i—In *Ives v. Williams*, 53 Mich. 636, it was held a failure to demur would not allow the scope of a declaration to be enlarged beyond what it would have been if properly framed on the same allegations, and the same principle was laid down fully in *Parker v. Armstrong*, 55 Id. 176, holding that a declaration bad intrinsically, for want of needful averments, could not be made good by not demurring. See, also, *Stoflet v. Marker*, 34 Mich. 313; *Jackson v. Collins*, 39 Id. 557; *Thompson v. Railway Co.*, 57 Id. 300; *Klanowski v. Railway Co.*, 64 Id. 279.

j—Unless something definite is averred, there is nothing to enable it to be known what is pertinent to the issue. A person suing for a single cause of action is bound to know beforehand what wrong he complains of, and wherein the wrong consists. It is not competent to go before a jury on uncertain or conflicting claims. Neither is it competent for a court to allow a mass of testimony to go before a jury, and leave them to decide, each for himself, what is legal negligence and what is not. See cases above cited, and *Anderson v. Boom Co.*, 57 Mich. 216; *Lindstrand v. Lumber Co.*, 65 Id. 254, 259.

k—If the fact that a defendant knows that a declaration contains a false charge or description precludes him from relying on or showing its falsity, there is not much use in rules of pleading. A misdescription is frequently as important as any other false statement, and it has been held, in our own decisions, that a serious misdescription is fatal to recovery in cases like the present.

l—In *Batterson v. Railway Co.*, 49 Mich. 184, it was held that for obvious reasons a difference existed between a main track

and a side track, as to conditions of maintenance in order. In *Klanowski v. Railway Co.*, 64 Id. 279, an accident alleged at one road crossing, when it occurred at another, was held badly alleged; and in *Ives v. Williams*, 53 Id. 636, a similar difficulty existed in regard to interference with a tenant's enjoyment. In *all* of these cases, it was known to both parties *where* the facts occurred.

Error to Gogebic. (Williams, J.) Argued June 13 and 14, 1889. Decided October 25, 1889.

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

M. M. Riley and *C. M. Howell* (*Bradley G. Schley* and *Alfred Russell*, of counsel), for appellant.

Hayden & Young (*M. H. Crocker*, of counsel), for plaintiff.

[The opinion discusses the positions of counsel.—REPORTER.]

CAMPBELL, J. Plaintiff, who is a little boy, was in the back part of a long sleigh, loaded with beer, owned and driven by one John Schupp, a teamster and agent for a beer house; and the sleigh was struck by the rear end or steps of a caboose, while crossing defendant's track, at Wakefield station, in Gogebic county. The accident took place on the depot grounds, January 29, 1887. Plaintiff was thrown out, and fell on the track. The hind wheels of the caboose did not touch him, but the fore wheel on one side caught and bruised one of his legs, without running over it. The injury required amputation.

At that station there is a main track and two side tracks, lying on the south side of defendant's premises, running east and west; and at the date in question one Miller, whose agent Schupp was, had a beer warehouse on

defendant's grounds, north of the tracks. A village street, known as "Sunday Lake Street," 60 feet wide, as laid out, ran across, north and south, between the station and this warehouse, which was 152 feet east of the street. A spur, or branch, called the "Sunday Lake Mine Spur," left the main track between the station and Sunday Lake street, running on a north-easterly curve from a switch about 50 feet west of the street, thence crossing the street, and extending north-easterly to a mine, the distance of which does not appear. The accident took place about 50 feet north-east from Sunday Lake street, on this spur. The front village street, called "Nunnemacher Street," lay north and parallel with the main track, as far east as Sunday Lake street, and thence about 60 feet from and parallel with the spur track, being crossed by Sunday Lake street. The depot grounds, which extended a considerable distance east and north-east from Sunday Lake street, on both sides of the spur, and the main track, were not inclosed by fences.

On the morning of the day in question, Schupp drove down to the beer house with a long sleigh,—about 18 feet long,—drawn by a mule team, to get a load of beer, in kegs. He unlocked the warehouse, and got 14 kegs, which he loaded in his sleigh. While he was in the warehouse, a train of freight and ore cars passed, going westward to the station, and backed up towards the spur, over which a part of the cars were to go. The rear car was a four-wheeled caboose. Several children, including plaintiff, had been allowed by Schupp to ride down with him; and when he was ready to start they had piled into his sleigh, the back part of which was not filled with kegs. According to his testimony, he drove off the larger boys, and put off the girls and the plaintiff, and started towards the village, on a track through the snow, which he claims had been commonly used, across defendant's grounds to

the intersection of Nunnemacher and Sunday Lake streets, which struck the spur rails about 50 feet eastward of Sunday Lake street, and between 25 and 30 feet north of the north side track, which was a few feet south of the beer house. Plaintiff had got or been put again into the back of the sleigh, and was not seen by Schupp, or any one else but some of the other children. The snow was deep, and ridged on either side of the spur by the snow-plow, between 18 inches and 2 feet. The passage-way was not a road, but a single path, made through the snow as a short cut, by persons coming down to the track east of Sunday Lake street; rising at the ridge, and descending into the trough between the ridges, where there was a single line of rails. According to Schupp's statement, he stopped about 10 feet from the spur, and saw the caboose and cars ahead of it, but did not see that they were backing. He drove on over the ridge, and across the track; one of the mules slipping, but recovering himself. He then saw the cars coming, and whipped up his team, and they got across, except that the rear 18 inches of the sleigh was struck by the steps of the caboose, and the sleigh upset. Plaintiff fell on the track, and the hind wheels of the caboose did not touch him; but the north fore wheel hit his leg, and pushed him along a few feet, injuring him as before mentioned. The caboose was stopped by the beer kegs, which were not run over, but lifted up the end. It stopped a very few feet from where the accident happened. The testimony of plaintiff's witnesses, except Schupp, and of all the other witnesses, agrees that the cars were moving back when Schupp started from the beer house, and were in sight all the time. There is no testimony indicating that the plaintiff was seen or visible before the accident, being behind the beer kegs, sitting on the bottom of the sleigh.

The case was submitted to the jury, overruling defendant's objections on the general merits, and upon various points made specifically; and they found a verdict of $10,000 for plaintiff. Defendant brings error.

After refusing a continuance, for reasons that we shall not consider, and in language which was also excepted to as prejudicing the jury, the court also refused to entertain an objection that the declaration was not such that any testimony could properly be introduced under it. The judge did so, using this language:

"If the defendant objects to the declaration on the ground that it does not with sufficient definiteness apprise him of the negligence complained of, the objection should be made before the case comes on for trial. Our own Supreme Court has criticised that method of procedure pretty severely. I have no doubt but what this motion as made here raises a question which is very close to the line; but, being so utterly opposed to this method of practice of waiting until the trial comes on before making the objection to the declaration, I shall leave the responsibility with the plaintiff's counsel. Let the witness be sworn."

The declaration contains one count, which is substantially to this effect: After setting forth the ownership by defendant of the main and side tracks, including the Sunday Lake mine branch or spur, it proceeded:

"And which main and side tracks, at and near said station, were wholly uninclosed, and were then and there, at all times, open, and were then and there contiguous to a public highway and street of said village, called 'Sunday Lake Street,' and crossed said street; and said side track, called the 'Sunday Lake Mine Track,' commencing at or near said depot, ran, in an easterly direction, across a certain other public road; said last-mentioned public road running from said Sunday Lake street, across the right of way of said defendant, to and along the side track nearest said main track. And that said last-mentioned public road was used by large numbers of the people of said village, residing in the vicinity of said station and

depot, and had been so used and traveled upon, to the knowledge of said defendant, its servants and employés, for a long time prior to said twenty-ninth day of January, 1887. That the plaintiff, at the time aforesaid, was an infant of tender age, to wit, of the age of five years, and resided with his parents in said village of Wakefield, on said Sunday Lake street, and in the vicinity of said station and depot of defendant.

"That at the time aforesaid, to wit, on the twenty-ninth day of January, 1887, the plaintiff was riding in a single sleigh drawn by a team of horses, which sleigh and team was being driven by John Schupp, upon said road, towards said Sunday Lake street, with all due care and diligence; that while said sleigh was approaching the crossing of said Sunday Lake mine track a certain freight train of defendant, with a locomotive attached thereto, and under the care and management of divers servants of the defendant, was standing upon said side track, to the west of said road, and about eighty feet therefrom; and that, while said sleigh, with the plaintiff therein, was crossing the said railroad track at the said crossing, upon said public road, the defendant then and there, by its servants, so carelessly and improperly managed the said locomotive engine and train that, by and through the negligence and improper conduct of the defendant, by its said servants, in that behalf, the said train then and there ran and struck with great force and violence upon and against the said sleigh; and thereby the said plaintiff was then and there thrown with great force and violence, from and out of the said sleigh, to and upon the track of said railroad. And the said plaintiff, when so thrown upon said track, was struck by the rear car of said train, and was run over by the wheels of said car, and then and there, without any fault or negligence on the part of said plaintiff, his parents or guardians, and without any fault or negligence on the part of said John Schupp, the driver of said sleigh. And by means of the premises, and by and through the wrongful conduct, carelessness, and negligence of said defendant, its agents and servants, as aforesaid, the leg of said plaintiff was cut off, and he then and there, by means of the premises, sustained the permanent loss of one leg as aforesaid, and was rendered sick, sore, lame, and disordered, and so remained and continued," etc.

The rest refers to damages.

When plaintiff's testimony was all in, defendant moved to strike it out, and for a nonsuit; but the court refused to hear argument upon it, ruling that defendant might, after all the testimony was in, ask a charge directing a verdict, and then make argument on it. When the testimony was through, the court refused to hear the same application separately, and confined its discussion to the general argument. When the case was submitted, the court disposed of these objections in this way, by addressing the jury:

"I am asked, in the first place, to charge you that the plaintiff cannot recover in this case, in consequence of the insufficiency of the plaintiff's declaration. A declaration is filed as the commencement of suit, and served upon the defendant. Defendant has an option to say that the declaration is not sufficient in law, which raises a question of law, or it has the privilege of joining issue on the question of fact. If the counsel for the defendant think the declaration is insufficient in any respect, or does not sufficiently apprise them of what the charge against them is, they can demur; and upon this question of law the sufficiency of the declaration will be determined. They decided not to take this course, but joined issue on the question of fact, and at the beginning of the case, before any of the witnesses were sworn, they asked that no evidence be introduced on the part of the plaintiff, because of the insufficiency of the declaration. Having seen fit to waive the joinder of the issue of law, and having joined in the issue of fact, if the declaration is sufficient to sustain a verdict, if a verdict shall be rendered, I don't think they should have the benefit of the objection at that time. I think it is bad practice. I don't think the plaintiff should be put to the expense of preparing for trial, procuring witnesses, etc., where objection will be made to the introduction of any evidence. I think the proper practice is to demur to the declaration. Had a demurrer been interposed before the plaintiff had been put to the expense of preparing for trial, I should have sustained the demurrer, in consequence of the insufficiency of the declaration.

But, not having demurred, I shall not sustain the objection.

"I am also asked to charge that the plaintiff, in his declaration, having alleged the injury to have taken place on a public road or highway, that there is no evidence in the case showing that it was a public highway or road, and that therefore there is a variance between the allegation in the declaration and the proof in the case; and for that reason they ask me to decide the case for the defendant. Upon that point, I have this to say: The place where the injury was occasioned was known to both plaintiff and defendant. The plaintiff indicated it; and the defendant indicated it upon its map, which it produced here, and hung up before you, at the beginning of the trial. The defendant has indicated the same place that the plaintiff has. There is no doubt as to where the accident took place; they both agree upon that; and to say that the plaintiff shall not recover because he possibly has designated this place by the wrong name, is not, to my mind, a sufficient variance to warrant granting the motion. As far as all practical matters are concerned, there is no variance. Calling a thing by the wrong name, as long as they have got the right place, is not of sufficient consequence to warrant granting the motion.

"I am asked, again, to charge you that the plaintiff cannot recover, because he has in his declaration alleged that there was an engine attached to the train. Well, as a matter of fact, there was an engine attached to the train when it came in. There was an engine attached to the train when it began to back. When the three or four cars were shunted onto the siding, whether the engine was attached to the train or not, I do not pretend to say; but the backing of the train was in part, if not wholly, the cause of those running down there. I think that point is rather too fine upon which to ground the motion that is asked for.

"Now we come to the merits of the case," etc.

Both parties presented requests, calling attention to the various points which they especially desired to be presented specifically to the jury; all of which were refused. Defendant's requests numbered 26, and they are all stated in the bill of exceptions to have been refused; and no

qualification is added. Plaintiff's requests are stated to have been refused, except as modified in the charge.

After the court had completed his charge, plaintiff's counsel called attention to some statements in his favor, which he suggested were beyond what the court could properly give, and the court stated the rulings had been made as plaintiff now claimed they should be. Counsel for defendant, who was not a member of the Michigan Bar, then asked this question:

"May it please the court, as a matter of practice, I would like to know whether the instructions asked for by the defendant are refused or granted, or do you consider them granted, in so far as you have incorporated them in your oral charge?"

To this the court answered:

"If I have not given your written requests substantially, or have not read them, they are refused. I will read a couple of the requests of the defendant:

"'The right of the plaintiff to recover for the injury alleged in the declaration in this case must depend on concurring facts.'

"I think I have covered that.

"'The defendant must be guilty of some degree of negligence which contributed to the injury.'

"I have covered that also, but I give it again."

To this defendant excepted.

Before going further, it is evident that by singling out these two paragraphs, without any new request, and presenting them as specially noticeable, the impression so created by the court's last words to the jury could not fail to do harm, by suggesting these insignificant truisms as important, and as being the chief grounds of defense. No one would ever think of presenting such points by themselves, or as of any separate weight, and the necessary inference would be one throwing discredit on the defense.

Referring to the charge itself, the court, after discussing and ruling upon several questions concerning contributory negligence, which, if the jury were supposed to confine themselves to a subsequent part of the charge, would have been entirely irrelevant, but which, nevertheless, were given by way of instructions, passed on to the question of defendant's negligence. This was dealt with as follows:

"We come now to the question, properly, of what negligence the defendant must be guilty of, in order to make it liable. Circumstances, as you have often heard, alter cases; and they modify, to some extent, the law applicable to cases. Now, with reference to a plaintiff of mature years, if he goes upon the track of a railroad company where he is either positively or impliedly invited, then that railroad company owes him such care and attention that they shall not be guilty of 'ordinary negligence,' as it is called. But if that man goes upon a place or part of the railroad—walking along the railroad track, for instance, not on its depot platform—where he has no business to be; where the railroad company does not invite him to go, and does not expect him to be, then a different rule applies, even with reference to an adult, and in that case he is, in law, technically, a trespasser. He had no business there, and the company had no reason to expect he would be there; and if, under those circumstances, he seeks to recover against the defendant, he must show not only that the defendant has been guilty of ordinary negligence, but, in addition to that, guilty of gross negligence.

"Now, I can't see, in my own mind, why the rule of law should vary because the plaintiff is of immature age. I think the rule should be the same with respect to a child of tender age as with respect to a grown person, upon this matter. Understand me, gentlemen, while the law would be the same, it would be proper to remark that what would be negligence with reference to a young child upon the railroad track, where he had no business to be, gross negligence, might not be more than ordinary negligence if it was a grown person on the track. Railroad men seeing a person of mature years upon the track, they have a right to suppose that that person has the

intelligence and capacity of a mature man, unless they know to the contrary; and they have a right to suppose that he will take such steps to protect himself and get off from the track, or away from where he ought not to be, as a sensible man would take. A child has not the same judgment as a grown person. He is not expected to have, and when a child is upon the track, or known to be upon the track, then they must exercise more care, because nobody expects that a child will act with that coolness and judgment, and have the capacity to take care of itself, under such circumstances, as the majority of men would. And hence, I say, what might be ordinary negligence in the case of a grown person being upon the track, might be gross negligence, if it was a child."

The court then proceeded to put aside, as unimportant, the question of this being a highway crossing, as the evidence only showed it a way by license, and said that the defendant had given no such license to children, and that plaintiff had no right there. The charge went on:

"Having no right there, I charge you that the rule is in such case that the plaintiff, in order to recover for the injury, must show that the defendant was guilty of gross negligence. Ordinary negligence will not answer. By gross negligence, I don't mean exactly that a man would be guilty of murder, or that he intended to run down and kill the child; but I mean that degree of carelessness, that degree of recklessness, which shows a disregard of the safety of persons who may happen to be there. For fear I may forget it, right here I will say: If you find from the evidence that the railroad company licensed or permitted people to cross that track at that place, as they had occasion to go on business down at the depot, then, with reference to the care they should exercise in running the train across there, the law would be that they must have regard to this license or privilege they have given these people to go there, if they have given such privilege; about which I say nothing. And the degree of care they should properly exercise at such a place would depend something upon the extent of the crossing,—the size of the place. For instance, you know that they should exercise more care where there are a

hundred people expected to go across in an hour from what there would be if it was a little village, of eight or ten houses, and a very few going across. The greater the danger, the greater the necessity for care. That is about all there is to it."

"Now, it is claimed on the part of the plaintiff that these railroad men saw this child with Schupp; that they saw him leaving in the sleigh with Schupp, and must have known, having seen them, that they were about to pass this spur track at the place indicated. I give you no intimation of my own as to what my ideas are with reference to whether they saw them or not. Understand me, gentlemen, I am leaving the facts entirely to you. Don't take any intimation with reference to the facts from anything I may say, or anything you may think I say. I wish to pass no opinion upon that question. It is for you to determine whether they did see them or not, and what figure it would cut in the case, as bearing on the question of their negligence, or the degree of their negligence."

The court then referred to whether the bell was rung and whistle blown, and undertook to give the jury instructions as to dealing with conflicting testimony on that point, and as to their right to determine between witnesses, whom they would or would not believe. Returning again to the question of negligence, this is stated:

"Now, with reference to the care and caution to be exercised by defendant, I wish to say one word more right here. This child, under the evidence, was in the sleigh of Schupp. It is for you to say how far that railroad company, or the railroad employés running and operating that train, should be governed by this fact. If he was in the sleigh of Schupp, would they have a right to suppose (and presumptively they would) that the man in the sleigh would use his judgment instead of the judgment of the child; and the railroad men would have a right to suppose it was the judgment of Schupp, who had the care of the sleigh and the care of the child, that would be exercised instead of the judgment of the child. But I leave that question of fact to you to be determined in the case. What, under fairness, ought those men to be required to have done under the circumstances? If

you find, under the circumstances, that the defendant's employés, in the running of that train, were guilty of such negligence as indicates a disregard for the safety of this boy, then it is your duty to say that the defendant is guilty, and it will be your duty to determine how much the defendant ought to pay."

Instructions were then given on the subject of damages which were separately excepted to.

The jury went out, and were absent from 10 o'clock A. M. to 6 o'clock P. M., without agreeing. They then sent word that they desired further instructions, and on their return these proceedings were had:

"*A Juror.* May it please your honor, there is some little dispute about what you said about the negligence of the company; about wanton negligence; also about the circumstances of the boy being in Schupp's sleigh.

"*The Court.* Do you mean what sort of negligence the company must be guilty of?

"*A Juror.* You made some remarks about what wanton negligence was; that is, gross negligence

"*The Court.* By gross negligence, I don't necessarily mean that a man intended purposely to run down another one, or to kill him; but it meant carelessness,—it meant recklessness,—it meant such recklessness as would indicate a disregard of the safety of the public or passengers, or those who were in the way. And, with reference to Schupp, I said you would have a right to conclude, the boy being in Schupp's sleigh, that the trainmen would look at it that he was in the control of Schupp, and that Schupp would take care of him, or take such care of him as best he could, being a man; and that you had a right to consider that, with reference to the negligence of the company. These things, with reference to that, are a matter of common sense. That is about all there is of it, anyway, and that is all you have to do,—to exercise your best judgment and sense in determining questions of this kind. Now, gentlemen, don't any of you become opinionated, and stick to your opinion, right or wrong; but confer together, carefully and candidly, without any feeling on the part of any of you, without any anger,—I have no idea to suppose there will be,—without any prejudice; and try and reach a conclusion. We have

been three days trying this case, and it is desirable that there should be a verdict. Each one of you have a judgment of your own upon the subject; but try and get together, if you can. I say it is important that you should try and reach a conclusion, and agree."

The jury thereupon had the issue left to them, and found a verdict of $10,000.

It is claimed here, as below, not only that the declaration was such as to render the case, as attempted to be proved, insufficient, but also that it was bad on its face, as presenting no definite cause of action.

The declaration contains no averment of any kind setting up any duty, or any violation of duty, laid by law upon defendant. The whole averment of acts and wrong is found in a few words, which are these:

"That, while said sleigh was approaching the crossing of said Sunday Lake mine track, a certain freight train of defendant, with a locomotive attached thereto, and under the care and management of divers servants of the defendant, was standing upon said side track, to the west of said road, and about eighty feet therefrom. And that, while said sleigh, with the plaintiff therein, was crossing the said railroad track, at the said crossing, upon said public road, the defendant, then and there, by its servants, so carelessly and improperly managed the said locomotive engine and train that by and through the negligence and improper conduct of the defendant, by its said servants, in that behalf, the said train then and there ran and struck with great force and violence upon and against the said sleigh; and thereby the plaintiff was then and there thrown with great force and violence, from and out of the said sleigh, to and upon the track of said railroad," etc.

Leaving out all reference to the lack of positive averments, instead of inferential, in regard to some of the facts, it appears that here are two leading facts, stated without any recited connection, one of which is, by itself, entirely unimportant. The fact that the freight train stood on the track, 80 feet away, while the sleigh was

approaching, is of no consequence whatever, alone. It is not given by the declaration any significance in regard to the subsequent collision; and it would require an averment to connect it. The declaration does not charge that the driver of the sleigh relied, or had any reason to rely, on the train remaining still till he could pass, or that it started unexpectedly or improperly, when it should have waited,—or any other fact connecting the standing still with the subsequent accident; and it is not alleged that it should not have started, or that it was started in any improper way. This, if it existed, would have been a very important element in the case, as will appear more fully hereafter.

The negligence is confined by the allegation to the single assertion that defendant, by its servants, "so carelessly and improperly managed the said locomotive engine and train" that by and through "their negligence and improper conduct" the train struck the sleigh.

While there are some courts which seem to have assumed that any damage done, or any collision between a train and things on the track, is presumably a trespass, so that an allegation of it amounts to an allegation of wrong which requires a defense by way of justification, that is not the general doctrine, and it has been positively denied by this Court. *Mitchell v. Railway Co.*, 51 Mich. 236 (16 N. W. Rep. 388), citing other cases. Under our decisions, a railroad is entitled to the use of its track, subject to such conditions as the law lays down, and the use of it at all times is lawful unless those conditions are broken. A collision may be due to pure accident, or to the wrong of the person injured, just as well as to fault in the company. No fault is presumed, and none can be relied on, until alleged and proved. It is the violation of duty which is the cause of action, and it must be such that if the duty had been performed there would have been no harm

done. The duty is to do no willful wrong, and to use such methods as the law has required as likely to prevent them.

The court below not only ruled that this declaration, not being demurred to, must be held to set up a cause of action, but it also held it sufficient to let in any testimony which plaintiff saw fit to offer. All that is averred is simply that defendant negligently struck a sleigh at a road crossing, the driver not being in fault; and, in so holding, the judge claimed to be following our rulings. On the argument no case was cited that goes as far as his rulings, and no such rule can be recognized, without disregarding the purpose of pleading, to inform the defendant what case is to be made against him.

When a corporation is sued for such a cause of supposed grievance, whatever neglect exists must be that of one or more of its numerous agents and servants, of high or low degree of powers. It is hardly possible to enumerate all the ways in which negligence may be manifested. It may be in the choice of improper agents or servants; in the condition of track, or cars, or engines; or in the immediate misconduct of its servants, confined to the circumstances of the particular case; or in more general arrangements; or in violating special arrangements; and, perhaps, in other ways, that do not occur to any one in advance of actual cases.

The law has never lost sight of the difference between trespass, where the act is presumptively wrong, until justified, and case, where the liability springs from the facts of the case as stated, and where a charge of what is a mere result from facts, and not itself a statement of facts, cannot be held good pleading. The court must be able to draw but one inference from the facts, as stated, and not from the pleader's inferences.

There are many simple cases where, when certain facts

are shown, a general allegation of negligence or want of care gives all the information needed; and in such cases the whole, taken together, makes a good declaration. But a naked charge that a person negligently hurt another, with nothing more, cannot be sufficient.

This Court has several times expressed disapproval of the general propriety of leaving questions that may be better raised by demurrer to be passed on at the trial or hearing; but it has not held that such an omission was in all cases a waiver, or made a bad declaration good without amendment, so as to make out a good cause of action where none is alleged. The statute of amendments is the basis of all the modern relaxation of rules of practice; and the manifest object of that statute is to give parties who are met with such objections on a trial the right of amendment on reasonable terms, and to make a verdict, where no point has been previously made at all, valid to rectify all defects that are not so radical as to leave nothing to amend, and to treat the record as if it had been actually amended. If there is a possibility of making such amendments as will present a good case, such amendments will be permitted, when the declaration is objected to, on the most favorable terms; and, in a majority of cases, with no need of any, or of any long, delay. It is only where the record itself shows what the amendment should be that it need not actually be made. An imperfect statement cannot be enlarged beyond what it means or fairly implies. But no statement is good that does not indicate the nature, at least, of the wrong complained of.

The decisions of this Court have been uniform that no proof of negligence can be received, beyond what is alleged, and that allegations of the wrong are necessary. In *Batterson v. Railway Co.*, 49 Mich. 185 (13 N. W. Rep. 508), it was held that no proof could be a ground

of recovery, not within what was alleged with reasonable certainty. The same rule was laid down in *Henry v. Railway Co.*, Id. 495 (13 N. W. Rep. 832), and *Marquette, etc., Railroad Co. v. Marcott*, 41 Id. 433 (2 N. W. Rep. 795). In *Ives v. Williams*, 53 Id. 636 (19 N. W. Rep. 562), it was held a failure to demur would not allow the scope of a declaration to be enlarged beyond what it would have been if properly framed on the same allegations. The same principle was laid down fully in *Parker v. Armstrong*, 55 Id. 176 (20 N. W. Rep. 892), holding that a declaration bad intrinsically, for want of needful averments, could not be made good by not demurring. See, also, *Stoflet v. Marker*, 34 Id. 313; *Jackson v. Collins*, 39 Id. 557; *Klanowski v. Railway Co.*, 64 Id. 279 (31 N. W. Rep. 275); *Thompson v. Railway Co.*, 57 Id. 300 (23 N. W. Rep. 820).

Unless something definite is averred, there is nothing to enable it to be known what is pertinent to the issue. A person suing for a single cause of action is bound to know beforehand what wrong he complains of, and wherein the wrong consists. It is not competent to go before a jury on uncertain or conflicting claims. Neither is it competent for a court to allow a mass of testimony to go before a jury, and leave them to decide, each for himself, what is legal negligence and what is not. See cases above, and *Anderson v. Boom Co.*, 57 Mich. 216 (23 N. W. Rep. 776); *Lindstrand v. Lumber Co.*, 65 Id. 254, 259 (32 N. W. Rep. 427).

The defect in the declaration here naturally led to errors in the progress of the cause and in the charge. But the rulings came directly within what is criticised by our precedents. The declaration did specify the place of the injury, and described it as a public road. The court held the variance between this allegation and the admitted facts was not material, because the parties all

knew where the accident happened, and intimated that counsel were going beyond propriety in setting up such a variance.

If the fact that a defendant knows that a declaration contains a false charge of description precludes him from relying on or showing its falsity, there is not much use in rules of pleading. A misdescription is frequently as important as any other false statement; and it has been held, in our own decisions, that a serious misdescription is fatal to recovery in cases like the present. In *Batterson v. Railway Co.*, 49 Mich. 184, it was held that for obvious reasons a difference existed between a main track and a side track, as to conditions of maintenance in order. In *Klanowski v. Railway Co.*, 64 Id. 279, an accident alleged at one road crossing, when it occurred at another, was held badly alleged. In *Ives v. Williams*, 53 Id. 636, a similar difficulty existed in regard to interference with a tenant's enjoyment. In all of these cases, it was known to both parties where the facts occurred.

This is not a difference merely in distance between two localities, which might not involve any material question, but it is a difference involving vital questions. If we should regard the allegations of negligence as showing enough to allow a trial, it could only be such negligence as involves a violation of duties at such a place as is described. This declaration, by the broadest inferences, could only refer to negligence at a highway crossing. The duties to persons using a public highway are very different from those existing on railway premises. It is not averred that there was any wanton or grossly negligent or reckless conduct; and a simple averment of negligence does not imply any such gross misconduct. No restriction was put on the introduction of testimony applicable to any kind of neglect committed anywhere; and, while the court undertook to tell the jury, in general terms,

that gross neglect must exist, testimony was commented on which had no such bearing, and the jury were not told what the difference in duty was, or what duty devolved on defendant at one place or the other. This was one of the difficulties met with by the jury themselves, and they asked light upon it, which was not given them in any tangible form; and they were sent back with an urgent appeal to agree, and a censure of disagreement. They were told that the question of negligence was one of common sense, and that all they had to do was to exercise their own judgment on it. This practically eliminated every question of legal duty, and made the jury judges of law and fact. When negligence is charged, without any definition of duty, and proof received applicable to different theories, and the jury left to dispose of the whole without guidance, it is evident that the whole case was affected by the same radical fault.

Attention was also called to the allegation about a locomotive, which the court held unimportant. Here, as in the other matter, the true ground of the objection was overlooked. The declaration certainly conveys the idea of a train standing on the track, and proceeding, as a moving train, so as to strike the sleigh in its course. The proof shows that the cars on the side track were backing, and not moving forward, and that they were not handled by the engine as a train, but detached and shoved backward; involving, again, different duties and perils.

We have called attention to these difficulties, because they are serious and misleading. But we think there was no case for the jury. The question is not one of contributory negligence chiefly, if at all. It is impossible to say that any negligence was shown. All of the witnesses agree that the cars were moving before Schupp reached the track, and that they were in full sight all

the time. No one would have supposed that a person, having such means of knowledge as he had, would have done so crazy a thing as to run such a sleigh into a place where it would almost inevitably be hit, if the least difficulty met it. It is manifest that Schupp, in his impatience, took a plain risk, trusting to the speed of his mules to cross ahead of the cars, as he would probably have done had the way been level, instead of a deep trough. The fact that the caboose was stopped by the beer kegs is proof that it was not moving very fast. There was no evidence that the child was seen by any one on the train, and none that the trainmen had reason to suppose Schupp would attempt to head them. In making up or separating trains on their own grounds, as was recognized by the court below, nothing but direct and serious fault, indicating recklessness of consequences, can make a railroad company liable for accidents. No such fault was shown, and none was pointed out to the jury, who could not have reached the result they did if they had been charged concerning the legal duty supposed to have been violated.

Judgment must be reversed, and a new trial granted.

CHAMPLIN, J. We concur in reversing the judgment and sending the case back for a new trial, when the plaintiff can, if he chooses to do so, apply to the court for leave to amend his declaration; and we prefer to reserve our opinion upon the question of defendant's negligence until the declaration shall properly allege the defendant's duty in the premises, and its neglect to observe such duty.

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

WILLIAM N. BROWN AND JOHN C. LEATON v. CHARLES E. RING, ELLIOTT O. EASTMAN, SIDNEY L. EASTMAN, AND FRED HEMPY.

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Appeal—Receiver—Conditional sale—Equity jurisdiction.

1. An order appointing a receiver is appealable when it takes from a party a possession to which he is entitled of right. *Taylor v. Sweet*, 40 Mich. 739.

   So *held*, where the vendors of shingle logs, who had retained the title to the logs and shingles manufactured therefrom, as security, etc., filed a bill to enforce their alleged lien upon a portion of said shingles in the hands of purchasers from their vendee who claimed to be good faith purchasers for value, and an order was made appointing a receiver to take possession of said shingles, and hold and dispose of them only under the direction of the court.

2. The facts that a vendee of shingle logs, the title to which, as also to the shingles manufactured therefrom, is retained by the vendor until certain notes given for the purchase price are paid, has sold the shingles in violation of the contract, and in fraud of the vendor, and that the purchasers threaten to remove the shingles out of the jurisdiction of the court, it not being claimed that they are pecuniarily irresponsible, do not create an equity entitling the vendor to maintain a bill in equity to enforce his alleged lien on the shingles, and for an accounting with said purchasers for shingles sold.

Appeal from Saginaw. (Gage, J.) Argued June 13, 1889. Decided October 25, 1889.

Bill to enforce an alleged lien upon shingles manufactured from logs sold by complainants to the appellants' vendor, retaining the title to both logs and shingles until purchase price was paid. Defendants Eastman, Eastman, and Hempy appeal from order appointing a receiver, etc. Order set aside, and bill dismissed. The facts are stated in the opinion.

Hanchett, Stark & Hanchett, for complainants, contended:

1. The order does not in any manner dispose of or pass upon, or prejudge the merits of the case; it does not take the property from the appellants' possession, and is in no sense a final order, and is not appealable; citing *Caswell v. Comstock*, 6 Mich. 391; *Enos v. Sutherland*, 9 Id. 148; *Perkins v. Perkins*, 10 Id. 425; *Demaray v. Little*, 17 Id. 386; *Salling v. Johnson*, 25 Id. 489; *Colgate v. Railroad Co.*, 28 Id. 288; *Hamilton v. Circuit Judge*, Id. 268; *Maxfield v. Freeman*, 39 Id. 64; *Beecher v. Rolling Mill Co.*, 40 Id. 307; *Lapham v. Lapham*, Id. 527; *Brown v. Vandermeulen*, 41 Id. 418.
2. It is held that an order which *takes property out of the possession* of a party and places it in the hands of a receiver, under such circumstances as prejudge the merits of the controversy against such party, is appealable by him, and an order allowing an injunction, having the like effect against a party in possession, is appealable by him; citing *Railway Co. v. Railroad Co.*, 61 Mich. 9; *Taylor v. Sweet*, 40 Id. 736; *Railroad Co. v. Circuit Judge*, 44 Id. 479; *McCombs v. Merryhew*, 40 Id. 721; *Railway Co. v. Circuit Judge*, 31 Id. 456; *Witbeck v. Chittenden*, 50 Id. 426; *Simon v. Schloss*, 48 Id. 233; *Morey v. Grant*, Id. 326; *Railway Co. v. Jones*, 33 Id. 303; *Barry v. Briggs*, 22 Id. 201; *Lewis v. Campau*, 14 Id. 458.
3. Appellants have no right of appeal based on the disturbance of Ring's possession, he being the only party who can complain of the order on that ground; citing *Salling v. Johnson*, 25 Mich. 489; *English v. Carney*, Id. 178; *Griggs v. Railway Co.*, 10 Id. 117; *Warner v. Whittaker*, 6 Id. 133.
4. It was competent for the parties by express agreement to create a lien upon the shingles, which lien was intended to be preserved, and the rights of both parties protected, by the terms of the contract in retaining the title in the complainants, with no power of sale vested in either party, so that the joint act of both parties should be necessary to a sale; citing 2 Story, Eq. Jur. §§ 1216, 1231; 2 Kent, Com. 637; *Hauselt v. Harrison*, 105 U. S. 401, 405–408; *Gregory v. Morris*, 96 Id. 619, 623; *Pinch v. Anthony*, 8 Allen, 536, 539; *Nagle v. McFeeters*, 97 N. Y. 196, 199, 201; *Dodsley v. Varley*, 12 Adol. & Ell. (40 Eng. Com. Law), 316; *Wright v. Bircher's Ex'r*, 37 Am. Rep. 433; *Seymour v. Railroad Co.*, 25 Barb. 284; *Mitchell v. Winslow*, 2 Story, 630.
5. No power of sale being reserved to enforce the lien, complainants' remedy is to foreclose their lien in chancery; citing

2 Kent, Com. 642, 643; 2 Story, Eq. Jur. § 1217; *Arians v. Brickley*, 65 Wis. 26; *Fox v. McGregor*, 11 Barb. 41; *Black v. Brennan*, 5 Dana, 311; *Gillespie v. Bradford*, 7 Yerg. 168; *Montandon v. Deas*, 14 Ala. 33; *Doane v. Russell*, 3 Gray, 382, 385; *Hauselt v. Harrison*, 105 U. S. 401, 405; *Pinch v. Anthony*, 8 Allen, 536, 539.

Wheeler, McKnight & Grant, for appellants, contended:

1. It is simply a suit to collect a debt. There is no agency, trusteeship, nor confidential relation. The fact that Ring has sold in violation of his agreement, and even in fraud of complainants, does not create an equity; even if vendee bought with idea of never paying, equity will not interfere; citing *Bridge Co. v. Van Etten*, 36 Mich. 210; *Teft v. Stewart*, 31 Id. 367; *Bennett v. Nichols*, 12 Id. 24; *Buzard v. Houston*, 119 U. S. 351; *Normandin v. Mackey*, 38 Minn. 417, *Bushnell v. Avery*, 121 Mass. 148; 1 High, Inj. § 395; 1 Pomeroy, Eq. Jur. § 178.
2. The principles as to so-called conditional sales laid down in *Jenks v. Colwell*, 66 Mich. 428, will protect us. The right to have legal questions involved submitted to a jury is settled in cases before cited, and in *Bank v. Circuit Judge*, 43 Mich. 297; *Lumber Co. v. McDonald*, 57 Id. 292; *Edwards v. Symons*, 65 Id. 348; *Wales v. Newbould*, 9 Id. 87.
3. In support of claim that order is appealable, counsel cited *Taylor v. Sweet*, 40 Mich. 739; *Railroad Co. v. Circuit Judge*, 44 Id. 479.

LONG, J. We take the statement from the brief of complainants' counsel as to the claim made under their bill.

The complainants, on February 9, 1887, by two contracts, agreed to sell to Charles E. Ring 2,000,000 feet of white pine shingle logs, to be delivered by them in the limits of the Tittabawassee boom, for $7 per thousand feet, payable, on one contract, $2,000 in 90 days, $1,500 in 4 months, $1,500 in 6 months, in notes of Mr. Ring, and the balance (of $5,500 more or less) in 90 days from delivery of logs in boom limits, by Ring's notes, if the complainants so desired. Payments under this second contract were to be $500 down, $1,000 in 4 months, $500 in 6

months, in Ring's notes, and balance ($1,500, more or less) in 90 days from delivery of the logs in the boom limits, by Ring's notes, if complainants so desired. A scale of the logs was to be made by D. C. Kendall, who was to decide when the logs were delivered in the boom limits.

Both the contracts contain the following provision, viz.:

"It is further agreed that, in case said second party desires to renew any of above notes, first parties agree to indorse such renewals, should they be presented for payment, until the shingles manufactured from the logs herein bargained for are sold.

"It is expressly understood that the title to said logs, and the shingles manufactured therefrom, shall remain in the first parties until all the notes given in payment by second party to first parties are paid; also agreed that the discount on all notes shall be paid by second party."

Both contracts provided that, in case the winter should make it impossible to get in the full quantity of logs, then the first parties only sell and deliver such an amount as they shall have at the breaking up of hauling; and, in case the mill operated by second party should blow up or burn up, he should take only so many of the logs as he should manufacture up to that date, and the notes in excess of the amount manufactured to be paid back by the first parties.

The complainants filed their bill setting out these contracts, and state that they put in about 1,700,000 feet of the logs, for which Ring delivered to them his notes, except such notes as were to be executed after the delivery of the logs in the boom limits,—the quantity of logs delivered from the boom to Ring, and which were manufactured by him into shingles, being 1,052,590 feet by the scale; that there has been paid on them only $1,140; and that there is now due and unpaid $6,618.

It is further claimed by the bill that Ring manufactured the logs into shingles at the mill operated by him at Saginaw, piled the shingles on his dock, and, without the knowledge or assent of the complainants, sold to parties unknown to them large quantities of the shingles; that with the assent of Wells, Stone & Co., who, for a time, held said contracts and notes as a security by assignment from the complainants, said Ring sold to C. & E. Ten Eyck and to Wells, Stone & Co. a small portion of said shingles, the proceeds of which were applied on said purchase price of said logs, being the said sum of $1,140; and that Ring sold all the balance of the shingles to the defendants Elliott O. Eastman, Sidney L. Eastman, and Fred Hempy, who claim to own them, by said purchase, free from any claim or title of the complainants, and assert their intention to remove them. There are about 1,000,000 of those shingles now on the docks.

The bill avers that Ring is entirely irresponsible; that he represented to complainants, from time to time, that he had no opportunity to make sale of the shingles, and that they were ignorant of any sales made; that Ring has sold without their knowledge, intending to cheat and defraud them; that some of the shingles have been removed beyond the jurisdiction of the court, and those remaining on the dock are exposed to loss by fire, and are so exposed that they cannot be insured, and they are also exposed to clandestine removal.

The bill prays for an injunction against defendants to prevent the removal and disposition of the shingles, and for the appointment of a receiver to take care of them pending suit.

The bill asserts that, upon the facts, the complainants have an equitable lien upon the shingles, and seeks to

foreclose the lien by a sale of the shingles under the decree of the court.

A preliminary injunction was issued, forbidding the removal or disposition of the shingles by the defendants.

The defendant Ring filed an answer not sworn to.

The defendants Eastman, Eastman, and Hempy filed an answer sworn to by Elliott O. Eastman, and say they bought 1,400,000 shingles, and paid full value for them at the time of the purchase; that they are *bona fide* purchasers for value; that they shipped of said shingles, during last fall, in all about 909,000 in weekly shipments, and the shingles so bought were the last of the shingles from complainants' said logs; aver, on information and belief, that complainants knew that Ring was making sales of the shingles to different parties named; and deny that complainants have any interest in the shingles; and also deny, on information and belief, the equities of the bill; and claim the benefit of a demurrer.

Upon the filing of these answers, the defendants entered a motion for the dissolution of the injunction, basing the application upon the answer filed; no affidavits being filed on the motion. This motion came on to be heard, together with complainants' motion for the appointment of a receiver, before his honor, Judge Gage, of the Saginaw circuit, who, on April 22, 1889, denied the motion for dissolution of the injunction, and appointed Mr. Farnum C. Stone as receiver, directing, in such order, that said receiver take possession of said shingles, and hold and dispose of the same only under the direction of the court. From this order the defendants Eastman, Eastman, and Hempy appeal to this Court.

It is insisted by counsel for complainants that this order is not appealable; that it does not in any manner dispose of, or pass upon, or prejudge the merits of the case; that it does not take the property from the appel-

lants' possession, and is in no sense a final order. Counsel cite many cases in support of this proposition; but we do not think the case, upon the facts stated, comes within the principles stated in those cases. Here the defendants claim to be the *bona fide* purchasers of these shingles, and to have paid for them their full value, and to have shipped a large part in weekly shipments. As between Ring and themselves, they are entitled to have possession and control of them. They have taken possession and shipped a part; and, as to the balance (the 500,000 in controversy here), they have taken such possession as is ordinarily taken of such property. By the terms of the injunction they are prohibited from removing them or disposing of them, and by the appointment of the receiver their rights and interests are interfered with, and their rights to ship them so far prejudiced. The order is appealable, under all well-settled rules. An order appointing a receiver is appealable when it takes from a party a possession to which he is entitled of right. *Taylor v. Sweet*, 40 Mich. 739.

The facts stated in the bill do not bring the case under any general head of equity jurisdiction. The right of action does not seem to be dependent upon, or connected with, any equitable feature or incident. While it is true the bill asks for an accounting by the defendants touching the amount due under the contracts with Ring, and the value of the shingles claimed to have been converted by the other defendants, and that the complainants may be decreed to have an equitable lien upon all shingles manufactured from said logs so sold, yet no fraud or mistake is claimed in making the contract, and no trust relations exist between the parties.

The case presented by the bill is that valid contracts were made between the complainants and Ring by which Ring was to take the logs into his possession, manufact-

ure the same into shingles, and pay to complainants certain amounts of money, evidenced by these several notes, and that the complainants, under the contracts, retained the title to all such logs and shingles until the full amount due on the notes was paid; and, further, that the other defendants claim to have purchased said shingles from Ring, and threaten to remove the balance undisposed of out of the jurisdiction of the court. The contract itself does not state, in express terms, by whom the shingles were to be sold. It is evident, however, that the notes were to be paid out of the moneys arising from the sale of the shingles.

Complainants' counsel insist that, under the true construction of these contracts, it required the joint acts of complainants and Ring before sales could be made, and the title to the shingles pass to the third parties, and that the attempt of Ring to sell and dispose of them to the other defendants was a fraud upon their rights. In this controversy, however, we are not called upon to give a construction to this portion of the contract, as we are satisfied that no case is made by the bill giving a court of equity jurisdiction. The fact that Ring may have sold in violation of the contract, and in fraud of the complainants, does not create an equity which would entitle complainants to maintain the bill; and the fact that the other defendants threaten to remove the property out of the jurisdiction of the court would not create such a right. There is no claim in the bill that the appellant defendants are pecuniarily irresponsible.

If the complainants are the owners of the shingles unsold, or have a lien upon them superior to any rights which the appellant defendants claim under their purchase from Ring, they have a complete and adequate remedy at law, as well as for the portion of the shingles which these defendants have already sold and converted.

If complainants' theory is correct, and the contracts warrant the construction claimed by them, we see no reason why their rights may not be litigated in an action of replevin for the shingles now remaining within the jurisdiction of the court, or in any other appropriate action at law for their value, as well as for the value of those which complainants claim the appealing defendants have heretofore shipped, and the proceeds of which they have converted.

The order appointing the receiver must be vacated and set aside, and complainants' bill dismissed, with costs of both courts.

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

SHERWOOD, C. J., *(dissenting)*. I think the decree in this case should be affirmed. The title to the property in question was in complainants, and they had never been divested of it. They took the only course affording them an adequate remedy for the grievance complained of. If they have a remedy at law and it can only be made available through a multiplicity of suits, this fact alone is sufficient to give a court of equity jurisdiction. It is neither equitable nor just to compel these complainants to surrender their property to the control of defendants, who have neither title or right to the possession thereof, and compel complainants to resort to an action of replevin to recover it again, and subject them to the risk and hazard of its loss or destruction, or of its being carried away into a foreign jurisdiction before the writ can be made available for its recovery.

The jurisdiction of equity is preventive as well as remedial, and neither should be withheld where necessary to protect the rights of parties and no other is adequate.

The decree at the circuit should be affirmed.

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CHARLES M. GREENE v. SAMUEL ANGLEMIRE.

Trespass—Division fence—Statute of limitations—Adverse possession —Evidence.

1. Statutes limiting the right to bring actions for the recovery of land are for the purpose of preventing litigation, quieting title, and securing peace among citizens. They are statutes of repose, and have come to be regarded with favor by courts and juries, rather than, as formerly, with disfavor. *Jewett v. Petit*, 4 Mich. 508; *Palmer v. Palmer*, 36 Id. 487; *Toll v. Wright*, 37 Id. 101.
2. The extent of the possession which secures a title under such statutes is a fact to be established upon the trial, and it is always competent to establish it by any testimony relevant for that purpose. It is not necessary in all cases that the possession should be inclosed by a fence, or if a fence is required that it should be any particular kind of a fence, or what is known as a *lawful* fence, but any kind will answer, when required, which shows an intention to make the possession exclusive; and, when title is claimed under a deed, the deed is the best evidence of the extent of the possession, and when applied for that purpose the same rules of evidence apply in a case of adverse possession as in any other case, and no more than a preponderance of evidence is ever required to establish such a possession.
3. When the possession is by actual occupation of the possessor, or by his tenants, under claim of title, his possession is visible, open, notorious, and distinct, and will be presumed to be hostile.

Error to Washtenaw. (Kinne, J.) Argued June 26, 1889. Decided October 25, 1889.

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

Frank E. Jones, for appellant.

E. B. Norris, for plaintiff.

SHERWOOD, C. J. The plaintiff brings trespass for a wrongful entry upon his land.

The plaintiff's declaration describes the land, and bounds it upon one side by what he claims to be a division fence. He claims the *locus in quo* is covered by his deed, but, if not, he insists he has acquired title thereto by adverse possession.

The defendant, whose lands adjoin the plaintiff's on the side bounded by said fence, claims title to the strip in question, and contends that the fence never stood upon the line between the parties, but upon his lands, and was always so understood to be by the parties and their grantors.

The issue was tried in the Washtenaw circuit, and the plaintiff recovered. The defendant brings error.

Greene's land lies west, and Anglemire's east, of the line between them. Proofs were offered on the trial, which was had before a jury, tending to support both positions taken by the plaintiff, viz., that he held by title and adverse possession, and both were controverted on the part of the defendant. Numerous objections and exceptions were taken to the rulings of the court in receiving or rejecting testimony, but we have discovered no error in these rulings by which the defendant's case was prejudiced, or needing discussion herein.

We see no objection to the depreciating manner in which counsel for plaintiff spoke in his argument to the jury of the manner in which surveys are frequently made, and the litigation and vexation caused thereby. These things have become matters of common knowledge, and the more generally known the less liable will parties be likely to be led astray, and jurors will be more apt to place the proper estimate upon this class of testimony. Especially does this become important as time is fast removing or obliterating the old monuments and physical

evidences of original surveys, under which all the lands in the State have been taken up, improved, and are now held by most owners.

Upon this subject two portions of the charge as given by the court were excepted to by counsel for the defendant. They are as follows: After having given the circumstances under which the defendant would be entitled to prevail, the learned circuit judge then said:

"If, however, from the evidence in this case, you find that the parties to this contest and their respective grantors have treated and acquiesced in this fence as the true boundary line for a period of fifteen years prior to May 20, 1888, then it becomes immaterial and unimportant where the actual line of the old original survey may have been. It would now be too late to disturb it, and the plaintiff would be entitled to recover."

"The peace of the community requires that all attempts to disturb lines with which the parties concerned have long been satisfied should not be encouraged, for government surveys are not always accurate, and the evidence of such surveys may become indistinct or lost; and if, after a long series of years, old and well-established lines, which have been recognized as true boundaries, were set aside by new surveys, necessarily the mischief arising from such a policy would be incalculable, and titles to property thrown into vast and endless confusion."

We see no fault in these charges. They are peculiarly applicable to the facts in this case.

We find no error in rejecting the special requests declined by the court. They ask the jury to return the evidence, instead of facts found therefrom. The latter was the object to be attained under the rule allowing such questions to be submitted and answered.

The following charges were given by the court, viz.:

"1. A party who has actual title to property may lose it by allowing another person to hold the land adversely to himself. To constitute adverse possession, that possession must be actual, continued,—that is, not interrupted,—visible,—something that can be seen,—notorious,

distinct, and hostile, and if the owner of the land remains inactive, and acquiesces in that adverse possession, his title is gone.

"2. If you find from the evidence that the fence was constructed by the plaintiff or his predecessors in ownership more than twenty years ago, and that such fence has been maintained on the line where it was constructed for the full period of fifteen years prior to May 20, 1888,—last May,—and that the plaintiff or his predecessors in ownership have occupied the land on the west side thereof, claiming the same to be their land, to and up to the fence during the fifteen years prior to May 20, 1888, and that such possession and occupancy has been adverse, continuous, open, and hostile, then your verdict must be for the plaintiff.

"3. If you find that continued adverse possession in the plaintiff, or in the plaintiff and his predecessors in ownership, then you are instructed that it is wholly immaterial where the fence was constructed or has been maintained,—on or along the true line or otherwise.

"4. If you find such continued adverse possession in the plaintiff, or in the plaintiff and his predecessors in ownership, then you are instructed it is wholly immaterial how, or by what right or authority, the fence came to be constructed and maintained at the place or along the line where it stood on May 20, 1888, if it was by or through an error or by a mistake; that is, if it was originally placed there by mistake, the plaintiff may still recover, if it has remained there that length of time and under the circumstances I have intimated."

Statutes limiting the right to bring actions for the recovery of land are for the purpose of preventing litigation, quieting title, and securing peace among citizens. They are statutes of repose, and have come to be regarded by courts and jurors with favor, rather than, as formerly, with disfavor. *Jewett v. Petit*, 4 Mich. 508; *Toll v. Wright*, 37 Id. 101; *Palmer v. Palmer*, 36 Id. 487; *Gautier v. Franklin*, 1 Tex. 732.

The extent of the possession which secures a title in this way to the possessor is a fact to be established in all such cases upon the trial, and it is always competent to

establish it by any testimony relevant for that purpose. It is not necessary in all cases that the possession should be inclosed by a fence, or that when a fence is required it should be any particular kind of a fence, or that it should be what is known as a "lawful fence;" but any kind of fence, when one is required at all, will answer, which shows an intention to make the possession exclusive; and, when title is claimed under a deed, the deed is the best evidence of the extent of the possession; and when the deed is applied for that purpose the same rules of evidence apply in a case of adverse possession as in any other case, and no more than a preponderance of evidence is ever required to establish such a possession. The action is always civil in which the claim is made, and the testimony is to be governed by the rules proper in other civil cases.

We think there is no reasonable objection to the last three charges. When the possession is by actual occupation of the possessor, or by his tenants, under claim of title, his possession is visible, open, notorious, distinct, and will be presumed to be hostile. In such case the conditions are all sufficiently complied with to make the possession adverse, and sufficiently notified to other claimants, or parties interested.

Many minor points are made in the assignments of error. We have said all, however, we deem necessary in disposing of the case, and, no error appearing in the record, the judgment at the circuit must be affirmed.

The other Justices concurred.

WILLIAM A. O'DONNELL v. JAMES W. PERRIN.

Tax sales—Application of funds—Demand—Acquiescence.

Where a purchaser of lands at a tax sale for the year 1885 bid off certain descriptions for the tax of 1883, and paid the amount of his bids to the county treasurer, who afterwards declined to deliver the certificates unless the purchaser also paid the tax of 1882 on the lands so purchased, which he refused to do, and the treasurer selected from said bids enough to amount to the money so paid, including the amount due for the taxes of 1882, and so applied said money, canceling the remaining bids, such action was illegal, and the purchaser may recover his money of said treasurer after demand therefor, and refusal to acquiesce in such application.

Error to Saginaw. (Gage, J.) Argued June 26, 1889. Decided October 25, 1889.

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

Trask & Smith, for appellant.

F. E. Emerick, for defendant.

LONG, J. This action is in *assumpsit,* brought in justice's court, where plaintiff had judgment, which, upon an appeal to the circuit court for Saginaw county, was reversed. Plaintiff brings the case to this Court by writ of error.

Upon the trial in the circuit court the plaintiff was called as a witness in his own behalf, and testified, substantially, that he attended the tax sales in October, 1885, at the county treasurer's office, and there bid in several descriptions of land for delinquent taxes; that these sales were being made by the defendant as county treasurer of Saginaw county for delinquent taxes for the years 1882

and 1883; that sales for the taxes for each year were made separately; that the sales for the taxes of 1882 were made first; that there were several days intervening between the sales for the year 1882 and 1883.

That, within two or three days after the sales, he went into the office of defendant, took out his memorandum of purchases, and told defendant he had come to pay the amount of his bids, when defendant told him he was busy, but that he could leave his money, and he would look it up later, and that he then left with defendant $120.29, the full amount of his bids. That a month or two thereafter, not having received his certificates of purchase, he went to defendant's office, and called for his certificates, and was there informed by the defendant that he had not left money enough, and that there was a balance of $309.12 due on the lands he had purchased for the unpaid taxes of 1882; that he then told defendant he had not bid in the lands for the taxes of 1882, for the reason that the taxes for that year were illegal in amount, and would be contested; that defendant then told him he knew he had not bid in the lands for that year, but that he could not sell unless the purchaser paid the taxes for both years; that he refused to pay the taxes for the year 1882, and left the office; that the defendant thereafter commenced suit against him for a penalty of twice the amount, under the provisions of the tax law. This suit was never tried. Sometime in 1887 he called again upon defendant, when he said he had taken certificates that came within a few cents of the bid, and canceled the other bids, and returned them to the State. Defendant refused to give him his money back, but offered him certificates therefor, which he refused, as they did not represent the lands he had bid off, and he then commenced this suit to recover for the money paid defendant.

The defendant was then called in his own behalf, and testified substantially as follows:

"I was the treasurer of Saginaw county in 1885, and as such treasurer made the sales for delinquent taxes that year. The sales were for delinquent taxes of both 1882 and 1883. I sold the list of lands for delinquent taxes of 1882 before I began on the list for 1883. All lands not bid in by some one for taxes of 1882 were struck off to the State. At the commencement of the tax sales, I read to the bidders present the instructions of the Auditor General as to how the lands should be sold. After that, it was announced each morning that taxes of 1883 were subject to prior taxes, and such instructions required all lands sold for taxes of 1883 to be sold subject to taxes of 1882. After the sales of 1882 were completed, I began the sales of 1883, and completed them. The sales lasted six or seven days.

"Soon after the sale was over, plaintiff came into my office, and took out a memorandum of the lands he said he had bid in, and said he had come to pay for them. I told him I was too busy then, * * * but he could leave me the money, and I would credit it on the books to him. He gave me $120.29.

"When I had reached the lands he had bid in for the taxes of 1883, I found that the same descriptions were delinquent for the taxes of 1882 to the amount of $309.12; making a total amount of taxes due for both years $429.41. I wrote plaintiff to call and see me and he did so a short time after. I told him I could not issue certificates of purchase to him of the lands bid in by him without he paid the taxes on the same land for 1882. He said he would not pay the taxes of 1882; that all he wanted was certificates of purchase for the lands he had bid in for the year he had bid it in. I told him I could return all the land to the State as not sold, and return him his money, or I could select out of the lot he had bid off what would come to the amount of money he had paid me, and return the balance of the lands. He said he wanted certificates for just what he purchased, and nothing else. I offered him the money he had left with me, but he went away without taking it.

"When I came to make my return of lands to the Auditor General, I selected of the various parcels bid in by the plaintiff some lands that the taxes of both years

amounted to $120.13, and issued certificates of purchase of those lands to plaintiff, and returned the balance of the lands plaintiff bid off as lands sold to the State. It was some months after this before I saw plaintiff again. He came into the office, and asked if I had his certificates ready. I told him I had, and got them. Plaintiff took out his memorandum of purchase, and I started to read the certificates. When I came to the certificate for the taxes of 1882, he said, 'I did not buy for that year.' I replied: 'I understand you did not bid them in; you bid in 1883, and I put in 1882, because I could not do otherwise.' We had some angry words, and plaintiff left the office. Before he left I offered him these three certificates and 16 cents in money, which he refused."

These certificates were then offered and received in evidence.

Upon this state of facts, the court charged the jury, among other things, that the county treasurer had no authority, under the law and the direction of the Auditor General, to sell to plaintiff the lands for the taxes of 1883, separate from the taxes of 1882; that the law required him to receive the bids for both years, or none; and directed the jury to find a verdict in favor of defendant.

The law under which these sales were made provided that the sales of both years should take place in October, 1885, and that—

"In all cases when a description of land is offered as State-tax land, and the same description, or any part thereof, shall be offered in the regular list of lands delinquent for taxes, it shall be the duty of the county treasurer to inform the person bidding for the description offered as State-tax land, of the fact, and such person shall be required to purchase the description so offered in the regular list at the same time the description offered as State-tax land is bid off by him; and, in case of his neglect or refusal so to do, the treasurer shall decline the bid of the person so refusing, but shall continue to offer such description as if no bid had been made thereon."

The county treasurer, at the opening of the sales, notified those in attendance at the sale that all persons bidding, in case they purchased from the regular list of 1883, would be required to pay any taxes that might appear in the list for the year 1882. Under this proof, which was not in dispute, the court further directed the jury that the county treasurer was not required every time he offered any description to make the same notification; that the notification made at the opening of the sale each day would be sufficient; that the law required him to receive from the bidder for both years, or none.

The assignments of error are based entirely upon the charge of the court, and are six in number. We need not discuss these several assignments of error. If the court was not in error in directing the verdict in favor of the defendant, under the circumstances here stated, then, whatever the views of the court may have been upon any particular part of the case, or upon the evidence, becomes wholly immaterial. The court having directed the verdict for the defendant, however, we must upon this record assume that the evidence of the plaintiff is true, and that, if the questions of fact had been submitted to the jury, they would have followed the plaintiff's evidence. It therefore becomes necessary to consider the case from the plaintiff's evidence, and to determine whether, under his own evidence, he was entitled to recover.

His contention is that the defendant never offered to return him his money, and he so testified on the trial. In almost every other essential the plaintiff and defendant do not disagree.

The plaintiff, it appears, attended the sales of the lands for taxes of 1882, and bid in certain descriptions of lands, and attended a few days thereafter the sales for taxes of

1883, and also bid in certain descriptions. He desired to contest the validity of the taxes on part of those descriptions advertised for the taxes of 1882, but he bid off three of those descriptions advertised for the taxes of 1882. He also bid off the same three descriptions for the taxes of 1883.

He also bid off three other descriptions for the taxes of 1883, which were also advertised for the taxes of 1882, but he did not bid off the last three descriptions for 1882, he desiring to contest them.

The following is a statement of the taxes for each year; those marked with a star being the bids taken by the plaintiff:

Descriptions.	Taxes of 1882.	Taxes of 1883.
No. 1—Lots 1,2,3,4,5,6,7,8, blk. 8	55.41	*13.17
No. 2—Lot cor. Douglass and King st	87.75	*17.38
No. 3—Lots 1,2,3,4,5,6,7,8, blk. 6	76.05	*13.17
No. 4—Lots 1,2,3,4,5,6,7, 8, blk 7	Lots 3,4,5,6,7,8, blk. 7, 44.23 *15.00; lots 1 and 2, blk. 7	*14.23
No. 5—Lots 1,2,3,4, blk. 9	*12.59	*11.08
No. 6—Lots 1,2,3,4,5,6,7, w ½ of 8, blk. 10.	*12.59	*11.08
	Bids taken 40.18. Bids taken 80.11.tl.120.29	
	" not " 219.21. " not " 44.23.tl.263.44	

Plaintiff deposited with defendant the amount of his bids, viz., $120.29. On learning that plaintiff had taken bids on lands advertised for 1882 that he had not also taken in the list for 1883, and that he had also taken bids for land advertised for 1883 that he had not also taken in the list for 1882, defendant informed plaintiff that in every such case he must take the bid for both years, or he could not take it for either year, as section 59 of the tax law required him to decline all such bids that did not include both years. Plaintiff declined to

take the bids as the defendant (and section 59 of the tax law) required, but demanded the certificates for the bids that he had taken, and, on being refused, he left the defendant's office, leaving the money that he had deposited for his bids, with no further instructions in regard to it. The defendant, for the purpose of making his returns of this transaction to the State, selected from plaintiff's lands, upon which plaintiff had taken the bid for either 1882 or 1883, such descriptions as would the most nearly amount to the sum of money deposited by plaintiff, and made out certificates for them in the name of plaintiff, intending to make these certificates comply as nearly as possible with the requirements of the tax law, and laid these certificates aside to be delivered to plaintiff, and canceled the remainder of plaintiff's bids, and returned them to the Auditor General, and paid the money deposited with him by plaintiff over to the State. Nothing further was done about the matter until late in the year 1887, when plaintiff demanded his money, and, payment being refused, he commenced this suit.

It is apparent that plaintiff knew in fact, at the time he made these bids, that he was not entitled under the law to hold bids under the sales of lands delinquent for the taxes of 1883, unless he also took the bids for the sales of 1882 upon the same descriptions. He knew that his lands were in both lists, and attended and bid at both sales.

It is not claimed by plaintiff that he made any demand for his money until 1887, when he demanded it, and payment was refused. This was after the county treasurer had paid the money over to the State, and set aside the bids for the plaintiff to the amount of the money paid by him. The county treasurer, in making the sales and receiving the money on such purchases, was acting as the agent of the State, and, if the plaintiff then had any

cause to complain, defendant contends that he should have made his application to the Auditor General, and not to the county treasurer.

This action is not brought against the defendant to recover damages for any misconduct or negligence, but for money had and received. When the moneys were paid on the bids made by plaintiff under the sales for taxes of 1883, he was bound also to take the same lands for the taxes of 1882. The statute and instructions from the Auditor General required this, and it is not pretended that plaintiff was ignorant of the fact. He refused to have his bids canceled in the first interview with the county treasurer, but insisted on retaining them; claiming, however, that he was not bound to pay the taxes on these descriptions for 1882, because of some irregularity. It is not shown, however, that the defendant had any instruction from the plaintiff to apply the funds in his hands as he did. They were left with him to apply upon particular bids, and upon descriptions then noted by him. While it may be true that the plaintiff was not entitled to hold the bids for the taxes of 1883, unless he also took the bids and paid the taxes upon the same descriptions for 1882, yet the defendant, as county treasurer or as agent for the State in making the sale, could not compel him to take the bids for 1882, unless he might so elect; neither had the defendant the right to so apply the funds in his hands, unless authorized to do so by the plaintiff. It was his duty, if the plaintiff was not entitled to hold the bids for 1883 without taking those of 1882, to have canceled the entire bids, struck the bids off to the State, and returned the money, or tendered a return. Instead of this, and without any authority from the plaintiff, he selected the descriptions which he thought plaintiff ought to take to meet the amount of money deposited, and made certificates to plaintiff for those,

and returned the balance to the State. This action was not authorized by the plaintiff, and we know of no rule of law that would authorize such application of funds in the hands of a party belonging to another. The court was in error in so holding.

There seems to have been but one question of fact in dispute: Did the plaintiff demand his money, and refuse to have it so applied? If he did, he is entitled to recover. If not, and he acquiesced in the disposition of it made by the defendant, or ratified the act of the defendant in so disposing of it, then he would be bound by such ratification, and ought not to be permitted to recover.

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

The other Justices concurred.

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CHARLES E. BENEWAY v. WILLIAM T. THORP.

Slander—Words actionable per se—Repetitions—Amendment of declaration.

1. Charging a son with having forged his mother's name to a note, means a note susceptible of forgery, and the words are actionable *per se*.
2. Proof of the repetition of the same slander charged in a declaration is admissible for the purpose of showing malice upon the part of the defendant in the original utterance.
3. An amendment of a declaration in a slander suit, by changing the date of the speaking of the alleged slanderous words from November 1, 1887, to February 1, 1888, is clearly within the discretion of the trial court, under How. Stat. § 7631, the exercise of which discretion will not be reviewed.

Error to Lenawee. (Lane, J.) Argued July 10, 1889. Decided October 25, 1889.

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

Westerman & Westerman, for appellant.

Fred B. Wood and *Seth Bean*, for plaintiff.

LONG, J This is an action of slander, and comes to this Court by writ of error brought by defendant.

The declaration alleges substantially that on February 1, 1888, at Tecumseh, in the county of Lenawee, in a certain discourse which the defendant then and there had with one Jennie McGowan, he did speak, publish, and declare of and concerning the said plaintiff these false, scandalous, malicious, and defamatory words, to wit:

"He [meaning the said plaintiff] has forged his mother's name to a note, and I can prove it."

The declaration also alleges that in a certain other discourse which the defendant had in the presence and hearing of one Thomas White, of and concerning the plaintiff, he did falsely and maliciously speak, publish, and declare, in the presence and hearing of said Thomas White, these other false, scandalous, malicious, and defamatory words of and concerning the plaintiff, to wit:

"I [meaning the said defendant] told Miss McGowan [meaning the said Jennie McGowan] that Charlie [meaning the said plaintiff] had forged his mother's name to a note,"—

The said Jennie McGowan being a daughter and the book-keeper of William McGowan, in whose employ the said plaintiff then was.

On the trial in the court below the plaintiff had verdict and judgment for $500. After the jury had been

impaneled in the court below, and while the said Jennie McGowan was on the witness stand, being examined by counsel for the plaintiff, defendant's counsel made objection to the introduction of any evidence in the case under the declaration, for the reason that the declaration did not set out a cause of action.

It is claimed on the argument here that the words complained of do not necessarily impute to plaintiff a crime which would make him liable to a criminal prosecution, the language being so uncertain as to be capable of two or more constructions, and therefore not actionable *per se;* that the words do not necessarily refer to a note which is susceptible of forgery.

It is a general rule that courts, in construing language set out in a declaration for the purpose of determining whether such words are actionable *per se,* will give the words their plain and natural import, according to the idea they are calculated to convey to those to whom they are addressed, and in the plain and popular sense in which the rest of the world naturally understands them. If the old rule prevailed that words, in such actions, must be construed in their most innocent sense, there might be some force in the position taken by defendant's counsel; but the rule is now well settled that courts will understand them as other people would. When the defendant charged that plaintiff had forged his mother's name to a note, the natural and common-sense meaning conveyed was that the note was a promissory note, one susceptible of forgery. The defendant was not introduced as a witness, and gave no excuse for the language, or that any other meaning was intended, or that it was not intended to convey the idea of the crime of forgery. The court below was not in error in its charge in directing the jury that these words were to be so understood.

Defendant's counsel also contend that the court was in

error in permitting testimony to be given on the part of the plaintiff as to what was said to and in presence and hearing of Thomas White, at a time subsequent to the speaking of the words to Jennie McGowan, on February 1. There was no error in this. Proof of repetitions of the same slander charged in the declaration is admissible for the purpose of showing malice upon the part of the defendant in uttering the words charged, and I have no doubt that repetition of such slander at any time previous to the trial may be given in evidence for this purpose.

One other question remains. In the declaration as framed, and as it stood at the time of the commencement of the trial, the time of uttering the words was charged as of November 1, 1887. After the jury were impaneled, plaintiff's counsel asked leave of the court to amend the declaration by changing the time to February 1, 1888. This the court granted upon the payment of a rule fee of five dollars to the defendant, and granting leave to defendant to amend his plea. Defendant accepted the five dollars rule fee, made no amendment to his plea, and the trial proceeded. No claim is made here that defendant was taken by surprise, or placed at a disadvantage on the trial by this amendment, or that he asked a continuance of the cause, and the trial apparently proceeded without objection on his part. This amendment was clearly within the discretion of the trial court, under the provision of section 7631, How. Stat., and this Court will not review such matters of discretion.

We find no error in the record, and the judgment of the court below must be affirmed, with costs.

The other Justices concurred.

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DAVID W. SIMONS, EXECUTOR, v. THE YPSILANTI PAPER COMPANY (A CORPORATION).

Contract—Rescission—Burden of proof—Measure of damages.

1. In a suit to recover damages for the refusal of a vendee to receive rags under a contract providing that they should be as good or better in quality than those furnished by the vendor the previous year, the burden is upon the plaintiff to establish this fact, and a charge that the burden of proof was upon the defendant to show that the rags delivered under the contract were of an inferior quality to those delivered the previous year is erroneous.
2. In this case the Court discuss the testimony as to damages, and find that a fair basis for their measurement would be the market value of the rags in Detroit, determined by their value in Chicago and Milwaukee, less the freight from Detroit to those cities. It is also suggested that an ascertainment of damages will be less liable to be erroneous if the jury are instructed to find the market price of the rags at the date, or as nearly so as possible, of each time of delivery under the contract, and find the damages for each breach, instead of "lumping" the whole together, as was done on the first trial.

Error to Washtenaw. (Kinne, J.) Argued October 10, 1889. Decided October 25, 1889.

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

Charles R. Whitman (*Sawyer & Knowlton* and *John F. Lawrence*, of counsel), for appellant, contended:

1. The measure of damages in this case is the difference between the market value of the goods at the *times* and the *place* the several deliveries ought to have been made and the contract price; citing *Brownlee v. Bolton*, 44 Mich. 218; *Dwiggins v. Clark*, 94 Ind. 49; Benj. Sales, § 870; and this is the rule of law in actions upon executory contracts for refusal to accept goods; citing *Gordon v. Norris*, 49 N. H. 376; *Collins v. Delaporte*, 115 Mass. 159; 1 Sedg. Dam. (7th ed.) 595 (note 6).

2. We do not dispute the right of a vendor to bind the vendee, in case goods are not accepted, by a resale, if made in a reasonable time; but in the case of a falling market it must be made at once; citing *Smith v. Pettee*, 7 Hun, 334; 1 Sedg. Dam. (7th ed.) § 281 (note); 3 Suth. Dam. 359; and, as the contract in this case calls for deliveries by installments, the plaintiff could not hold the rags due in May, June, and July until a final breach in October, and then sell the entire lot, and bind defendant by such resale; citing *Barningham v. Smith*, 31 L. T. Rep. (N. S.) 540; 2 Suth. Dam. 358.

3. As to plaintiff having the burden of proof as to quality of rags, counsel cited *Stewart v. Ashley*, 34 Mich. 183.

4. The contract was a verbal one for the sale of goods, to be executed distributively by installments, and delivery and receipt of one or more installments, and payment therefor, did not relieve subsequent installments from the operation of the statute of frauds; citing *Deming v. Kemp*, 4 Sand. 147; *Seymour v. Davis*, 2 Id. 239; Reed, Stat. Frauds, § 296.

Conely, Maybury & Lucking, for plaintiff, contended:

1. If there is no market value, or but an uncertain one, the value of the property may be shown by such prices on actual sales as took place at or near the time and place, including evidence of the sale of like articles for months before and after the time in question; citing Field, Dam. § 264; Blackburn, Sales, 511, 512; 2 Benj. Sales (Kerr's Am. ed.), 885; 2 Suth. Dam. 375–8; and sales at other markets may be shown, together with cost of transportation and the like; citing Field, Dam. § 264; and evidence of the value of a cow one year before the time in question has been received; citing *Denton v. Smith*, 61 Mich. 431; and of land seven or eight months after; citing *Abell v. Munson*, 18 Id. 313.

2. It may be said to be a universal rule that where a party admits that an obligation once rested upon him, but claims a discharge from it, he has the burden to show the matter of discharge, as, for instance, payment, bankruptcy, statute of limitations, etc. Defendant admits the obligation of the contract, but claims that the rags delivered were inferior to the contract standard. The burden is upon defendant to establish this fact; citing *Lothrop v. Otis*, 7 Allen, 435; *Briggs v. Humphrey*, 5 Id. 314; *Dorr v. Fisher*, 1 Cush. 271; *Webber v. Dunn*, 71 Me. 331; *Day v. Raguet*, 14 Minn. 273; *Hollister v. Bender*, 1 Hill, 150; *Topper v. Snow*, 20 Ill. 434; *McGregory v. Prescott*, 5 Cush. 67; *Tobin v. Aid Society*, 72 Ia. 261; *Cutler v. Wright*, 22 N. Y. 472; *Peck v. Hunter*, 7 Ind. 295.

3. Where a verbal contract is void under the statute of frauds, a partial delivery of goods under it validates the entire contract; citing Reed, Stat. Frauds, § 290.

4. In answer to the claim that the contract was for the delivery of 25 tons of rags per month, making 12 separate contracts, and that the delivery of five installments and payment therefor did not take the others out of the statute, counsel cite *Gault v. Brown*, 48 N. H. 185–7; where the question is discussed, and authorities collected.

MORSE, J. October 12, 1885, the firm of S. Simons & Son, of Detroit, Michigan, contracted to sell and deliver rags to the defendant, which contract is evidenced by the following memorandum in the handwriting of Cornelius Cornwell, president of the defendant company:

"Oct. 12, 1885. Bought of S. Simons & Son, 300 tons rags at $2.06, delivered at Ypsilanti, 3 months' time; one car to be shipped this month, and 25 tons per month until the whole is shipped, the last shipment to be made about Oct. 10, 1886. Rags to be as good or better than what he has furnished us in 1885."

Under this contract, and up to May 3, 1886, 129 tons were delivered and received. At that date defendant refused to receive any more rags on the contract, claiming that those already received were not up to the standard of the agreement. With a slight deduction, the rags received were paid for. The claim for the value of the balance of the rags undelivered was assigned by S. Simons & Son to Simon Simons, who commenced the present suit. The present plaintiff is his executor.

The suit is planted in *assumpsit*, and the plaintiff claims in his declaration that the rags furnished in 1885, and mentioned in the contract, were of the quality known as "good, merchantable *print* rags." He avers that the said firm of S. Simons & Son proceeded to perform the contract on their part, and continued to faithfully perform the same, until May 3, 1886, when the defendant absolutely refused to receive or pay for any more of said

rags, or further continue the contract on its part; that at this time 129 tons had been delivered, and 171 tons remained undelivered. S. Simons & Son were ready and offered to deliver this balance, as provided in said contract, but defendant refused to receive them. For this breach the plaintiff claims damages

The defendant pleaded the general issue, and gave notice that it would show that it was discharged from the further performance of the contract on its part by reason of the refusal of the said firm of S. Simons & Son to deliver under the contract rags of the quality described in the contract.

The plaintiff had verdict and judgment in the sum of $3,085.98

As the evidence developed upon the trial, the only important issue to be determined by the jury was whether or not the plaintiff furnished to the defendant such rags, or rags of such a quality, as were called for by the contract. The jury were instructed that if they found that the 129 tons delivered were substantially as good or better than the rags furnished by S. Simons & Son to defendant in 1885, before the contract, then their verdict must be for the plaintiff. On the other hand, they were instructed as follows:

"Under the contract between the parties, the regular performance of each installment of the plaintiff was a condition precedent to the continuance of defendant's obligation under the contract; and if you find from the evidence that plaintiff, in the spring of 1886, sent defendant rags inferior in quality to those he furnished defendant in 1885, that thereupon defendant objected to the quality of the rags, but that, notwithstanding such objection, plaintiff continued to send rags inferior in quality to those contracted for,—that would amount to such a breach of the contract as would entitle the defendant to treat the contract as discharged."

By these instructions the issue was plainly and clearly

submitted to the jury, who found against the defendant.

But the court committed error in further stating that the burden of proof rested on the defendant to show that the rags delivered under the contract were of an inferior quality to those furnished by S. Simons & Son to defendant in 1885. The plaintiff was insisting that S. Simons & Son were entitled to the further performance of the contract on the part of the defendant, because up to the time of the refusal to take any more rags S. Simons & Son had fully and faithfully performed their part of the contract, which could not be true unless the rags delivered by them were of as good or better quality that those furnished defendant in 1885. It was therefore a part of plaintiff's case to establish this fact, and the burden of proof was upon him. The instruction requested by plaintiff's counsel, and given by the court, above noted, recognized that the issue raised by the pleadings and proofs was whether the quality of the rags delivered —the 129 tons—was as good as those furnished defendant in 1885. The affirmative of this issue was clearly with the plaintiff. *Stewart v. Ashley*, 34 Mich. 183.

It is further objected that the jury were allowed to adopt an erroneous measure of damages. The court charged as follows:

"If you find for the plaintiff, the damages to be awarded will be the difference between the market value of the goods at the times the several deliveries ought to have been made and the contract price."

No fault is found with this; but the error is claimed in the following remarks of the circuit judge in connection therewith:

"If you find from the evidence that the price at which the rags were sold—$1.22¾ per cwt., net, in Detroit—was as good or a better price than could have been obtained for that class of rags between the date of the cancellation of the contract by defendant and the time of such sales,

that market value of these rags at the time they should have been received by defendant under the contract may be regarded as the price so received, to wit, $1.22¾ per hundred pounds; and if you find that the plaintiff is entitled to recover, then the measure of damages will be the difference between the said net contract price of $2 per hundred pounds and that market value so ascertained to be $1.22¾ per hundred pounds."

The evidence showed the freight to Ypsilanti to be six cents per hundred pounds, which brought the contract price, net, at Detroit, to $2. The testimony further shows that no sales were made of the class of rags named in the contract until after the expiration of the time for the delivery of the whole 300 tons under the contract. About December 1, 1886, sales were made by S. Simons & Son to parties in Wisconsin, shipping to Milwaukee, and selling there for $1.37½, with two per cent. off for cash. From this $1.37½ was deducted the freight from Detroit to Milwaukee and the two per cent., leaving the net price $1.22¾, as figured by the plaintiff; and the court in his charge to the jury adopted the calculation of the plaintiff. Other sales were made about the same time in Ohio, the price being about the same, or lower. The testimony on the part of the plaintiff, which was not controverted by any evidence offered or received on the part of the defendant, showed that there is no market price for these rags, save in large cities; Chicago and Milwaukee being the principal rag markets. The plaintiff's assignors, S. Simons & Son, did not undertake to sell any of these rags to other parties until in June, 1886, as from the correspondence between them and the defendant it would seem that they still hoped to deliver the rags until June 11, 1886, although they were informed May 3, 1886, by the defendant that it would receive no more. The plaintiff, being the only member of the firm of S. Simons & Son living, testified that from June up

to December the firm tried to sell these rags, but were not able to sell them,—

"That is, not at anything reasonable. We did not receive any direct offers. Some people stated what they could buy for; they said they did not want any, but could buy for certain prices,—$1.20 in one case."

They were not able to sell any of them up to December. During the period of June, July, August, and September there were print rags sold in the markets all the way from one cent a pound up to $1.21 per 100. The rags sold in December were bargained for in November. It was also shown by a Mr. Lowenthal, a dealer in rags, residing in Chicago, that he visited the store of S. Simons & Son in November, 1886, and examined some rags claimed by plaintiff to be of the quality of rags sold by that firm to the defendant. He (Lowenthal) called these rags—

"Trade print rags, * * * superior to print rags, as they are packed in Detroit, and much superior to Chicago and Milwaukee print rags."

He could not give the value of these rags, or print rags, at Detroit at any time, or at Chicago or Milwaukee in December, 1886. He testified that the market price of print rags varied from $1.15 to $1.25 per 100 pounds in those cities through June, July, August, September, and October. This was the price of print rags. That the rags he saw in Detroit were worth about 5 or 10 cents per 100 more than the best quality of Chicago print rags. The plaintiff also testified that the rags to be furnished defendant were of a better quality than ordinary print rags, but could not or did not tell how much more they were worth per 100.

We do not understand from the argument of defendant's counsel that he objects to this fixing of $1.22½ as a basis, if there was any evidence in the case to support it; or that he would complain of the jury using that

amount for the whole 171 tons, if there was any testimony showing that it was as good or a better price than could have been obtained for the rags at any of the times when the installments should have been, but were not, delivered. In such case the defendant certainly could not be harmed, as he would be called upon in any event to pay no more, and might pay less, than he would if the damages on each installment were ascertained by the price on the particular day of each breach. But what he contends is this: There was no competent evidence by which the jury were authorized to find that the market value of the rags on any day of any breach was not more than $1.22\frac{3}{4}$. When the letter of May 3, 1886, from defendant to plaintiff, refusing to take any more rags, was received, the April car-load had not been delivered. The breaches of the contract by refusing this installment, and also the installment for the month of May, do not appear, as claimed by plaintiff, to have been reached by the evidence. We can find no value anywhere in the testimony set upon these rags in the months of May or April. This was probably an oversight, owing to the plaintiff's idea that there was no breach until June 11. These breaches covered about 50 tons. We think there was sufficient evidence from that time on to warrant the finding of the jury as to the balance.

It seems to have been substantially admitted or conceded by both parties that the market value in Detroit was the proper value, and that this was determined by the value in Chicago and Milwaukee, less the freight from Detroit to those cities; and from the testimony we think that was a fair way of obtaining it. There were no sales shown in Detroit. It is true that in June the plaintiff (who was a member of the firm of S. Simons & Son) used 17,000 pounds of these rags in a paper-mill in Detroit, in which he was interested with another party,

and charged the paper-mill concern $1.62½ per 100 for them. But this one act did not fix the price in June, nor was it controlling as to the market value in Detroit. It was a circumstance to be considered by the jury in ascertaining the market price, in connection with the other evidence.

It is complained that all the testimony of value was confined to ordinary print rags, while the rags to be delivered to defendant were to be of much better grade or quality. There was a dispute between plaintiff and defendant as to the degree of this better quality. It is true, plaintiff did not swear what was the value of the rags above print rags; but the testimony of Mr. Lowenthal showed them to be worth about 10 cents per 100 more than print rags as they were known in the Chicago market. This would make the highest price for these rags in that market for the months of June, July, August, September, and October $1.35 per 100 pounds, and less than the price of the December sales.

It is also claimed that, as the goods were contracted to be sold to defendant on three months' time, it was entitled to the deduction of two per cent. off for cash, if such deduction was allowed on the December sale, which was also on time. This claim is no doubt correct. The two per cent. should not have been deducted from the $1.37½. Only the freight charges from Detroit to Milwaukee should have been taken from the gross price. The plaintiff's counsel suggest that this deduction, erroneously made, is more than offset by the loss of interest on the damages, to which he would have been entitled if the jury had found the same by installments at the times of the different breaches, but that by calculating the damages in one sum, and at the expiration of the time for the whole delivery, enough interest was lost to more than cover the sum gained by the two per cent.

As the case must go back for a new trial, it is not necessary to review the matter of damages any further, but it may be well to suggest that an ascertainment of damages, if any shall be found by the jury on a future trial, will be less liable to be erroneous if the court shall instruct them to find the market price of the rags at the date, or as nearly so as possible, of each time of delivery, and find the damages for each breach, instead of "lumping" the whole together, as was done in this trial.

The judgment must be reversed, and a new trial is granted, with costs of this Court to defendant.

The other Justices concurred.

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GEORGE W. CULVER, DIRECTOR, ETC., v. WALTER ARMSTRONG.

School-districts—Election and qualification of officers.

1. Duly elected school officers cannot be deprived of their offices by being prevented from filing their acceptances, and otherwise qualifying, by a conspiracy between the old officers of the school-district.

   So *held*, where after the election of a moderator and assessor they handed their acceptances to the old moderator, who either delivered them to the director or laid them on the table, and the director on leaving the building gathered up all of the papers from the table and carried them away with him, and the next evening the newly elected officers went to the director's house to again tender their acceptances, but found him absent, and returned the following morning, when he refused to receive the acceptances and necessary bonds, and, on the officers persisting in their efforts to qualify, threatened to use an ax upon them, he having on the previous day handed his resignation to one of the old officers, who, on the same day of

such final refusal, met and, claiming to hold over, appointed a director to fill the alleged vacancy, after which, with their appointee, they employed a daughter of the old director as teacher of the school in the district.

2. Technicalities will not be permitted to defeat the will of the electors, fairly and honestly expressed at the annual school meeting, in the choice of district officers; and public policy and the best interests of the schools require that controversies as to who are the legal officers of a school-district shall be settled as speedily as possible.
3. The election of an assessor of a school-district on an informal ballot, coupled with a vote of the meeting declaring such election, is sustained in this case.
4. Proceedings under chapter 295, How Stat., to secure the possession of books and papers in the hands of an illegally appointed school director are held more appropriate than by *quo warranto*, being more speedy and simple.

Certiorari to Lake circuit judge. Argued October 16, 1889. Writ dismissed October 25, 1889. The facts are stated in the opinion.

Ransom Cooper, for George W. Culver.

A. H. Swarthout, for Walter Armstrong.

MORSE, J. In this case it is clear that, at the annual school meeting of district No. 3 of the township of Pinora, Lake county, held on the evening of September 3, 1888, John Speers was duly elected assessor, and Levi W. Ricker, moderator. This is shown by the official record of the meeting, made up and signed by Michael Derschell, director, and P. McLaughlin, moderator. These officers were elected to take the places of P. McLaughlin and John Lindner. The record also shows that, the same evening of the annual meeting, said Speers and Ricker wrote out their acceptances of the offices, and handed the same to the moderator, McLaughlin, who either handed them to the director, Derschell, or laid them on the table in front of them. When the director

left the building where the meeting was held, he gathered up all the papers on the table, and carried them away with him. The next day, Speers and Ricker heard rumors that they had not properly accepted the offices to which they had been elected, and therefore went to Derschell's house in the evening to again tender their acceptances, but found him away from home. On the morning of September 5, 1888, they again called at the director's house, and found him at home. They had with them the necessary papers, acceptances, and bonds with which to qualify. Derschell refused to receive them, or do any business whatever with them, stating that he had no time for school matters. Speers and Ricker were anxious to qualify, and were somewhat persistent in their endeavors to do so. They followed Derschell out to his stable, and tried to coax him to receive the papers and finish up the business, as it would take but a few minutes. Derschell finally lost his temper, and, drawing an axe, threatened to use it upon them if they followed him further, and notified them that, if they bothered him any more, it would be at the "peril of their lives."

It further appears from the record that Derschell, the day before (September 4), had written out his resignation of the office of director, and handed it to one of the old officers. Thereupon, and on September 5, 1888, McLaughlin and Lindner, claiming to hold over for the reason that their successors had not been duly elected and qualified, met and appointed Walter Armstrong director, in the place of Derschell. September 22, 1888, Armstrong, McLaughlin, and Lindner, claiming that they composed the legal school board of the district, met, and hired Derschell's daughter Anna for teacher of the school for the term of six months, at $30 per month. This probably furnishes the key to Derschell's action, and the motive of it. September 11, 1888, Speers and Ricker,

claiming to hold the offices to which they were undoubtedly legally elected, met, and appointed George W. Culver director, to fill the vacancy caused by Derschell's resignation, of which resignation they were informed by the action of the old board in appointing Armstrong, and the surrender of the books and papers of the district to Armstrong by Derschell. Culver, having qualified, thereafter demanded the books and papers belonging to the office of director of Armstrong, who refused to deliver them up. Thereupon Culver, under chapter 295 of Howell's Statutes, made complaint to the judge of the circuit court for the county of Lake. Upon this complaint a hearing was had, and testimony taken, in open court; both parties appearing, and a full investigation being gone into as to the facts. December 6, 1888, the circuit judge, Hon. J. Byron Judkins, made an order that the said Walter Armstrong deliver the books and papers belonging to the said office over to the said George W. Culver.

We are asked to review these proceedings on writ of *certiorari* sued out by said Armstrong. We have done so. We are satisfied that Ricker and Speers were duly elected at the annual school meeting, by a majority of the qualified electors of the district present and voting, moderator and assessor, respectively, of said district. We are also further satisfied that they were prevented from filing their acceptances, and otherwise qualifying, by a conspiracy between the old officers, McLaughlin, Lindner, and Derschell. This conspiracy was for personal ends; one of the objects being to keep McLaughlin and Lindner in, that they might employ Derschell's daughter as teacher. Derschell's resignation was for the express purpose of preventing Ricker and Speers from qualifying. Ricker and Speers each did all in his power to qualify. Duly-elected school officers cannot be prevented from holding the

offices to which they are elected by any such proceedings as these on the part of the retiring officers; and no technicalities will be permitted to defeat the will of the electors, fairly and honestly expressed at the annual school meeting, in the choice of district officers; and public policy, and the best interests of the schools, require that controversies as to who are the legal officers of a school-district shall be settled as speedily as possible.

It is substantially admitted by the counsel for the respondent, Armstrong, that Ricker was duly elected; and the record of the meeting, made up by the old officers, shows that Speers received 18 votes to 16 for Lindner, for assessor. But it is claimed that the ballot was an informal one. The record so shows; but it also appears that a motion that Speers be considered elected upon that ballot was carried, and, without any question as to his election, the meeting then proceeded to vote for moderator. We think he was fairly elected, and that, after the tender of their acceptances and bonds were made to Derschell, Ricker was the lawful moderator, and Speers the legal assessor, of this school-district.

This ends the controversy as to who is the director. Culver, being appointed by the legal school board, was the director, and entitled to the books and papers at the time of his demand for the same.

We shall not look further into the proceedings before Judge Judkins to ascertain whether or not he erred in some matters as to the admission or rejection of testimony. If he did err as claimed, it did not, and could not, affect the merits of the controversy or the result. It is perfectly plain that his order was just, and the only one that could have been made under the facts as shown by the testimony on both sides.

Nor do we think that Culver made a mistake in his remedy. We think the proceedings taken under the

statute more appropriate than that of *quo warranto*, being more speedy and simple. The Legislature evidently intended that it should reach just such a case as the one before us; for it is provided, in case of vacancy, that the successor to the office (which would be one legally appointed, as well as one legally elected) can take the proceedings to recover the books and papers belonging to the office as well against any person who may have the possession of them as he might, under the statute, against the officer who has been removed, or whose term has expired. How. Stat. § 8547.

The action of the old school officers was unjustifiable, and without any excuse. We think the circuit judge was none too severe in his strictures upon their conduct. His order in the premises is affirmed.

The writ of *certiorari* will be dismissed, with the costs of this Court, and of the proceedings before the circuit judge, against the respondent, Armstrong.

The other Justices concurred.

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THE JOHN SPRY LUMBER COMPANY v. THE SAULT SAVINGS BANK LOAN & TRUST COMPANY ET AL.

Constitutional law—Mechanics' lien law of 1887.

The mechanics' lien law (Act No. 270, Laws of 1887) strikes at the foundation of property in land, and is unconstitutional, and all its parts must fall together, leaving the law of the State where it was before the passage of said act.

Error to Chippewa. (Grant, J., presiding.) Argued October 18, 1889. Decided October 25, 1889.

Proceedings under mechanics' lien law of 1887. Plaintiff brings error from judgment holding the law unconstitutional. Affirmed. The facts are stated in the opinion.

Sutton & Martin (*Shepard & Lyon*, of counsel), for appellant.

John H. Goff and *H. M. Oren* (*Hayden & Young*, of counsel), for defendants.

CAMPBELL, J. Plaintiff sued, counting expressly on the lien law (Act No. 270, Laws of 1887), claiming a lien on the banking-house of the principal defendant for lumber furnished the defendants Myers, and used in its construction.

The Savings Bank Loan & Trust Company made a written contract with the defendants Myers, June 27, 1887, to begin by July, 1887, and finish by November 1, for $27,000, the building in question, payable on monthly estimates, with the usual drawback of 20 per cent. to be held till completion. The court below held the lien law of 1887 to be unconstitutional, and gave judgment on the personal debt against defendants Myers, who do not appeal. Plaintiff appeals on account of the denial of the lien.

The law of 1887 repeals all previous laws on the subject, and only saves pending proceedings. But it is assumed, and correctly, to apply to all material furnished after the law took effect, whether under old or new contracts. It changes the old law chiefly in regard to the cases under which liens may be created, and does so in such a way that it must stand or fall together. The changes are all in one direction, and upon one theory. The machinery is merely secondary and incidental. The new law varies from the old law in these important particulars:

1. It allows a homestead to become bound to the persons claiming a lien, where a building contract is executed with the original contractor, signed by husband and wife.

2. It binds a married woman's land, where the articles or labor are furnished to a contractor or subcontractor of the husband with her knowledge or consent, express or implied, as if by her own express authority; and furnishing labor or materials "in an open and public manner" is made sufficient evidence of knowledge and consent.

3. The building contract made with any person, whether man or woman, has no effect on the lien, whether fully performed by the land-owner or not; and the laborer or furnisher may enforce his lien for any material or labor furnished under any contract, express or implied, written or unwritten, whether conforming to the original contract or not.

In short, this law makes the mere fact that a building contract exists, or has existed, a sufficient reason for binding the land for any act or omission of the building contractor or his subcontractor, whether within the range of the contract or not, or whether or not in harmony with its terms. The law (sec. 2) says, in so many words:

"Such lien shall not be defeated by any contract, agreement, or understanding between the owner, part owner, or lessee of the real estate upon which such improvements are made, or for which such materials are furnished, and the original, or any subcontractor, by any payment made by such owner, part owner, or lessee to such contractor or subcontractor for the contract price of such labor or material [materials], or any part thereof, in case the person performing such labor or furnishing such material shall comply with the provisions of this act."

This statute is made for the express, and, so far as differing from former laws, for the only, purpose of enabling strangers to the title to subject it to sale for obligations to which the owner never became bound, and in which he has no part whatever. It strikes at the foundations of all property in land. There is no consti-

tutional way for divesting a man's title except by his own act or default. Here his own act is not required, and his freedom from default is no defense. He may pay in full, in advance or otherwise, for all he has contracted for. He may contract for a house built in a certain way, and of certain materials, and may have to pay for what he never bargained for, and what his building contractor had no right to put off upon him. The original contract plays no part in the matter, except as a fact which binds no one, and has no significance. Such a gross perversion of all the essential rights of property is so plain that no explanation can make it plainer. And, as this purpose forms the only apparent reason for repealing the old law, and passing the new one, the present statute, and all its parts, must fall together, leaving the law of the State where it was before the law of 1887 was passed. In *Hanes & Co. v. Wadey*, 73 Mich. 178 (41 N. W. Rep. 222), the validity of the law was not discussed, as it has not been in any other case hitherto.

The judgment must be affirmed, with costs.

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

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JOHN C. HOLDEN, PRESIDENT OF THE VILLAGE OF REED CITY, v. THE BOARD OF SUPERVISORS OF OSCEOLA COUNTY.

Constitutional law—Title of act—Representation of village on board of supervisors.

1. Act No. 342, Local Acts of 1889, entitled "An Act to amend section three of Act No. 331 of the Local Acts of 1875, entitled

An Act to re-incorporate the village of Reed City,'" and which makes the president of said village *ex officio* a member of the board of supervisors of Osceola county, is constitutional.

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

a—It was decided in *Attorney General v. Preston*, 56 Mich. 177, that it was competent for the Legislature to make the president of a village an *ex officio* member of the board of supervisors of his county, and it is purely a matter of legislative policy when and where such power shall be exercised.

b—Most of the great changes in our city organizations have come in under laws which did no more than to indicate by their titles a purpose to incorporate, or re-incorporate, or revise the corporate charter of the municipality dealt with. Anything which is meant to form a permanent element in municipal arrangements is pertinent to the incorporation.

c—It is undoubtedly competent to introduce by amendment anything which might have been introduced in the original act.

Mandamus. Submitted October 15, 1889. Granted October 25, 1889.

Relator applies for *mandamus* to compel respondents to allow him to sit with them as a member of the board of supervisors. The facts are stated in the opinion.

Charles A. Withey, for relator.

C. O. Trumbull, for respondents.

CAMPBELL, J. Respondents refuse to allow relator, as president of Reed City, to act with them as a member of the board. Their objection that his election was not certified to them is frivolous. There is no question of his official position. They also rely on a supposed constitutional difficulty in the act conferring on him the powers of a member of the board of supervisors.

It was decided in *Attorney General v. Preston*, 56 Mich. 177 (22 N. W. Rep. 261), that it was competent for the Legislature to make the president of a village an *ex officio* member of the board of supervisors of his county.

If the power exists, as we have held it exists, it is purely a matter of legislative policy when and where it shall be exercised. The only question, therefore, must be whether it has been exercised in this case.

The only constitutional objection presented with any show of plausibility is that the power is granted under an amendment not fairly within the title of the act amended.

In 1875 the Legislature passed an act entitled "An act to re-incorporate the village of Reed City." Local Laws of 1875, p. 527. Instead of doing this by a long statute, with specific powers in detail, the Legislature, as is not uncommon, and as is quite proper, saw fit to make its powers and duties conform to the general village act adopted at the same session, adding only such provisions as were necessary to connect the corporation thus remodeled with the one before existing. It is impossible to discover anything in this action which would differ from an introduction in terms, instead of by reference, of all the provisions of the general statute thus made a part of the village charter. Had the act of 1875 made the president a member of the board of supervisors, it could not be held that such a change would not be as legitimate an element of re-incorporation as any other provision. Most of the great changes in our city organizations have come in under laws which did no more than to indicate by their titles a purpose to incorporate, or re-incorporate, or revise the corporate charter of the municipality dealt with. Anything which is meant to form a permanent element in municipal arrangements is pertinent to the incorporation. In the *Mackinac Case* the power of the president to act as a member of the board of supervisors is found in "An act to re-incorporate the village of Mackinac," adopted by the same Legislature that re-incorporated the village of Reed City. Local Laws of

1875, p. 436. If this was proper in re-incorporating one village, it must have been proper in another, under a title identical in character.

It is undoubtedly competent to introduce by amendment anything which might have been introduced in the original act.

The amendment was, therefore, not beyond the title and was valid. The *mandamus* is granted.

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

MORSE, J., *(dissenting)*. I think the writ should be denied in this case. By Act No. 331 of the Local Acts of 1875, the village of Reed City was re-incorporated, and placed under the general law for the incorporation of villages in this State. The title of the act was as follows: "An act to re-incorporate the village of Reed City."

Section 1 of the act describes the boundaries of the village, and constitutes the territory a village corporate, to be known by the name of "The Village of Reed City."

Section 2 reads as follows:

"The inhabitants, residents within the boundaries aforesaid, are hereby declared to be a corporation, and shall hereafter be known in law by the corporate name of 'The Village of Reed City;' and by that name they and their successors shall have perpetual succession, capable in law of suing and being sued, complaining and defending, in any court of law or equity, and may make and use a common seal, and alter the same at pleasure, and shall also have power to purchase, hold, and convey such real and personal estate as the purposes of the corporation may require.

"SEC. 3. The officers of said village now in office shall continue in office, with the same powers and duties as are conferred by this act upon like officers, until their successors shall be elected pursuant to the provisions of this act and the general law relating to villages, entitled 'A bill granting and defining the powers and duties of incorporated villages,' approved April 1, 1875.

"SEC. 4. All ordinances and resolutions of said village of Reed City shall continue in force until repealed.

"SEC. 5. Said village of Reed City is hereby made subject to the general law entitled 'An act creating and defining the powers and duties of incorporated villages,' approved April 1, 1875. Said village shall possess all the powers, and be subject to all the duties and liabilities, imposed by said act.

"SEC. 6. Said village of Reed City, as hereby incorporated, shall possess all the rights and property, and be subject to all the debts and liabilities, of the said village as heretofore organized."

This act took immediate effect, and was approved April 16, 1875.

It will be seen that the whole purpose and effect of this act was of an enabling and saving nature. The village of Reed City was at the time of its passage incorporated under a general law, supposed to be unconstitutional; and this method was adopted to save the organization under that law, and to keep the old officers in until their successors could be elected under the new law, and at the same time placing the village, as a re-incorporation, under the new law of April 1, 1875. There are no powers granted, or duties imposed upon, the officers of the village, save such as are to be found in the general law, and an amendment of the general law governs and controls this village, in every respect, the same as it does any other village under it; and this local act is powerless to prevent it. The charter of Reed City has been, ever since this local act was passed, the general law of the State defining the powers and duties of incorporated villages. This local act of 1875 served its purpose in its passage, and has since been obsolete and useless. It is practically dead. No one looks to it to ascertain the powers or duties of the officers of Reed City. The general law is now, and has been since 1875, the organic law of this village.

The Legislature of 1889, in attempting to create the president of the village of Reed City an *ex officio* member of the board of supervisors of Osceola county, did so by an amendment to section 3 of this obsolete act. The title of the act of 1889 is as follows:

"An act to amend section three of Act No. 331 of the Local Acts of 1875, entitled 'An act to re-incorporate the village of Reed City,' approved April 16, 1875."

Section 3, as thus amended, provides that—

"The president of said village, in addition to the powers and duties conferred upon him by said general law for the incorporation of villages, shall be *ex officio* a member of the board of supervisors of the county of Osceola, and he shall attend all the meetings of said board, and be entitled to vote upon all matters that may be brought before the board of supervisors; and for attending all such meetings he shall receive the same compensation authorized by law to be paid to supervisors of townships for similar services, to be audited by the board and paid by the county."

This amended act was ordered to take immediate effect, and was approved March 20, 1889.

It is plainly apparent to me that the author of this act intended to evade the constitutional provision that—

"No law shall embrace more than one object, which *shall be expressed in its title;*"—

And I think that in the attempted evasion this provision has been, practically, clearly violated, and that the act is therefore null and void.

The sole object of this act of 1889 is to make the president of the village a member of the board of supervisors of Osceola county. Is it expressed in the title? Would any one get notice, or even a hint, from an act to amend section 3 of the act to re-incorporate Reed City, that the object was to create a new member of the board of supervisors of Osceola county? Most assuredly not.

The question answers itself in the negative. If this proposed creation of an additional member of the board of supervisors of this county in this way had been attempted by an amendment of the charter of Reed City, which is the general law for the incorporation of villages, it would have been necessary to specify in the title the real object,—the creating of such supervisor by making the president of the village of Reed City an *ex officio* member of the board. The general law could not be amended to attain this end without a proviso or exception added to such general law, excepting Reed City out of the operation of the general law, which does not authorize village presidents to act as members of the board of supervisors, or providing that the president of this particular village should have this privilege, not granted to the presidents of other villages, and it would have to appear in the title what the object of this proviso or exception was. Or, if an act had been passed without amending any law, providing what is attempted in the act passed, it would have been necessary to state its object in the title; that it was—

"An act to make the president of Reed City, by virtue of his office, a member of the board of supervisors of Osceola county,"—

Or words to that effect. If this thing had been attempted, as it ought to have been, both honestly and constitutionally, the people of Osceola county would have been notified of the attempt, and it would not probably have succeeded. The object of the constitutional provision would have been then complied with. As it now stands, it has been not only evaded, but violated, both in spirit and letter.

This could, it seems to me, have been the only reason why this thing was done under an amendment of a section of an act as dead, for all purposes, as though it had

never been passed, or had been repealed. The people vitally interested in this legislation, the inhabitants of Osceola county,—save perhaps those residing in Reed City, —were misled and deceived by the title of this act while it was pending in the Legislature. The very thing against which the Constitution has attempted to guard has been accomplished by this act, and the people have been deprived of their right of protest against obnoxious legislation. And this has been done by a deceptive and fraudulent title.

It will be further noticed that section 3 of the act of 1875 contains no reference whatever to officers thereafter to be elected under the new charter, the general law of the State. It applies entirely to the officers of the old incorporation, and its express and only purpose is to save them in office until their successors in office are elected. It does not state what village officers there shall hereafter be elected in Reed City, and contains no reference to the powers and duties of the village officers.

This act of 1889 is therefore not germane to the section of the act it seeks to amend; and this section of the act is dead. The officers it saved have long since passed out of office; and its only use upon the statute book is that it testifies to what it has done, and shows its use.

I do not, under the previous rulings of this Court, question the right of the Legislature to create members of the boards of supervisors out of as many village officers as it may choose; but the policy of such legislation is doubtful, to say the least, and it is known to be against the wish, in almost every case, of the great body of the people interested. Such legislation is also generally obtained for personal or local ends, rather than for the public good. It is therefore necessary and proper that this kind of legislation be held to the strict requirements

of the Constitution. Such legislation, in my opinion, must be accomplished, not by a title, which simply gives notice of an amendment to a dead section of an obsolete act,—an enabling and saving act, which has long since served its only purpose, and passed out of memory,—but by an amendment, or an act, which shall express its real purpose plainly in its title, thereby giving due notice to those interested in its object as well as to the members of the Legislature who are to vote upon it.

CHAMPLIN, J., did not sit.

MERRILL B. MILLS v. HENRY N. BREVOORT, WAYNE CIRCUIT JUDGE.

Electric street railways—Injunction—Mandamus—Appeal on merits.

Relator applied for a *mandamus* to compel the respondent to set aside an injunction, and the Court, while finding that the proceedings below were not regular, not being convinced that there is any imperative necessity for summary interference, deny the writ, but without prejudice, etc.

Mandamus. Submitted October 29, 1889. Denied October 30, 1889. The facts are stated by the Reporter as a preface to the opinion.

The relator asks that a *mandamus* may issue to the respondent commanding him to set aside and hold for naught an injunction made on September 5, 1889, in the case of *Detroit City Railway v. Merrill B. Mills et al.*, then pending before said respondent, commanding the relator to absolutely desist and refrain from—

"Interfering with or obstructing the erection of poles and wires, and the construction, completion, application, and use of the system

of electric motive power, described in the bill of complaint, for the operation of the street railway on Mack street or avenue in the city of Detroit," etc.

The showing made by relator is that, as administrator of the estate of Merrill I. Mills, deceased, he has title to, and is in possession of, lands having a large frontage on said Mack street; that said street was formerly about 50 feet in width; that about three years since he and other persons living along said street, for the purpose of beautifying and enhancing the value of their lands, by making a grass plot or lawn on either side of the roadway of said Mack street, caused their fences to be moved back from the line of said street a distance of about eight feet on each side thereof; that the same was done by the petitioner without any order from the probate court of Wayne county, and was not done for the purpose of making a present to the city of Detroit; that he did not intend to give up actual possession of such ground, or to dedicate the same for street purposes; and that the city of Detroit has never condemned the same or any part thereof for street purposes.

That the Detroit City Railway, acting under an ordinance of the common council of the city of Detroit set forth in the petition, has caused to be erected on either side of the center line of Mack street certain posts or poles, which are so placed as to be about 40 to 41 feet apart when measured over and across and at right angles with the line of said street; that said posts or poles are placed outside of the ditch on either side of the roadway of said Mack street, and upon the grass plot or lawn on either side of said street; that the ordinances of the city of Detroit provide that the sidewalks on either side of Mack street shall be of a uniform width of six feet; that said posts or poles are so placed that they would stand in said sidewalk, and thereby become a great nuisance and inconvenience to public travel.

That, upon the erection of said posts, said Detroit City Railway proceeded to string wires from post to post, and has caused said wires to be charged with vast quantities and currents of electricity, and that they are thereby rendered dangerous to the health and life of persons having business upon and over said Mack street. That the Detroit City Railway is now running electric cars over said Mack street; that when one of said cars is passing

one of said posts it is impossible for a large loaded wagon to pass between said car and said post, because of the close proximity of said post to the track on which said cars run. That the erection of said posts and wires is a great damage to the estate of Merrill I. Mills, deceased, in that the same has destroyed the lawn in front of said lands, and for the further reason that said posts destroy the appearance of Mack street and the property abutting thereon, etc.

The return of respondent shows that he granted a preliminary injunction in said chancery cause, and afterwards an order suspending the same; that the counsel for complainant, the Detroit City Railway, renewed the application for a preliminary injunction, and that, believing that in so superseding the preliminary injunction he had not acted under a proper understanding of the facts, he at once caused a request to be sent to Mr. Look, counsel for defendant Mills, to appear in court with reference to the subject matter; that, at the time appointed, it was conceded by Mr. Look that the city had authority to permit the erection of poles within the lines of the highway, but that the poles were, as a matter of fact, not within the highway, but upon lands actually owned by the defendants; that he announced to counsel that he would visit the site, and endeavor to determine by observation whether the posts were within the highway; that he did so visit and inspect the site August 27, 1889, to which time said matter had been continued, and announced to counsel for complainant and defendants, who were present, that he was unable to determine by inspection whether the posts were within the limits of the highway, and that he would require proof on that question; that he fixed the 29th of August for the taking of such proofs; that the testimony of witnesses was taken on that day and the following day, and that from such testimony he found the following facts:

"1. That the complainant was a corporation, and was engaged in constructing an electric street railway on said Mack street, as alleged in the bill of complaint.

"2. That the highway known as Mack street, upon which the premises claimed by the defendants abutted, had been open and used by the public, and improved and cared for by the public authorities, for more than 20 years, for a width of 50 feet, at the place where the said premises of the defendants so abutted.

"3. That the complainant had called upon the board of public works to supervise the construction of the said electric railway, and that the said board, through the city engineer, had established the center line of its track along Mack street, and that the said track had been constructed on said line.

"4. That the poles in question had been erected by the complainant within lines of the highway, 50 feet in width, and were not upon the strips of land claimed to be owned by the defendants, which they had permitted the public to use by moving back their fences."

The return concludes as follows:

"Respondent found that the street railway company had commenced the construction of the road in July, and that the defendants and their employés, in combination with others, had several times cut down and destroyed the poles and appliances which had been erected; doing so under cover of the night, and it was apparent that they intended to continue doing so, and made no effort to conceal their intentions of so doing, and thus prevent complainant from completing its road and putting the same in operation within the time fixed by the ordinance; which course was likely to result, in the opinion of respondent, in serious breaches of the peace, and perhaps bloodshed and loss of life.

"That prior to said preliminary hearing, on the 29th of August, said defendants had filed an original, and defendant Mills an amended, answer, plea, and demurrer to the bill, copies of which are hereto attached and made a part of this return, and that the only order respondent entered in said cause was for the issuing of an injunction to stand during the pendency of the suit, and was not a final decree in said cause, or the final decision of the merits thereof.

"That said cause is still pending, and an order was, on September 24, 1889, entered therein by complainant for the taking of the proofs; that without the consent of counsel for the defendants said cause could not be brought on for a final hearing until the next January term of this court, which would be some time after the time allowed complainant to construct and put in operation the line on Mack street; that, if the complainant was not permitted to go on with the construction, the damage to it might and probably would be very great should the court finally decide in its favor; whereas, if it was permitted to continue and construct the road, and if, upon a final hearing, it be decided that complainant was not lawfully entitled to build the road, defendants could be restored to all their rights, unimpaired, by the taking down of the poles.

"That no objection was made on the hearing to the right or power of complainant under its articles of incorporation to build or

operate an electric street railway, nor was a copy of its articles of incorporation or other evidence introduced in relation thereto, nor was the question considered by me."

William Look and *H. F. Chipman* (*Don M. Dickinson*, of counsel), for relator.

Brennan & Donnelly and *Hoyt Post*, for respondent.

PER CURIAM. In this case it is important that any action we take shall be such as to settle effectually the rights of the parties. The controversy is one of the most serious character, and, in the case as it now stands before us, all we could do would be to set aside an injunction, which, whether right or wrong, has spent its principal force. The mischief has been so far done that we think it would be more satisfactory to have the contest before us on the entire merits on an appeal after hearing, so that affirmative relief may be granted to defendants if entitled to it, and the whole matter disposed of completely. In declining to act now we deem it proper to allow defendants to add to their answer a claim for the effect of a cross-bill.

The proceedings below were not regular, but, under all the circumstances, we are not convinced that there is any imperative necessity for summary interference. No costs should be allowed against the relator, and we do not wish to be understood as indicating any opinion against the defendants, on the merits.

The *mandamus* is denied without costs, with leave to amend the answer, and without prejudice to any rights of defendants in the ordinary course of practice.

RICHARD WINSOR v. PHILO B. LUDINGTON ET AL.

Mortgage foreclosure—Decree for deficiency against third party—Damages for breach of contract—Not cognizable in foreclosure suit.

1. In order to authorize a decree for the payment of the deficiency on a foreclosure sale against a third party, under How. Stat. § 6704, the obligation or evidence of debt of such party must be one upon which he can be sued at law to recover the mortgage debt.
2. A creditor attached lands subject to a mortgage, which mortgage he afterwards agreed to *purchase*, and on appeal from a decree holding him liable for any deficiency on foreclosure sale, it is *held* that in order to hold him his contract must have been to *pay* the mortgage debt, and that if there was a valid contract to sell him the mortgage his liability thereon could only extend to the damages the complainant would sustain by a failure to perform such agreement, which could not be litigated in the foreclosure suit.

Appeal from Huron. (Beach, J.) Argued April 11, 1889. Decided November 1, 1889.

Bill to foreclose a mortgage. Defendant Noble appeals. Bill dismissed as to appellant. The facts are stated in the opinion.

Winsor & Snover, for complainant, contended:

1. A guarantor of the payment of a debt secured by mortgage may be made a party defendant to its foreclosure, and a personal decree for the deficiency, if any, on the sale may be made against him; citing How. Stat. § 6704; *Johnson v. Shepard*, 35 Mich. 123, 124; and the same rule applies where the purchaser of mortgaged premises agrees to pay the incumbrance; citing *Crawford v. Edwards*, 33 Mich. 354; *Miller v. Thompson*, 34 Id. 10; *Taylor v. Whitmore*, 35 Id. 97; *Carley v. Fox*, 38 Id. 387; *Higman v. Stewart*, Id. 513; *Winans v. Willkie*, 41 Id. 264; and the makers of a joint and several mortgage note, although the mortgage is given by only one of them, must be made defend-

ants where a personal decree is sought; citing *Dederick v. Barber*, 44 Mich. 19; *Botsford v. Botsford*, 49 Id. 29; and the indorsor of a promissory note secured by mortgage is liable thereon; citing *English v. Carney*, 25 Mich. 178.

Divine & Babcock (*Elbridge F. Bacon*, of counsel), for defendant Noble, contended for the doctrine stated in the opinion.

SHERWOOD, C. J. The bill in this case is filed to obtain a decree of foreclosure of a certain mortgage made August 10, 1883, for the sum of $500, by Philo Ludington and Hannah, his wife, to Richard Winsor, to be paid in five years from date, with interest at 10 per cent., payable annually. The mortgage also contained a clause that in case the interest became due and remained unpaid for 60 days, the whole should become due, and foreclosure might be made for the whole amount, both principal and interest. The bill was filed July 23, 1886. Defendant Noble was made a party to the suit as a subsequent incumbrancer, and complainant asked for and obtained a personal decree against defendants Ludington and Noble for the amount due on said mortgage, and costs, and from this decree defendant Noble appeals.

It appears from the testimony in this case that the mortgage in question was assigned by Richard Winsor to William H. Baxter on February 13, 1884; that the defendants Noble & Wagner afterwards caused an attachment to be levied upon lands described in the mortgage, and other lands, and that there were two levies on this land, subsequent to this mortgage and prior to the levy made by defendants Noble & Wagner; that on November 25, 1884, and on February 9, 1885, Winsor & Snover wrote to defendants Noble & Wagner, stating that they held the mortgage in question, and asking if they (Noble & Wagner) did not wish to purchase it; that on April 1, 1885, defendant Noble wrote to Winsor & Snover that

if they would wait a short time he would buy the mortgage, and asked for a statement of the amount necessary to purchase it; that on April 1, 1885, Winsor & Snover wrote giving the amount at $586.67, and again, on April 9, wrote that they had procured an assignment from Baxter, to whom the mortgage had been previously assigned; that defendant Noble wrote in reply that he did not have the money then, but would take the mortgage on or before October 1 following. The following is his letter:

"Just at this moment I have no money, as I have loaned everything on mortgage this winter I could rake and scrape. I will, however, guarantee to take up the Ludington mortgage between now and October 1 next, and pay you all that is due on same, and will take it, anyway, just as soon as I can call in the money. Write me at 662 Trumbull, Detroit. I have a lot of fine 10 per cent. Huron Co. mortgages will trade you any time."

To which letter Winsor & Snover made the following reply:

"PORT AUSTIN, MICH., April 14, 1885.

"B. R. NOBLE,

"662 Trumbull Ave., Detroit, Mich.

"Yours on ours of the ninth. Will hold same for you on your guarantee to pay same by October 1. Would prefer to get the money sooner if you can so arrange.

"Yours, etc.,

"WINSOR & SNOVER."

The following letters seem to have closed the correspondence on the part of Noble:

"WINSOR & SNOVER,

"*Sirs:* Yours of the twenty-sixth received. When I made the promise to you to buy the Ludington mortgage I supposed, as I wrote you before, that your mortgage covered the buildings, or I should have never made it. Of course, I made a mistake, but do not want you to be out anything, and I think my offer to pay the interest in the mean time both fair and honorable under the cir-

cumstances, as it places you just where you were before I wrote you in the spring.

"Yours,
"B. R. NOBLE."

And the following gives the views of Winsor when the correspondence closed:

"Nov. 4, 1885.

"B. R. NOBLE, ESQ.,

"*Dear Sir:*. Your twenty-eighth ult. rec'd. You cannot place me where I was in the spring. I then had a chance to get formal service and secure the debt outside of the mortgage. I want this money to use in my private matters, at White Rock; and now, on the eve of wanting it, relying on you promise, cannot get it. No such offer as you make is satisfactory to me. I need the money, and shall expect it. Yours, etc.,

"R. WINSOR."

On May 12, 1886, the mortgage in question was assigned by Edward K. Baxter, administrator of the estate of William H. Baxter, to the complainant.

Noble testified that during the correspondence he had a conversation with the complainant, and asked him if the buildings were on the land mortgaged, and that complainant told him he supposed they were. This, however, the complainant denies, and says he told the defendant he understood not, and that Bacon, who made the loan, could give him the full particulars. It would appear the buildings were not on the land.

There is no question but that complainant is the lawful assignee of the mortgage in question. The defendant claims that the decree is erroneous, upon three grounds:

1. "Because there was no privity of contract between the complainant and defendant Noble in regard to the purchase of the mortgage;" that "the liability to authorize a personal decree must be one that can be enforced at law as a legal obligation;" that whatever liability Noble had incurred, if any, was to the firm of Winsor & Snover,

and not to Winsor; and that defendant was never liable personally for the amount of the mortgage debt.

2. Because the decree is an absolute personal one against the defendant Noble, and makes him liable for the whole debt equally with Ludington, the maker of the mortgage.

3. That if there was any liability at all under the alleged contract the most that could be claimed for it by the complainant would be the damages for refusing to purchase the mortgage, and there is no evidence of such damage in the case.

These grounds were all urged by defendant's counsel at the hearing. The power to make a personal decree against the makers of a mortgage upon real estate, or against others interested in its payment, upon a foreclosure in chancery, comes entirely from the statute. *Dunkley v. Van Buren,* 3 Johns. Ch. 330; *Johnson v. Shepard,* 35 Mich. 123; *Downing v. Palmateer,* 1 T. B. Mon. 67; *Culver v. Judge,* 57 Mich. 25 (23 N. W. Rep. 469). Our statute upon the subject (How. Stat. § 6704) reads as follows:

"If the mortgage debt be secured by the obligation or other evidence of debt of any other person besides the mortgagor, the complainant may make such person a party to the bill, and the court may decree payment of the balance of such debt remaining unsatisfied, after a sale of the mortgaged premises, as well against such other person as the mortgagor, and may enforce such decree as in other cases."

The remedy can be enforced only in those cases which are clearly within the terms of the statute. *McCrickett v. Wilson,* 50 Mich. 513 (15 N. W. Rep. 885); *Vaughan v. Black,* 63 Id. 215 (29 N. W. Rep. 523). There must be a liability upon which Noble could be sued at law for the mortgage debt to enable the complainant to sustain the decree against him. The only interest the defendant Noble had in the mortgaged property was by virtue of his attachment lien. This did not oblige him to pay

the mortgage debt. As against the mortgagee or his assignee it only gave him the right to redeem. He at no time agreed to pay the mortgage. His proposition was to buy the mortgage, and the complainant only charges this, and that he agreed to sell; but this is not the contract which would entitle the complainant to take the decree made by the circuit judge. It must be a contract to pay the debt that will make him liable under such decree. He is not a purchaser of the property subject to the mortgage, with a promise to pay it. His own interest which he had acquired was no more than a lien upon the property, and liable to be defeated at any time by redemption. By the decree, it will be noticed, Noble is held equally liable to pay the mortgage. If the complainant had a valid contract with Noble to sell him the mortgage, which we do not now decide, his liability could only extend to the damage complainant would sustain by failure to perform such agreement, and that could not be litigated in this foreclosure suit. Appellant Noble would have a right to defend against such liability in a suit at law and before a jury, and nothing appears showing such a suit would not afford an adequate remedy.

In no view that can be taken of this case can defendant Noble be made liable for this mortgage debt, and the points made by defendant's counsel are well taken, and the bill must be dismissed as to the appellant, with costs.

CHAMPLIN, MORSE, and CAMPBELL, JJ., concurred.

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ABRAM B. WRIGHT v. SYLVESTER STARKS.

Chattel mortgages—Ownership of mortgaged property—Evidence—Trover—Charge to jury.

1. A mortgagee of chattels may maintain trover against any person wrongfully interfering with his right to their possession, even before condition broken. *Grove v. Wise*, 39 Mich. 163; *Harvey v. McAdams*, 32 Id. 473.
2. The questions involved in this case are so intimately connected with the facts, as stated in the opinion, that an examination of the opinion is essential to their correct understanding, and it is not deemed desirable to embody them in head-notes.

Error to Ingham. (Gridley, J.) Argued June 6, 1889. Decided November 1, 1889.

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

Smith & York (*S. L. Kilbourne*, of counsel), for appellant.

E. D. Lewis (*R. A. Montgomery*, of counsel), for defendant.

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

SHERWOOD, C. J. This is an action of trover, to recover for a flock of sheep alleged to have been converted by the defendant. The case was tried in the Ingham circuit, before Judge Gridley, by jury, and the defendant prevailed. The plaintiff brings the case to this Court, and assigns 12 allegations of error.

The circumstances of the case, as the record presents them, are as follows: The parties to the suit were two

neighbors, living near each other, and both were farming in Ingham county. In December, 1880, defendant, on account of failing health, went to Florida, leaving his farm, farming implements and stock in the care and charge of his three sons, George, Hiram, and Ellsworth; George being the only one of age at the time. The three sons carried on the farm until defendant came home, in May, 1881. With a view of returning to Florida to live at this time, he sold his farm to his three sons, together with the personal property thereon, by contract, under which each son was to have an undivided third. The sons were all living upon the farm at the time. In the fall of 1881 defendant returned to Florida, and did not visit Michigan again until the summer of 1883.

In the fall George bought of the plaintiff 77 sheep, at an agreed price of $167, and gave his note therefor, due in June following. George failed to pay this note when it became due, and it was allowed to run until October 21, 1884, at which time he gave a chattel mortgage on 170 sheep, which were then upon the farm (and George was then living upon the same), to secure the payment of the amount due on the note at that time,—$179.97; the mortgage covering, as claimed, the same sheep purchased of plaintiff, and their increase, and a small flock purchased by George and put with the others upon the farm. The mortgage was duly filed on October 22, the day after it was given, and was made payable on or before June 15, 1885.

The defendant came to Michigan in the summer of 1884, and found things not agreeable among the boys on the farm. Hiram and Ellsworth were not satisfied with the management of George; and it is claimed by the defendant that he bought all of George's interest in the farm and the personal property thereon on August 2, 1884; that he paid George $500 therefor, and gave his

note for the same, due in two years, and took an assignment from George as follows:

"LEROY, August 2, 1884.

"Assigned all my right and title over to Sylvester Starks that I have in this contract, and he, the said Sylvester Starks, agrees to pay me $500 for the same.

"GEORGE W. STARKS. [L. S.]"

The note was offered in evidence, signed by Sylvester Starks, of the date, amount, tenor, and effect above stated.

It appears further from the testimony that after this assignment George was not at home much of the time that summer, but was at different places about the State; and that in the forepart of October, 1884, Sylvester Starks transferred his interest in the farm to Hiram and Ellsworth; that defendant returned to Ingham county again about the time the mortgage became due, and at which time plaintiff saw him, and had a conversation with him about the sheep and mortgage, in which plaintiff says defendant told him he owned the sheep; said George had no right to mortgage them when he did; that after the mortgage became due plaintiff went to the farm to get his pay, or the sheep mortgaged, and defendant forbade his taking the sheep; that plaintiff then sent a constable to take them under his mortgage, and defendant again refused to allow them to be taken; and he then brought this suit to recover their value.

The case is somewhat peculiar upon the testimony. It is not entirely free from difficulties, as presented. It presents some equitable features which cannot well be entirely left out of the consideration to be given to it. The plaintiff claims the debt he seeks to recover was known to the defendant and his three sons; and in whatever dealings he had with either of them, if their testimony is to receive credence, each have had the benefit

of his property, to a certain extent at least, for which he has never held or had anything but George's note, or note and mortgage; and that the property he let George have, with all of its increase, has never been out of the possession of Sylvester, or one or more of his sons. When George bought the sheep of plaintiff, so far as the record shows, he bought them for himself; and George, in his bill of sale to his father, does not appear to have included these sheep, and down to the time George left the premises he never claimed to the plaintiff that he had sold them, or any interest in them, to any one; and when he gave the chattel mortgage to plaintiff, which was several weeks after the defendant claims he bought them of George, and after the bill of sale was dated, he says in it, the sheep "are free and clear from all liens, conveyances, incumbrances, and levies," and he further authorized plaintiff, at any time when he should deem himself insecure, to take possession thereof. George told the draughtsman who filled out the mortgage, at the time it was made, that the mortgaged sheep were his; and there was testimony in the case that defendant, after the mortgage was given, said he had nothing to do with the sheep, and that he offered to give the plaintiff a note, which defendant claimed was good, of $150, on the plaintiff's debt.

There was also some testimony given tending to show that the sale of the sheep to the father by George was not a *bona fide* sale, and that plaintiff knew nothing of the sale until after he had brought this suit, and that George made his home upon the farm with his brothers until after the mortgage was given. There was also testimony given tending to show that, while George purchased all the mortgaged property, still his interest therein was but an undivided one-third thereof.

There were no special findings by the jury, but the verdict was general for the defendant.

With a single exception, the questions presented by the exceptions all refer to the instructions given or refused by the court in making his charge to the jury.

The testimony ruled in the case against objection of plaintiff's counsel relates to what was said and done at the time defendant offered, as he says, to pay the plaintiff a good note on George's indebtedness for the sheep,—whether the note was good or bad. The objection was that it was immaterial. I do not think the testimony was material. The defendant did not claim that he owed George anything for which he was authorized to make payment on the note for George, and the plaintiff did not claim any original liability on the part of defendant to make payment for the sheep. The plaintiff's claim against defendant was that defendant refused to let plaintiff have the property when he was entitled to the possession under his chattel mortgage.

At first view, it would seem the error was a harmless one. A few moments' consideration, however, leads to a different conclusion. The first impression is that the offer of the note to pay for the sheep would only show an equitable obligation on the part of defendant to pay for the property, for which George was liable, but this would not raise the legal liability to pay under the mortgage, which was the plaintiff's only claim for the money, and the foundation of his interest in the sheep, and his right to their possession; and, while the testimony went to support defendant's theory of ownership of the property, it was entirely inconsistent with all of the plaintiff's rights under his theory to make his money out of the property, and was serious error to the plaintiff's case, and the testimony should have been excluded.

It was the theory of the plaintiff that George was the owner of the property when the mortgage was made; that it was made to secure an honest indebtedness of George; and that the interest claimed by his brothers was only a pretense, and that the claimed ownership of the defendant was only a sham and a fraud; and this theory was strongly urged to the jury by learned counsel for the plaintiff. There was testimony in the case tending to establish each of these positions, and the plaintiff had the right to have the case go to the jury upon his theory, as well as upon the theory of the defendant; and, had this been done, the verdict would have been final in the case.

It was claimed by the defendant no demand was made for the sheep after the mortgage became due. The plaintiff could only recover upon his theory of the case, and, under that, the demand testified to by plaintiff and his witnesses was sufficient, as against the defendant, if made before or after the mortgage became due. The original note was given up when the mortgage was taken, and George's promise to pay was contained in the mortgage.

"A mortgagee of chattels may maintain trover against any person wrongfully interfering with his right to the possession of the mortgaged property, even before condition broken." *Grove v. Wise*, 39 Mich. 163; *Harvey v. McAdams*, 32 Id. 473.

Under the theory of the plaintiff, the oldest son, George, was the owner of the property when he gave the mortgage, and the defendant and the other two sons were fraudulently making claim thereto, and the defendant, under the circumstances, stood in no more favorable position than he would if he had been a stranger to the property claiming to own it, and when plaintiff attempted to

assert his rights, he found himself confronted by defendant, who threatened to protect his possession under his pretended title by the use of arms, if necessary; and this theory of plaintiff found support in the testimony he put into the case, and the court should have charged the law applicable to such a case, and directed the jury to apply it if they found such facts to exist.

The plaintiff's first, second, and third requests should have been given as requested. They are as follows:

"1. No question is made in this case but that the chattel mortgage, when given, was valid to incumber all the right, title, and interest which George W. Starks had in the sheep at the time it was given, and that the mortgage was duly recorded so as to protect the plaintiff in all his rights under it against all subsequent purchasers.

"2. If the jury find that George W. Starks was the owner of, or had any interest in, the sheep at the time the mortgage was given, and the defendant prevented the plaintiff from taking the sheep, or foreclosing his mortgage after it became due, in the manner claimed by the plaintiff, then the plaintiff is entitled to recover the amount or the value of the interest George had in the sheep, to the full amount of the chattel mortgage, and interest thereon.

"3. Unless the alleged sale of the sheep by George to his father, in August, 1884, was accompanied by an immediate delivery, and was followed by the actual and continued change of possession of the sheep, such sale was presumptively fraudulent and void as against the plaintiff, and is conclusive evidence of fraud, unless it is made to appear on the part of the defendant that the sale was made in good faith, and without any intention to defraud the plaintiff, or any other creditor of George W. Starks."

Instead of giving these, or either of them, the court refused them all, and, in referring to the last, told the jury that when plaintiff surrendered up the note he took for the sheep, and received in its stead the chattel mortgage, he ceased to be a creditor of George within the statute. This was error. The mortgage contains an

express promise of the mortgagor to pay the debt, and it appears without any contradiction that the plaintiff at all times held George's express promise to pay for the sheep plaintiff sold to him.

The plaintiff's fourth, fifth, and sixth requests were properly refused, except as given in the general charge.

Several other questions are raised upon the record, and referred to in the assignment of errors, principally relating to the charge as given, which we do not think it necessary or profitable to discuss, as under the views herein expressed there is no probability they will recur upon a retrial of the case; but for the errors mentioned a reversal must be had, and a new trial granted.

CHAMPLIN, MORSE, and CAMPBELL, JJ., concurred.

COMMISSIONER OF HIGHWAYS OF GARFIELD TOWNSHIP v. SUPERVISOR OF SPRINGFIELD TOWNSHIP.

Judgment against highway commissioner—Not attackable in mandamus proceedings against supervisor—Jurisdiction of justice of the peace.

1. In *mandamus* proceedings against a supervisor to compel the assessment of taxes to pay a judgment rendered against the commissioner of highways, properly certified to him, and which has not been appealed from, vacated, or discharged, the only inquiry that arises is, did the court have jurisdiction?
2. A commissioner of highways is treated by chapter 283, How. Stat., as a [municipal] corporation, and a justice of the peace has no jurisdiction of a suit against such officer, unless conferred by Act No. 312, Laws of 1887.

Mandamus. Submitted June 7, 1889. Denied November 1, 1889.

Relator applies for *mandamus* to compel respondent to assess certain taxes. The facts are stated in the opinion.

William D. Totten (*J. L. Boyd,* of counsel), for relator, contended:

1. In support of the proposition that the respondent cannot go behind the judgment, in *mandamus* proceedings, counsel cited: *Lloyd v. Circuit Judge*, 56 Mich. 237; *McGunn v. Hanlin*, 29 Id. 480; *Mabley v. Judge of Superior Court*, 32 Id. 190; *O'Brien v. Tallman*, 36 Id. 13.
2. The parties to this record are not the identical parties to the judgment, which cannot be collaterally attacked; citing *Jacobson v. Miller*, 41 Mich. 94; and if they were the same the merits of the case cannot be here reviewed, because once adjudicated; citing *Jacobson v. Miller*, 41 Mich. 90, 94; *LeGuen v. Gouverneur*, 1 Johns. Cas. 436, 502; *Pierson v. Reynolds*, 49 Mich. 224, 225.
3. A commissioner of highways can be sued in justice's court, because—

   a—The statute regulating the general jurisdiction of justices of the peace as against corporations expressly states that "all actions against corporations, except municipal corporations, shall be cognizable before a justice of the peace," etc.; citing How. Stat. § 6361.

   b—A highway commissioner is not a municipal corporation, but on the contrary this Court has held such officer to be a *corporation* in respect to suing and being sued, such suits not being affected by change of incumbents; citing *Commissioners v. Stockman*, 5 Mich. 528, 529; and see, also, How. Stat. §§ 8215–8217.

Willis B. Perkins, for respondent, contended for the doctrine stated in the opinion.

LONG, J. On June 18, 1887, a judgment was recovered by the commissioner of highways of the township of Garfield against the commissioner of highways of the township of Springfield, in the county of Kalkaska, before a justice of the peace, for the sum of $100 damages, and $7.20 costs. A certified transcript of the judgment was filed with the supervisor of the township of Springfield in the year 1887, and a demand made upon him to

spread the same upon the tax roll of his township, which he refused to do. His successor in office for the year 1888 also refused to cause said tax to be levied, or to spread the same upon the tax roll of his township. Application is made to this Court for *mandamus* to compel the supervisor to spread this amount, with interest, upon the tax roll of this township.

The respondent's answer admits the judgment, as set forth in the petition, and there is no contention but that the judgment is not appealed from, vacated, or discharged. The respondent alleges, however, in his answer, that he is not bound to assess the amount of the judgment, and claims the right to go behind the judgment to dispute the grounds upon which it was rendered. This he cannot be permitted to do in this proceeding.

The only inquiry that arises is, did the court have jurisdiction? Upon this point it is contended that no suit could be maintained against a highway commissioner of a township before a justice of the peace. How. Stat. § 6861, provides that—

"All actions against corporations, except municipal corporations, shall be cognizable before a justice of the peace in like manner and with like restrictions as the same are or may be by law before a justice of the peace when brought against an individual."

Chapter 283, How. Stat., specifically confers upon the commissioners of highways the power to bring suits in their name of office, and also provides that actions against any of the officers or bodies named in the second section of that chapter shall be brought against them by the same name in which such officers or bodies are authorized to sue. Commissioners of highways are required to bring such suits in their name of office, and their individual names are not allowed to be used; and with reference to prosecuting and defending suits, and the

abatement and discontinuance thereof, such officers are treated as a corporation. It is evident that the whole chapter treats such officers as a corporation, the suit being in no way affected by changes of incumbents.

Even if the statute of 1887 now confers jurisdiction upon justices of the peace to hear and determine suits against highway commissioners, the act had not taken effect at the time judgment was so rendered. Act No. 312, Laws of 1887. The justice therefore had no jurisdiction, and the judgment is a nullity.

The writ of *mandamus* must be denied, with costs.

The other Justices concurred.

THE CONNECTICUT FIRE INSURANCE COMPANY v. EDWARD D. KINNE, JUDGE OF THE CIRCUIT COURT FOR MONROE COUNTY.

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[See 73 Mich. 1.]

Fire insurance—Pleading—Amendment of declaration—New cause of action.

1. A declaration in the usual form upon an insurance policy cannot be amended so as to claim damages for the failure of the defendant to deliver a policy of insurance in conformity to an alleged *verbal* agreement, the *causes* of action being independent and distinct.
2. A declaration upon an insurance policy which contains a guarantee on the part of the insured "that there shall be a clear space of 200 feet between staves and heading and mill," cannot be amended so as to eliminate said clause from the policy, under an allegation that the same was inserted either through mistake or fraud, and was never assented to by the insured.

Mandamus. Submitted June 19, 1889. Granted November 1, 1889.

Relator applies for *mandamus* to compel respondent to vacate an order allowing an amended declaration to be filed. The facts are stated in the opinion.

Norris & Norris, for relator.

Cramer & Corbin, for respondent

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

MORSE, J. Neil O'Donnell and Hugh O'Donnell, composing the firm of N. & H. O'Donnell, brought suit in *assumpsit* in the Monroe county circuit court against the Connecticut Fire Insurance Company. The suit was commenced by summons. A declaration was filed, to which the defendant company filed a plea of the general issue. A trial was had, and judgment rendered in favor of the plaintiffs, February 21, 1888, for the sum of $1,083.48. The case came to this Court, and the judgment was here reversed, and a new trial granted. It will be found reported in 73 Mich. 1 (41 N. W. Rep. 95).

The declaration was upon the policy as it read. The case was treated on the trial in the court below as a suit upon a contract for insurance, as claimed by the plaintiffs, which differed materially from the contract as contained in the policy of insurance. The property insured is described in the policy as follows, with the insurance taken thereon:

"$1,000 upon their stock of staves and heading, contained in sheds and open yards; $200 upon frame barrel-house; $200 upon cooper stock therein,—all situated in yard east of and adjacent to their stave and heading mill, situate at Dundee, Monroe county, Mich."

The policy also contained the following, among other clauses:

"Other insurance permitted. It is guaranteed that there shall be a clear space of 200 feet between staves and heading and mill."

The property burned was a quantity of heading, of the value of $1,000. It was conceded on the trial and in this Court that the property, when burned, was not 200 feet from the mill; but it was located in the same place as when insured, and the agent of the insurance company knew its location at the time of taking the insurance. The plaintiffs were allowed to recover in the circuit court upon the theory that the company agreed to insure this heading in their yard just where it stood, and that the condition as to the 200 feet space was put in the policy without the knowledge or consent of the plaintiffs, and that they knew nothing of such insertion until after the fire, when they for the first time examined the policy; that the clause was a mistake or a fraudulent interposition; that plaintiffs paid the insurance company the premium in good faith, upon the order they gave for the insurance of their property as it stood; and that they were therefore entitled to the benefit of their contract as made. We held that this theory was not permissible under the declaration filed in the cause.

After the decision in this Court, and on January 17, 1889, a *remittitur* was filed in the court below, and the cause, March 12, 1889, noticed for trial for the April, 1889, term of that court by defendant. March 14, 1889, plaintiffs entered a motion for leave to file an amended declaration, and filed a copy of their proposed declaration as amended. Upon a hearing of this motion, which was resisted by the defendant, the circuit judge made an order granting the motion. A motion was then made to

vacate this order, which was denied. We are now asked to compel by *mandamus* the vacation of the same.

The amended declaration is in two counts. The first count sets out an oral contract for insurance, substantially as plaintiffs claimed they had established it on the first trial. It alleges that plaintiffs made a verbal application to defendant for insurance; that in response to said application the agent of the defendant called at plaintiffs' place of business, and there examined all the property to be insured, which was pointed out to him; that he then and there saw the property, and knew its location with respect to the stave-mill; and, after such examination and designation, well knowing its location, he contracted on behalf of said defendant to insure said property for the sums hereinbefore stated, in consideration of $28 then and there paid by plaintiffs to defendant, for one year, and also agreed that defendant would issue a policy of insurance to plaintiffs in accordance with said contract; that defendant did not deliver the policy as agreed, but delivered a policy containing this clause:

"It is guaranteed that there shall be a clear space of 200 feet between staves and heading and mill."

Plaintiffs further allege that at the time said defendant inspected the property, as before stated, said staves and heading were not 200 feet from plaintiffs' mill, and such fact was known by the defendant at the time of the making of the contract for insurance, and that the clause in reference to the 200 feet clear space was written in the policy delivered by said defendant either through mistake or fraud, and without the consent or knowledge of the plaintiffs.

Plaintiffs aver that they never knew of or consented to this clause in the policy, and that such clause is a fraud upon them; that they relied upon the contract as made

by them, and did not examine or read said policy until after the burning of said staves and heading. The destruction by fire of the staves and heading is then alleged, whereby the plaintiffs claim damages in the sum of $1,000—

"By reason of the defendant not performing its said contract and agreement for insurance so made with the plaintiffs as aforesaid, and by not executing and delivering to the plaintiffs a policy of insurance therein, and thereby insuring the plaintiffs against loss or damage by fire upon said property, according to the terms of said contract and agreement for insurance so made as aforesaid, and by fraudulently inserting in said pretended policy said 200 feet clear space clause."

The second count consists of the original declaration, with the following amendment, inserted after the allegation of the insurance of the property by a written policy of insurance, to wit:

"And these plaintiffs allege that the said defendant did, at the time and place aforesaid, either through mistake or fraudulently, insert and write in said policy the following words and figures, to wit:

"'It is guaranteed that there shall be a clear space of 200 feet between staves and heading and mill.'

"Which last words or clause was never assented to or known to be in said policy by the said plaintiffs, nor assented to by them in any way at the time of making said contract and agreement and policy of insurance; and the plaintiffs allege that they never knew of said clause in regard to the 200 feet until after the said staves and heading were burned, as hereinafter mentioned, nor did they ever in any way consent to the same; nor should the said clause be held as a part of said policy, so far as these plaintiffs are concerned, but should be held as a mistake or fraud as regards them."

Some minor amendments are also made to conform to this main amendment, so that the declaration becomes in fact a claim of insurance based upon the policy issued,

with the 200 feet space clause eliminated therefrom as a mistake or fraud.

It is conceded that the policy of insurance contains a limitation clause as to the bringing of suit, and it is claimed by the relator,—this limit being one year, and having passed at the time the amendment was made,—that, if a new suit was begun, this limitation could be pleaded in bar of plaintiffs' claim; that if the amendment is allowed to stand, this right to plead is defeated; that the amendment, as allowed, sets forth a new and distinct cause of action, and therefore should not be permitted. See *Gorman v. Judge,* 27 Mich. 138; *Mich. Cent. R. R. Co. v. Judge,* 35 Id. 227. But it is contended by the respondent that this limitation contained in the policy is not only doubtful in its validity, but could be waived by the defendant or its agent, and therefore the cases cited, which apply to the statute of limitations, are not in point here.

It seems to me that the first count of the amended declaration introduces a new cause of action. The original declaration, as before said, counted upon a written contract of insurance, and claimed damages for the breach of that contract in the failure or refusal to pay the amount of the insurance upon loss by fire without the fault of plaintiffs. The first count of the amended declaration claims damages for the refusal of the defendant to deliver a policy of insurance in conformity to a verbal agreement, by which the plaintiffs were deprived of the insurance upon their goods for which they had contracted. These are two independent and distinct causes of action, although both sound in *assumpsit,* and may be said to grow out of the same transaction. Does our statute of amendments, in the discretion of the circuit judge, allow an amendment of this character? We think not.

It is further objected to the second count in the amended declaration that it seeks to reform and alter the contract sued upon by striking out the "200 feet space" clause in a court of law, and that this can only be done in equity. In this count the plaintiffs plainly sue upon the policy as it would stand with this clause omitted, and charge that such clause was inserted without their knowledge and consent, by the defendant, the relator, by mistake or fraud; and insist that they have the right to treat and sue upon said contract as if no such clause was inserted in it. If this can be done, it is clear that no new cause of action is substituted by the amendment, and the allowance of the amendment would be properly within the discretion of the court. It would be substantially the same cause of action, the variance being only in the terms or conditions of the contract sued upon to meet the proofs as developed on the trial of the cause. If a mistake were made in setting out a contract in a declaration, as to some of its terms and conditions, there can be no doubt that the trial court would have the power to allow an amendment to be made to correct such mistake.

The only question to be considered is whether or not this alleged mistake or fraud in the writing of the insurance policy can be corrected in a court of law in the manner here sought to be done. We are satisfied that it cannot be so corrected.

The writ of *mandamus* is therefore granted as prayed, with costs against the plaintiffs in the suit, Neil and Hugh O'Donnell.

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

SHERWOOD, C. J., *(dissenting)*. I cannot concur in the opinion of my Brother MORSE in this case. It was

never necessary that a contract of insurance should be in writing in order to be binding upon the company after it received the premium from the insured, and recognized its obligation in such manner to pay when there had been no fraud on the part of the insured, and the policy is only for the purpose of evidencing the terms of the contract. In a suit to enforce the liability of the company it may be brought on the contract for insurance as well as upon the policy. The claim, or cause of action, is the same in both the contract and the policy. The damages, and the measure thereof, are also the same under each, and ascertained in the same way, and are recoverable in the same form of action under each; and a breach of one is always a breach of the other, as the policy must always include and be based upon the contract for insurance. The latter, in fact, determines the terms and conditions of the former, and the former can contain no element different from the latter. For this reason a declaration containing a count upon the one may always be amended by adding a count upon the other without introducing a new or different cause of action; and such I conceive to be the question in the present case, and I have no doubt of the correctness of the action of the circuit judge.

I think the *mandamus* should be denied, with costs.

JAMES B. BOLE v. THE SANDS & MAXWELL LUMBER COMPANY (A CORPORATION.)

Pleading in justice's court—Misnomer of defendant in declaration —If properly summoned, not a jurisdictional defect.

1. Where, in a suit in justice's court, the defendant, a corporation, was correctly named in the summons as "The Sands & Maxwell Lumber Company," and the plaintiff declared orally "against the *defendant*, a corporation doing business under the name of the 'Pentwater Lumber Company,'" and, in default of defendant's appearance,—the summons having been personally served,—a judgment was rendered against it in its *corporate* name, the record will be given such construction as will support the judgment, by construing the language in the declaration as stating that the *defendant* was doing business under the name of the Pentwater Lumber Company.
2. A variation in a declaration from the summons in stating the name of the defendant is not a jurisdictional defect, and may be amended by the court under How. Stat. § 7633; and where it is not, the amendment will be treated as made after judgment has been rendered in the cause.
3. Where the correct name of a defendant is given in the summons, and in the judgment rendered on default, after personal service, the judgment cannot be reversed, impaired, or in any way affected by reason of defendant's name having been incorrectly stated in the declaration. How. Stat. § 7635.

Error to Oceana. (Russell, J.) Submitted on briefs October 8, 1889. Decided November 1, 1889.

Assumpsit. Plaintiff brings error. Judgment of circuit court reversed, and that of justice's court affirmed. The facts are stated in the opinion.

James Brassington, for appellant.

W. E. Ambler, for defendant.

CHAMPLIN, J. In this case the summons issued by the justice of the peace was duly served upon the defendant corporation. Upon the return-day the plaintiff appeared in person and by attorney. The cause was duly called, and the defendant did not appear, and, after waiting more than one hour, the defendant not appearing, the plaintiff declared orally, which declaration was entered by the justice in his docket as follows:

"The plaintiff made declaration orally against the defendant, a corporation doing business under and by virtue of the laws of the State of Michigan, at Pentwater, Mich., under the name of the 'Pentwater Lumber Company,' in a plea of trespass on the case upon promises, and upon all matters provable under the common counts in *assumpsit,* and claims damages of $300 or under."

The defendant not appearing, the plaintiff proceeded to trial. A witness was sworn for the plaintiff, and no one was sworn for defendant; and, after hearing the proofs and allegations, the justice forthwith rendered judgment in favor of the plaintiff and against the defendant, The Sands & Maxwell Lumber Company, for $25.40 damages, and costs of suit, taxed at $7.60.

Within the proper time thereafter the defendant filed its affidavit for, and perfected, a special appeal to the circuit court for the county of Oceana. The error alleged in the affidavit is as follows:

"That there is and was no declaration in said cause against the Sands & Maxwell Lumber Company, as required by law. That the declaration in said cause was and is against a different corporation,—to wit, The Pentwater Lumber Company,—from the corporation named in the summons issued in said cause, to wit, The Sands & Maxwell Lumber Company."

The affidavit further alleges—

"That there is a corporation, to wit, The Pentwater Lumber Company, organized and existing under the laws

of this State, and doing business at Pentwater, Mich., but is an entirely separate and distinct corporation from the corporation, The Sands & Maxwell Lumber Company."

For the error alleged the circuit court reversed the judgment rendered by the justice, and to review the action the plaintiff brings the case here.

We are unable to perceive any such error as is assigned by the defendant in the affidavit for special appeal. The summons was against the defendant in its corporate name, and was duly served and returned. The court had jurisdiction of the subject-matter and of the parties. The Sands & Maxwell Lumber Company was defendant in the action. The plaintiff declared "orally against defendant," and alleged that it was—

"A corporation doing business under the name of the 'Pentwater Lumber Company.'"

This language is somewhat ambiguous, but the record should be given such construction as will support the judgment, and it is consistent to construe the language as stating that the Sands & Maxwell Lumber Company was doing business under the name of the "Pentwater Lumber Company." We think the declaration should be construed as against the defendant in form and substance. The judgment was rendered against the defendant by name, and, in effect, as upon default upon the non-appearance of defendant.

Section 7633, How. Stat., provides that after judgment in any cause any variation in the record from any process, pleading, or proceeding had in such cause shall be reformed and amended according to such original process, pleading, or proceeding. Under this section, if there was a variation in the declaration from the summons in the name of the party defendant in the declaration, it

could have been amended by the court. It was not a jurisdictional defect; and where it is not, the amendment will be treated as made after judgment has been rendered in the cause. Section 7635, How. Stat., enacts that no judgment upon default shall be reversed, impaired, or in any way affected by reason of any mistake in the name of a party when the correct name shall have been once rightly alleged in any of the pleadings or proceedings. If the name was wrong, as alleged, the judgment should not have been reversed. The correct name was rightly alleged in the summons, and again in the judgment.

The judgment of the circuit court will be reversed, with costs, and that of the justice affirmed, with costs of both courts. A judgment will be entered here for $25.40 and interest at six per cent. from May 11, 1887, the date of judgment, and for costs, to be taxed.

The other Justices concurred.

JEROME EDDY v. ARTHUR C. MCCALL.

[See 71 Mich. 497.]

Chattel mortgages—Assignment of—Affidavit for renewal.

1. An affidavit of renewal of a chattel mortgage upon a stock of lumber and other material kept for sale in connection therewith, including all other lumber, stock, or material of every kind which the mortgagors might thereafter add to said business, which states that the mortgagee's interest in the chattels described in the mortgage remains unchanged, and is hereby renewed for the amount claimed to be due upon the mortgage, is sufficient to continue the mortgage in force as to such *after-acquired* property.

2. Where a chattel mortgage had been assigned as collateral security, but was surrendered by the assignee to the mortgagee before he brought suit for an alleged illegal attachment of the property, said assignee assenting to such suit and accepting other securities in lieu of the mortgage, but not formally re-assigning the same, the defendant cannot complain that his interests, if he has any, were affected by such assignment.

Error to Genesee. (Newton, J.) Argued October 8, 1889. Decided November 1, 1889.

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

Edget, Brooks & Conway, for appellant.

Baldwin & Eddy, for plaintiff.

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

SHERWOOD, C. J. The plaintiff brings trover to recover of the defendant, who is sheriff of the county of Genesee, for a certain quantity of lumber seized by him under a writ of attachment issued in favor of one Littlefield against Samuel J. Lewis. The property was subsequently sold under an execution issued in the case.

The plaintiff bases his right to recover upon a chattel mortgage given to him by Lewis and wife prior to the attachment proceedings, and which had been kept in force by proper renewals. The case was first tried at the December term of the Genesee circuit, and a verdict was rendered for the defendant, which was subsequently reversed on appeal to this Court. See 71 Mich. 497 (39 N. W. Rep. 734.) On the second trial the verdict was for the plaintiff, and the proceedings in that trial are now before us for review. A full statement of the facts appear in the opinion given when the case was first before us, as will be seen by a reference thereto.

In the present case the defenses urged at the circuit were substantially as follows:

1. That the renewals of the plaintiff's mortgage were not in compliance with the statute, and did not have the effect to keep the plaintiff's security alive as against the attachment and execution levy.

2. That the plaintiff, before the bringing of the suit, had assigned the mortgage, and was not at the time of the institution of the suit the legal holder thereof.

3. That by a settlement effected between the mortgagors and the mortgagee the mill and other property had been turned over to the mortgagee in complete and absolute satisfaction of the debt, and had thereby terminated all interest in the mortgage and the mortgaged property."

The other facts litigated on the trial related to the measure of damages.

The principal points relied upon in this Court are: That the renewals of plaintiff's chattel mortgage were not in compliance with the statute, and did not have the effect to keep the plaintiff's security alive as against the attachment and execution levy; that the plaintiff, at the time of the institution of the suit, was not the legal holder or owner thereof; that a settlement between parties to the chattel mortgage was made, by which the mill and other property had been conveyed to the mortgagee in full satisfaction of the chattel mortgage debt; that errors were committed by the court in the admission of testimony, to the prejudice of the defendant in making his defense. Thus it will be seen that the same defenses are relied upon in this Court as were passed upon at the circuit.

The first point was ruled against defendant when the case was formerly before us, and we have discovered nothing changing our views then expressed.

The second point is not well made. The facts upon which it was based were passed upon by the jury under

a proper charge by the court. The mortgage had been assigned as collateral security by the plaintiff to one Whaley for an indebtedness to him, but was surrendered to the plaintiff, before suit was brought by the assignee, who assented to plaintiff's bringing this suit, and accepted other securities for the payment of the indebtedness. Certainly the defendant could not complain that his interests, if he had any, were affected by this transaction.

The third point was settled by the verdict of the jury in favor of plaintiff. If no error was committed in the rulings, in taking the testimony, or in the charge upon that subject,—and an examination of the record discloses none,—further review of the testimony and the charge could serve no useful purpose in this opinion.

The judgment must be affirmed.

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

JOHN P. JAMINET v. THE BOARD OF SUPERVISORS OF MONROE COUNTY.

Justices of the peace—Jurisdiction—Fees.

There is no statute forbidding action by a justice of the peace without the consent of the prosecuting attorney, when he takes security for costs, and the board of supervisors have no right to assume to criticise his action within his lawful jurisdiction, or to be governed by the prosecuting attorney's views of policy, nor can they refuse to audit the legal fees of the justice for services so rendered.

Mandamus. Submitted October 8, 1889. Granted November 1, 1889.

Relator applies for *mandamus* to compel respondents to audit and allow his bill for justice's fees in a criminal prosecution. The facts are stated in the opinion.

I. R. Grosvenor, for relator.

Seward Baker, Prosecuting Attorney (*C. A. Golden,* of counsel), for respondents.

CAMPBELL, J. Respondents refused to allow the fees of relator in a criminal proceeding before him for disturbance of public worship, in which the respondent was tried and found not guilty, but in which the justice certified there was probable cause for prosecuting. It appears that the justice before issuing the warrant took security for costs.

The supervisors purported to base their action on the ground that the warrant was issued without the approval of the prosecuting attorney, and without security for costs; that the prosecuting attorney disapproved of the prosecution, and the justice proceeded after knowing of such disapproval; and that, in the opinion of the board, it was essentially a private prosecution.

There is no statute brought to our notice forbidding action by a justice of the peace without the consent of the prosecuting attorney, when he takes security for costs, and the board of supervisors have no right to assume to criticise his action within his lawful jurisdiction, or to be governed by the prosecuting attorney's views of policy. His files show the proper recognizance for costs, and must be respected as showing it. It would be very dangerous for the public interests if a judicial officer, acting within his powers, must depend for his compensation on the view that may be taken of the wisdom of his conduct by the board or prosecuting attorney. Every officer must be respected when exercis-

ing his lawful authority, and any interference with it, except such as the law permits, is unjustifiable.

The justice is entitled to his fees, and the *mandamus* must be allowed as prayed, with costs.

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

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BENJAMIN F. ROSE, GUARDIAN AND TRUSTEE, v. JOB C. EATON, SHERIFF, AND JACOB MCCARTY, DEPUTY-SHERIFF.

Replevin—Possessory action—Review of non-jury case in Supreme Court—Construction of will.

1. Where it appears from an examination of the record that there are no material *disputed* facts to be settled in the case, but that the whole issue turns upon the construction of a will, and is a matter of law, the case is open to review on a general exception to the judgment and its entry.
2. The action of replevin in this State is a possessory one, and a stranger to the property is not concerned with the title of one in actual and peaceable possession.
3. Unless the defendants in a replevin suit by a judgment debtor for property seized on an execution against him, and of which he was in the peaceable possession, can show that it was his property, at the time of such seizure, they will fail to establish their right to interfere with such possession; and they cannot preclude his recovery by showing ownership in third persons not joined with him as plaintiffs.
4. Where, in a replevin suit by a father for wheat belonging to his five children as tenants in common, which had been levied upon by *his* creditors, he showed himself in the peaceable and actual possession of the property, as the legal custodian of *three* of his children, the defendant cannot question his right to the possession of the wheat belonging to the other *two* children, or demand that the suit to recover the *whole* property should be brought by *all* of the children.

5. The will set forth in the opinion is construed as vesting the title to the devised land in plaintiff's children, and it is held that the clause in the will giving plaintiff his support and living out of the estate of the children does not give him a life-estate therein, nor does the fact that he has appropriated all the income of the estate to his own use since the death of the testator, or that he has leased the farm in his own name, change the rights of the children.

Error to Monroe. (Kinne, J.) Argued October 9, 1889. Decided November 1, 1889.

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

John O. Zabel and *G. Morris,* for appellants.

H. A. Lockwood and *I. R. Grosvenor,* for plaintiff.

[The opinion fully states and discusses the positions of counsel.—REPORTER].

MORSE, J. The bill of exceptions and the errors assigned in this Court confine us to an examination of the whole case upon the facts, to ascertain whether the facts support the judgment of the circuit court, which was in favor of the plaintiff. The case was tried by the circuit judge in the Monroe circuit, without a jury. No findings of fact were filed, and none were requested by either party.

The only exception upon which the assignments of error are or can be based is the following:

"Whereupon the issue so joined as aforesaid was submitted to the said court as aforesaid; and thereupon, on November 22, 1888, the said court rendered judgment in favor of the said Benjamin F. Rose, guardian and trustee, as plaintiff, and against the said Job C. Eaton and Jacob McCarty, as defendants, for the sum of $101 damages, besides plaintiff's costs to be taxed; and the clerk of said court did forthwith enter in the journal of said court

the said judgment as rendered by said court. To the entry of said judgment, the determination of said court, and the several rulings of the said court, as set forth in the testimony of said witnesses, the counsel for said defendants did then and there except."

No errors are assigned on the rulings as to the reception or rejection of evidence. The only exception is to the judgment, and the entry of the same. The entry of the judgment is correct in form.

It is contended by the appellee that the judgment must be affirmed without review of the facts or the law as applicable to the same; that a general exception to a judgment like this, if the judgment is good in form, is not available to raise any questions in the Supreme Court; citing *Chatterton v. Parrott,* 46 Mich. 432 (9 N. W. Rep. 482); *Yelverton v. Steele,* 40 Id. 538, 540; *Tuxbury v. French,* 41 Id. 7, 10 (1 N. W. Rep. 904); *Treasurer of Berrien Co. v. Bunbury,* 45 Id. 79, 83 (7 N. W. Rep. 704); *Green v. Gill,* 47 Id. 86 (10 N. W. Rep. 119); *Irwin v. Schlief,* 48 Id. 237 (12 N. W. Rep. 220); *Butts v. Davis,* 50 Id. 310 (15 N. W. Rep. 486).

An examination of the record shows that there are no material disputed facts to be settled in the case. The whole issue turns upon the construction of a will, and is a matter of law. We shall therefore hold that the case is open to review here.

The plaintiff, as guardian and trustee, brought replevin against the sheriff and a deputy-sheriff of Eaton county for a quantity of wheat raised on certain premises, and levied upon and taken into possession by these officers, as his property, by virtue of an execution running against him. The lands upon which the wheat was grown were owned, in 1875, by Oliver T. Rose, the father of the plaintiff. In that year Oliver T. Rose died, leaving a last will and testament, which was duly admitted to pro-

bate. This will made the plaintiff executor. He qualified as such. The estate was settled, and the executor discharged, February 1, 1887. The will provided:

"*First.* I give and bequeath unto the heirs of my son B. F. Rose that his wife, Susan, has by him, or may have by him hereafter,—the said wife that he is now living with,—all the farm which I now live on, being my homestead; and also the Wing & Cole tract of land adjoining east from said homestead, situated in the township of Summerfield, and all thereto belonging. I also declare it to be my last will and bequest that my son B. F. Rose shall have his support and living out of the estate that I have hereby given to his children, so long as he shall live.

"*Second.* I give, devise, and bequeath to my beloved wife, Sylvia, one-third of the profits of my homestead farm on which I now live, and one-third of the Wing & Cole tract, as long as she shall remain my widow.

"*Third.* I also give and bequeath and devise unto my granddaughter Louisa Rose, daughter of my son Oliver T. Rose, Jr., deceased, five hundred dollars ($500) out of the proceeds of my personal estate.

"*Fourth.* I will, devise, and bequeath that after the payment of my just debts, and of my last sickness and funeral expenses, the remainder and residue of all my estate, real and personal, consisting of land, money, mortgages, and other evidences of indebtedness, shall be equally divided between my son, B. F. Rose, my grandson Royal Barber, son of my daughter Elizabeth, deceased, and my daughter Mary D. Rose, and their heirs, by my administrator, and, in case of the death of any of the above-mentioned heirs, the property hereby devised to go to next nearest of kin, equally."

It is claimed by the plaintiff that under the will, and by its terms, the land upon which the wheat in controversy was grown belonged, at the time of the levy, to the children of the plaintiff born of his wife, Susan, and now belongs to them. These children, living at the time of said levy, and at the commencement of this suit, were Minnie A. Gramkie, about 25 years of age, and married and living away from home, and Oliver T., Laura, Eliz-

abeth, and Jennie, minors, living with the plaintiff. January 24, 1880, the plaintiff was by the probate court of Monroe county appointed guardian unto his children, described in the letters of guardianship as Minnie A., Oliver T., Laura J., and Henrieta E. Rose, and Susan A. Vandercook. The last-named died without issue before the levy on this wheat, and Jennie has been born since the issue of said letters of guardianship. After the death of Oliver T. Rose, the father of plaintiff, the farm was managed by plaintiff as executor until the estate was settled and his discharge from his trust. None of the children except Minnie are now of age. Minnie married since the appointment of her father as guardian, and soon after or just before she was 21 years of age. Since that time he has managed the farm, as he claims, as guardian and trustee of the children who own it. He has never rendered any account of such management as guardian to the probate court, and has kept no particular account between himself and the children. He has boarded, clothed, and otherwise maintained all of them, except the married daughter, who has been married and lived away from home for four years. He fitted her out at the time of her marriage, and she had some provisions from the farm the first year after she was married.

The wheat taken under the writ in this case was raised on shares by one Stull, who had leased the premises of plaintiff for three years, with the privilege of five years. The lease was made by the plaintiff, as it appears in the writing, as Benjamin F. Rose, without any designation of guardian or trustee. One-half of the crops raised on the place were by the lease to be delivered to plaintiff in the half-bushel, as his share.

May 10, 1875, Sylvia, the widow of Oliver T. Rose, for and in consideration of $400 to be paid her annually by said Benjamin F. Rose, by quitclaim deed conveyed to

plaintiff all her right, title, and interest in the real estate of her husband, and all her claims against his estate.

It will be noticed that the will provides that the plaintiff shall have his support and living out of the estate devised to the children of himself and his wife, Susan, and the wife of the testator, Sylvia, is to receive, as long as she remains his widow, one-third of the profits of the homestead and the Wing & Cole lands. This share of the widow the plaintiff held at the time the wheat was grown and harvested. When the wheat grown by Stull in the year 1888 was threshed, the half that was going to plaintiff under the lease was set apart for him,—about 208 bushels. This the officer levied upon and seized, releasing and setting off to him 75 bushels, retaining 133 bushels, for which this suit is brought.

It is claimed by the defendants that this land did not vest in the children; that the plain intent of the will was to give the care, possession, and management of the homestead farm to plaintiff while he lived; that, Benjamin F. Rose being still living, his heirs cannot now be determined. One has been born since the death of Oliver T. Rose. One has also died without issue. Those now living may all die before the termination of plaintiff's life, and other heirs may be yet born to him by his wife, Susan, who is still living; so that his heirs may prove to be persons not yet in being. That Benjamin F. Rose has a life-interest in the farm subject to the widow's claim of one-third of the profits, which has been purchased by plaintiff and now belongs to him, and that the conduct of Rose in the management of said farm, and disposition of the grain and produce raised upon it since the death of his father, has been a practical construction of the will as claimed by defendants, to wit, a life-estate in the plaintiff.

Rose did not show upon the trial, or allege in his declaration, that he was trustee for any particular person or persons. The defendants further claim that, even if it be found that the homestead did vest in the children, the plaintiff must succeed in this suit, if at all, as guardian of the children; that he cannot recover in his own right, nor as trustee; and he is not now the guardian of Minnie, who has been of full age and married for four years, and Jennie has been born since he was appointed guardian, and has never had a general guardian appointed; that, being natural guardian of Jennie, he might have been entitled to the appointment of next friend to bring suit, but nothing of this kind was done; that, therefore, he had no right to sue for the interest of these two children, and that he could recover for only three-fifths of the wheat taken, there being five children now living.

We think that the title to the land is in the children of the plaintiff, and Susan, his wife. The clause in the will that the plaintiff should have his support and living out of the estate of the children does not give him a life-estate therein. Nor does the fact that he has appropriated all the income of the farm to his own use since the death of his father, or that he has leased the premises in his own name, change the rights of these children. He claims, and it is not disputed, that there has been no profit from the homestead, and that the proceeds of the same have all been used to support himself and the children. What he has done with the children's share of such proceeds over and above his living,—whether or not he has accounted to the probate court, or whether he has kept an account with the children,—does not concern his creditors, who have no interest in or lien upon the children's property. If he has systematically set himself about cheating his children out of the proceeds of this farm which belongs to them, it does not authorize his

creditors to seize such property, before he has converted it, to pay his debts. The 208 bushels of wheat was the property of the children, unless it can be said to have been profits of which he was entitled to one-third as assignee of Sylvia. But the showing is that there have been and are no profits. Under the lease to Stull, the plaintiff furnished one-half of all the seed used and stock kept on the farm, paid the land tax and half of the threshing bills, and there is nothing to show that his statement that there were no profits is not a true one. He had the management and control of the farm at and before his father's death, and has had it ever since. He testifies that he is managing and taking care of it for the benefit of his children, in whose behalf he made this lease. As guardian of three of them he has the right to do this. The daughter of age alone can complain as to her share, and, as the natural guardian of Jennie, he is the proper person to care for her share until a guardian is appointed, to which appointment he would be entitled.

We think the probable intent of the testator was that during his life the plaintiff should work, care for, and manage this farm, having his living and support out of it, one-third of the profits, if any, to go to the widow, Sylvia, and the balance of the profits to the children. If he had intended to give a life-estate to the plaintiff, he would undoubtedly have said so. He meant, however, it appears to me, that, if anything was realized out of the farm over and above the living and support of plaintiff, it should belong to the children. The fact that the plaintiff received about $8,000 worth of property under the fourth clause of the will confirms the opinion that only what was given him in express terms—his support and living—was devised, or intended to be devised, to him out of the homestead and the Wing & Cole tract of land.

Having the rightful possession of this wheat, as the property of his children, at the time it was levied on, the technical objections to his suit are of but little moment.

It is admitted that he told the officers that the wheat belonged to his children, and forbade their taking it. He was the proper custodian of this property, and it was lawfully in his possession. No one had a better right to such possession than he, and no one could question such possession excepting the married daughter as to her share of the same, and a lawfully appointed guardian of Jennie as to her share. But the daughter does not complain, and Jennie has no guardian save a natural one, who is her father, the plaintiff. He had the right to regain this lawful possession by the writ of replevin, and it is not important in what technical character he sues. He might have sued in his own name, and showed upon the trial, as he did in the present case, that he was in the actual and lawful possession of the property when it was taken. The action of replevin in this State is a possessory one, and a stranger to the property is not concerned with the title of one in actual and peaceable possession. Unless the defendants in this suit could show that the wheat was the property of Benjamin F. Rose at the time they seized it upon an execution against him they had no right to meddle with his possession of it, and they could not preclude his recovery of such possession by showing an interest in the same in third parties, and that such third parties were not joined with him in the suit. See *Van Baalen v. Dean*, 27 Mich. (annotated edition) 104 and notes.

This suit was brought to regain the lawful possession of the plaintiff. He showed himself in the peaceable and actual possession of the property as the legal custodian of three of his children, and that the wheat, beyond

question, belonged to his five children as tenants in common. The defendants, showing no claim against, or right of possession to, the children's property, could not question his right of possession to the wheat belonging to Minnie A. and Jennie, or demand that the suit to recover the whole property should be brought by all the children. They took it from the plaintiff without right, and he was entitled to its return or its value.

The judgment is affirmed, with costs.

The other Justices concurred.

SAMUEL SHEPARDSON v. SAMUEL F. STEVENS.

Equity—Deed—Undue influence—Reconveyance.

In this case complainant seeks to cancel a deed of his farm, executed to the defendant, the real consideration for which was the maintenance and support of the complainant upon the farm during his natural life, by the defendant, which agreement the Court find has not been performed by the defendant, nor can it now be kept for reasons stated in the opinion; and that complainant's grievance can only be redressed by a reconveyance of the farm, which is decreed. The case is essentially one involving questions of fact.

Appeal from Macomb. (Canfield, J.) Argued October 9, 1889. Decided November 1, 1889.

Bill to set aside a deed and for a reconveyance of the property. Complainant appeals from decree dismissing bill. Reversed and decree granting relief prayed for entered in this Court. The facts are stated in the opinion.

Dwight N. Lowell (*A. B. Maynard*, of counsel), for complainant, contended:

1. From the pleadings and proofs complainant insists that there is a clear case for equitable jurisdiction, and that there is fraud and undue influence,—constructive fraud, growing out of the time, and the relationship and condition of the parties,—and a total want and failure of consideration.

2. It is not necessary to show either insanity or incompetency, but, from the relations of the parties, the condition of complainant's mind arising from grief at the loss of his wife, and the confidence reposed in the defendant the same as a son, in connection with an inadequate consideration, or failure of consideration, a court of equity will presume fraud and undue influence, and avoid the deed unless the defendant makes a clear and conclusive showing of fairness and good faith, and clears himself from such presumption; citing *Allore v. Jewell*, 94 U. S. 506; *Harding v. Handy*, 11 Wheat. 103; *Crawford v. Hoeft*, 58 Mich. 10; *Farmer's Ex'r v. Farmer*, 39 N. J. Eq. 211; *Condit v. Blackwell*, 22 Id. 481; *Porter v. Woodruff*, 36 Id. 174; *Tate v. Williamson*, 1 Eq. Cas. (L. R.) 528; *Cowee v. Cornell*, 75 N. Y. 91; *Boyd v. De La Montagnie*, 73 Id. 502; *Hall v. Perkins*, 3 Wend. 631; *Whelan v. Whelan*, 3 Cow. 572; *Case v. Case*, 26 Mich. 484; *Thorn v. Thorn*, 51 Id. 177; *Humphrey v. West*, 40 Id. 597; *Griffith v. Godey*, 113 U. S. 89; *Taylor v. Taylor*, 8 How. 183; *Seeley v. Price*, 14 Mich. 541; *Bowe v. Bowe*, 42 Id. 195.

Eldredge & Spier, for defendant, contended:

1 When one comes into a court of equity seeking to set aside a transaction from which he has received material benefits without making or offering to make restoration, his prayer for relief ought to be denied; citing *Bumpus v. Bumpus*, 59 Mich. 95; *Terry v. McClinstock*, 41 Id. 492, 502; *Connors v. Detroit*, Id. 128; *Goodenow v. Curtis*, 33 Id. 505; *Prout v. Wiley*, 28 Id. 164; *Miller v. Cornwell*, 71 Id. 270.

SHERWOOD, C. J. The bill in this case is filed for the purpose of obtaining a decree setting aside a deed made by complainant to the defendant of 120 acres of land lying in the township of Armada, in the county of Macomb, and being a farm upon which complainant had made his home for more than thirty years. The consid-

eration stated in the deed is the sum of $6,000, but which was in fact to be the maintenance and support of the complainant upon his farm for and during his natural life by the defendant. The conveyance was made June 8, 1886.

The defendant appeared and answered the bill, and the cause was heard on pleadings and proofs in the Macomb circuit before Judge Canfield, who dismissed the bill, with costs against complainant, and he now appeals to this Court to grant him the relief for which he prays.

The bill was filed August 14, 1888. The complainant at the time he made the deed to defendant, it is claimed, was about 60 years of age, had no children, and, but six days before, had lost his wife, and was left entirely alone in his home. The defendant, who had lived in the family of complainant from the time he was eight years of age until he was 21, and who was the nephew of the complainant, at the time of making the deed was married, and lived at North Adams, in the state of Massachusetts, and had always manifested much respect and affection for his uncle, who had in return, on several occasions, expressed his intentions to make him heir to his property.

The record shows that the defendant came from Massachusetts on learning of the death of his aunt (complainant's wife), and was present at her funeral, and afterwards remained a few days with his uncle; and complainant states in his bill that it was during this period, and while he was borne down with grief, and the desolate condition of his home, and not knowing what to do, the defendant proposed to abandon his business in Massachusetts, and come with his family and live with and make a home for complainant, and care for him, and that in consideration of defendant's promises and agreements so

to come and make him a home, and support him in health and in sickness during life, complainant agreed to deed the lands set forth in the bill to defendant, and that he did execute and deliver a deed thereof accordingly, which was recorded, the expressed consideration of which was $6,000, but the true and only consideration therefor was said agreement, which was recited on the face of the deed; that complainant has frequently requested defendant to come and perform his agreement, but that he refuses, and has not performed, and still neglects and refuses so to do; that defendant took an undue advantage of complainant's condition to obtain the title of the lands by his said promise and agreements, and that it was only by reason of the fact of his grief and desolate condition, and the promises of defendant, that he obtained said deed; that he had left complainant without a home or support, and he has been obliged to make it for himself; that the value of the lands, $6,000, was made wholly by complainant's labor; that defendant obtained the deed solely upon the promise and consideration of his performing such agreement, and that the agreement was made by him to obtain the title, without intending to perform it; and that the consideration has wholly failed, and the defendant has fraudulently obtained the title, and still holds and refuses to perform or reconvey.

Complainant asks for a cancellation of the deed, and a reconveyance of the property to him, or that a decree to that effect may be made, to operate as a conveyance, and for general relief. Such is the substance of the bill and complainant's prayer.

The answer made by defendant admits the residence, relationship of the parties, the deed, ownership of the lands, the death of complainant's wife, and that he had no children; the execution of the deed, with its recital;

the record; the residence and business of defendant, and that he formerly lived with complainant; states that he aided complainant with money in the improvement of the farm; that he was treated as a son, and was informed he was to have the farm, which induced him to expend money for complainant; that by reason of relationship, and the money he had expended for complainant, the deed was made; that the proposition of making the deed was complainant's; denies that as an inducement he agreed to remove to the lands and make his home thereon and support complainant; that when complainant proposed to secure him upon the farm it was talked that, as soon as he could, he would, with his family, remove to the farm, and then, with the proceeds, support complainant; that such has been his intention, but he has been delayed by litigation and sickness, and complainant has consented to the delay; denies that he promised to remove to the farm and support complainant as a consideration for the deed; and avers that he was only to do it as he reasonably could; that his remaining has been with the consent of complainant; denies that he took undue advantage of the condition of complainant to get the title by reason of any promises.

Defendant denies that he has violated his agreement; and avers that complainant has had the use of the farm; that he has visited complainant, and aided him in arranging his household, until his marriage; that he has put up a monument for complainant at a cost of $500; that the monument was talked of when the deed was proposed; denies that the deed was obtained by fraud, or that he has made any promise he has not fulfilled as an inducement of making the deed; avers that until the marriage of complainant, in August, 1887, there was no suggestion that his remaining at North Adams was not fully approved; denies that complainant has requested him to perform the

agreement; denies that he has fraudulently obtained or holds the title to the lands, or that he has intended not to remove to the lands; and avers that his delay was by complainant's consent; denies the equity of the bill, and asks the advantage of demurrer,—and this is the substance of the answer.

It is apparent from what appears in the testimony that the complainant's object in making the deed was to secure a place in the family of defendant, in his old home upon his farm; and to obtain it he was willing to give in exchange for it all his property. The deed itself bears strong evidence of this. After reciting that the consideration was $6,000, we find the following clause:

"The said party of the first part reserves the use, occupancy, and possession of said premises for and during the term of his natural life, to secure to himself the comfortable support, in health and sickness, by said second party, which forms the consideration hereinbefore expressed."

His continued home upon the farm, with such care and comfort as he could only expect from his kindred and relatives, and in this case which he had good reason to suppose he could receive from a kind and affectionate nephew, who had been reared in his family, and for 13 years was a member of his own household, who knew all of his wants and necessities in his old age, and how to administer to and supply them, were what he desired, and they were what constituted the consideration for the deed he gave of his property; that there can be no question but that both uncle and nephew understood the nature and character of the consideration which the latter was to give alike. I think no one can read the record in this case and come to any other conclusion than that this nephew comprehended fully the obligation and duty he placed himself under towards this old uncle

when he entered into the agreement he did with him, and received the conveyance of the property in question; and that under it it was his duty, within a reasonably short time, to remove upon the complainant's homestead, and there, in the house and home of the old gentleman, and there, in defendant's own family, discharge all the obligations which his contract imposed, in an acceptable and reasonable manner. No legal construction was required to be given to his contract with the complainant to inform him of his full duty in the premises. The testimony in the case shows that filial relations existing between these parties was relied upon by complainant, and ought to have been sufficient to secure the full performance of the contract between them on the part of the defendant; and courts of equity, when called upon to enforce such agreements, will take in consideration these relations, and the duties they impose, and, while they cannot enforce such duties in all cases, they will carefully look into the circumstances of each case presented, and see to it that the rights they can enforce and preserve of the injured party are not prejudiced by any disregard of such duties.

There are but two questions in the case needing further consideration:

1. Has the defendant performed his agreement with the complainant, as herein construed, constituting the consideration for the conveyance of the complainant's farm?

2. If he has not, can he do so in the future, and make proper and adequate recompense and reparation for his past delinquency?

Without bringing into this discussion of these questions the testimony upon which I base my judgment, and by which it is fully supported, though it conclusively appears in the record, I shall content myself with a brief statement of the conclusions I have reached in the case.

As to the first question, it is not seriously urged that defendant has yet made such performance as a reasonable execution of the contract on his part would require; but he seeks to excuse his failure to perform on the ground of sickness in his family, and the acquiescence of complainant in the course pursued by defendant.

It is apparent from the testimony that sickness of defendant or of his family did not preclude him from performing his contract made with the complainant; and it is equally apparent that the aversion of the defendant's wife and children to remove to the farm had much more to do with defendant's failure to perform, and I do not think the acquiescence of complainant in the defendant's delay to comply with his agreement is made out in the proofs. Upon this point no more appears than he submitted with composure to that which he could not prevent; but at no time did he willingly consent to being left alone, or to the indefinite postponement of the duties and obligations which the defendant, by his contract, had assumed.

The failure of the defendant to perform his agreement being established, upon the decision of the second question depends the nature and character of the relief to be granted, if any. It is impossible for the defendant now to carry out his contract made with complainant. It is not in the defendant's power to furnish to complainant in the future that which he could only enjoy in the past. Two years of that home life and its surroundings promised by the contract has been lost to the complainant, and which the defendant can never restore to him. Added to this also has been the mortification of complainant over the loss of the title to his farm, and the control of it, only as he could use it in making his living, which was one of the things he sought to avoid when he made his contract with the defendant. Indeed, if not

probable, it is possible, that the time which has elapsed since the making the contract may be the last two years of complainant's life, and, should this be so, the defendant would secure the property without giving any consideration therefor. And, after waiting more than a year for the defendant to redeem his promises with complainant, he found himself obliged to provide for himself the care and attention of some one who could sympathize with him, and administer to his wants and infirmities as he passed into old age, if such should be his fortune, and complainant married his second wife in the month of July, 1887, and with whom he lived at the time of filing his bill in this case.

Under these circumstances it is very manifest the grievance of which the bill makes complaint can be redressed only by a reconveyance of the property to complainant, and I think the decree at the circuit should be set aside, and a new decree should be entered in this Court in accordance with the prayer of the bill, with costs of both courts.

It is claimed in any event the defendant should be re-imbursed for the money he paid out for a monument for complainant for his deceased wife. Under the pleadings in the case we can make no order for such payment. We may say, however, that justice would seem to require that this should be done by complainant.

The other Justices concurred.

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EBER PINKHAM v. HARVEY COCKELL.

Bills and notes—Special payee—Proof of handwriting—Notice required of taking depositions—Notaries public—Evidence—Admission of letters.

1. The provision of How. Stat. § 7463, that where the distance exceeds 240 miles 20 days' notice shall be sufficient of the taking of depositions, was not meant to enlarge the time, in any case, beyond the period of one week-day for each 20 miles, but to fix a maximum which should suffice for distances beyond 240 miles.

2. The presumption, according to the general custom, is that a notary public can administer oaths.

   So *held*, where a deposition was taken in another state, to which was attached the certificate of the proper officer that the person before whom the deposition was taken was a notary public of said county, duly commissioned and sworn, and that his acts as such were entitled to credit.

3. It is certainly legal and proper for a person to appoint a special payee of funds in his own interest, and there may be contract or other relations calling for it.

4. Where one or more letters, purporting to come from a certain person, are recognized by him in subsequent transactions, that may, in some cases, be admissible on questions of handwriting. But the mere receipt of letters purporting to be from a person never seen, and with whom no subsequent relations existed which were based on them as genuine, has no value as means of knowledge.

5. Where there is no direct knowledge of handwriting, there must be something which assures the recipient of letters, in a responsible way, of their genuineness, before he can swear to their writer, or use them as comparisons of handwriting.

   So *held*, where a witness called to prove an indorsement on a note, testified that he never saw the purported indorser write, but had one or two letters from him, and saw two or three that a bank had, and *thought* the signature was his.

Error to Oceana. (Dickerman, J.) Argued October 9, 1889. Decided November 1, 1889.

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

W. E. Ambler (*L. G. Rutherford,* of counsel), for appellant, contended:

1. A. only can indorse a note payable to A. for the use of B.; citing 2 Par. Bills & Notes, 4; Chitty, Bills, 202; 1 Dan. Neg. Inst. 610; *Smith v. Kendall,* 6 Term Rep. 123; *Feltmakers v. Davis,* 1 Bos. & P. 101 (note c).
2. Where a bill is payable to the order of two or more persons who are not partners, all must indorse; citing *Ryhiner v. Feickert,* 92 Ill. 305; *Lane v. Stacy,* 8 Allen, 42.
3. The object of a corporate name is to identify the corporation; citing *Walrath v. Campbell,* 28 Mich. 112.
4. If a person to whose order a bill is meant to be payable is wrongly designated, or if his name is misspelled, he may negotiate the bill by indorsing it as described; citing *Chenot v. Lefevra,* 3 Gil. (Ill.) 637.
5. If the parties bear two names which are quite similar, but not the same, it seems to be held that no evidence is admissible to show that any person was payee with the right of indorsement excepting him who bore that very name; citing 2 Pars. Bills & Notes, 4; *Bolles v. Stearns,* 11 Cush. 320; Edwards, Bills & Notes, 251.
6. The question of title to the note or property therein is one of the necessary requisites to enable plaintiff to recover, and, if the law does not raise the presumption in his favor by the construction of the instrument, he must offer evidence to show the fact; citing *Redmond v. Stansbury,* 24 Mich. 445; *Peabody v. McAvoy,* 23 Id. 526; *Spicer v. Smith,* Id. 96; *Robinson v. Wilkinson,* 38 Id. 299.

Gurney & Travis (*F. J. Russell,* of counsel), for plaintiff, contended:

1. We insist that the note was to be paid to the First National Bank at Boise City, the same as commercial paper is frequently made payable at a bank, but that E. Pinkham was in fact the payee, and that his indorsement controlled, and that appearing in blank the note was payable to bearer, though Cockell could have paid it when due at the bank, at Boise City.
2. How. Stat. § 7463, providing for notice where the distance exceeds 240 miles, was designed to provide a maximum limit

for long distances which under the other rule would require a longer time.

3. The certificate to the deposition shows that Philip A. Hoyne is a notary public, duly commissioned and sworn, and whose acts as such are entitled to credit; and when he acted as such notary, as in this case, and the certificate says that those acts are entitled to credit, it will be presumed that he acted within the scope of his powers; citing *Bank v. Deyo*, 6 Cow. 732.

CAMPBELL, J. Plaintiff sued defendant in the Oceana circuit court, and recovered on the following instrument:

"$1,235.00. Six months after date, for value received, I promise to pay to the First National Bank of Boise City, Idaho, in favor of E. Pinkham or order, the sum of twelve hundred and thirty-five dollars, with interest at eight per cent. per annum. HARVEY COCKELL.

"*Chicago, Dec.* 11, 1885."

The declaration, in a special count, set up this paper, and averred—

"That the E. Pinkham mentioned in said written promise is the plaintiff in this suit, and that, to wit, on the day and year and at the place aforesaid, and after the making of said promise, the said First National Bank of Boise City, Idaho, assigned all its right, title, and interest in and to said promise or contract to the said plaintiff."

It also contained the common counts for goods sold and delivered, and for work and materials, as well as the money counts, with notice that the plaintiff would introduce in evidence, under the money counts, the promissory note before referred to. The copy annexed contained nothing but the face of the paper.

The defendant pleaded the general issue, and gave special notice of want of consideration, and set out that the paper was given in a horse trade, in which plaintiff gave false representations and a false warranty; and asked for recoupment of damages.

On the trial the paper in question was introduced in evidence, and showed on its back this indorsement:

"E. PINKHAM."

"Pay to the order of Citizens' Exchange Bank (Hart, Mich.), for collection, for account of First Nat. Bank of Idaho. JOHN HUNTOON, Cashier."

A line had been drawn through all the words between "Pinkham" and "First Nat. Bank." etc.

Against defendant's objection, this note was received in evidence, without any proof of signatures of any one; and plaintiff's attorney, Mr. Travis, proved the computation of interest, and was the only witness produced by plaintiff in making out his opening case. Defendant's counsel cross-examined Mr. Travis, who swore that his firm received the paper, in the spring of 1887, from the bank at Hart, having the indorsement, with no part of it erased, and that they sent it to the First National Bank of Idaho, from which it came back, with the erasure. Whether this was before or after the suit—which was by attachment—was begun, he could not say.

On redirect examination, he testified that he never saw Huntoon write, but had one or two letters from him, and saw two or three the Citizens' Exchange Bank had, and thought the signature was his. The note did not come into the hands of witness till after due. He was not sure of having received more than one letter, and whatever he had were lost or destroyed. In response to plaintiff, he said the letter-head read, "First National Bank, Idaho," and John Huntoon signed as cashier; that he did not know but there were two national banks at Boise City, Idaho,—one First National Bank, Boise City, Idaho, and one First National Bank, Idaho. Defendant objected again to the introduction of the instrument for want of sufficient proof of Huntoon's signature, or of his authority to sign, and also because it does not purport to be signed on behalf of the bank named in it, but on

behalf of a different bank. The court overruled the objections, and plaintiff rested his case.

Defendant put in testimony in support of his plea; showing the note was given for a lot of horses warranted and represented to be sound, and that they were worthless,—most of them dying, and the rest of no value. The testimony, if believed, made out a full defense.

Plaintiff introduced himself, and some other witnesses, in rebuttal,—including two letters of defendant, which he claimed were the only two he happened to have kept, and to which defendant's counsel objected, because the rest of the correspondence should have been produced. The question of handwriting of these became immaterial.

Plaintiff offered a deposition taken at Chicago, before a notary public, which was objected to because there was no proof he was a proper officer, although properly certified to be a notary,[1] and because the notice should have been 20 days, and was short of that. The affidavit of Mr. Ambler was introduced that the distance from Pentwater to Chicago was 240 miles, and it was more than 242 miles to the notary's office. Plaintiff's counsel made affidavit that it was not more than 229 miles to Chicago, and not more than 6 miles further to the notary's office, according to an annexed time-table. According to this table, the distance from Pentwater to the notary's office would appear to correspond with defendant's showing, and not with plaintiff's, if we add up the figures correctly, from the printed record. There may be some error in this; but it certainly seems that the objection was valid, if 20 days' notice was needed; and, as the deposition was *ex parte*, it was not waived.

Defendant was not permitted to give evidence, in

[1] The clerk's certificate shows "that Philip A. Hoyne is a notary public in said county (Cook), duly commissioned and sworn, and whose acts as such are entitled to credit."

answer to plaintiff's rebutting evidence, as to the remainder of his correspondence with plaintiff on either side.

The court, against objection, held and treated the paper sued on as established, and belonging to plaintiff, and did not leave any question to the jury, except as to the facts pleaded in defense.

The statute concerning depositions requires at least one day's notice for each 20 miles travel, with a provision that where the distance exceeds 240 miles 20 days' notice shall be sufficient. How. Stat. § 7463. We do not think this was meant to enlarge the time, in any case, beyond the period of 1 week-day for each 20 miles, but it was only to fix a maximum which should suffice for distances beyond 240 miles. There is no reason why 11 days should suffice for 220 miles, and 7 additional days be allowed for the additional 21 miles. We do not think the deposition was bad for lack of notice; and, as we must hold the presumption, according to the general custom, that a notary can administer oaths, we do not think Mr. Hoyne should be held incompetent to do so without proof. If the statutes of Illinois give him no such power, it can be shown by the statute-books.

We can see no reason why defendant should have been prevented from showing the full correspondence between him and plaintiff. The letters introduced by plaintiff were brought in on rebuttal, and defendant had no occasion to introduce testimony on the subject earlier.

Apart from some minor questions, which may not come up again, we think a fatal defect exists in the proof of title to the paper. This controversy being between defendant and plaintiff, concerning the consideration of the paper, if plaintiff owned it, the defense was relevant. If he did not own it, he could not sue upon it, under the declaration.

The form of the paper is peculiar. Taken as it reads,

it indicates that, for reasons of his own, plaintiff had it made payable to the bank named in it, to be held subject to his order. Or, in other words, he made the bank his bailee, or trustee, for his benefit. It is certainly legal and proper for a person to appoint a special payee of funds in his own interest, and there may be contract or other relations calling for it. Such paper, although not very common, is not unknown. Chitty lays it down, on the faith of several cases, some of which are early ones, that paper payable to one for the use of another must be sued for by, and paid to, the trustee. Chit. Bills, 180. Other text-books, referred to on the argument, are to the same effect. The doctrine which treats the beneficiary as owner of property is equitable, and not legal, and is not universal in equity. The policy of the law does not favor ambiguities in negotiable paper.

In the present case, the declaration goes upon the ground that the paper was once owned by the bank to which it was made payable and assigned to plaintiff; and plaintiff's testimony shows, or tends to show, that the bank was the real owner, whether as payee or indorsee from plaintiff. The testimony shows that the note was sent to the bank at Hart, to be collected for the bank at Idaho; and plaintiff's attorney testified that he received it from the Hart bank, and does not say it was not received on account of the Idaho bank. And when he sent it to the latter bank, and received it back, with the special indorsement for collection by the Hart bank erased, it still held plaintiff's indorsement as first indorser; and Huntoon's indorsement is unexplained, and just as consistent with title in the bank as any other.

If, as seems to be suggested, plaintiff's title must be traced through this indorsement from the bank which owned it, there is a double difficulty in the case. There is no evidence that the First National Bank of Boise

City, Idaho, is identical with the First National Bank of Idaho, neither is there any proof that Huntoon was cashier of either of them. It would be going pretty far to hold that Huntoon's handwriting was sufficiently proved without some further examination into the witness' means of knowledge. Where one or more letters, purporting to come from a certain person, are recognized by him in subsequent transactions, that may, in some cases, be admissible on questions of handwriting. But the mere receipt of letters purporting to be from a person never seen, and with whom no subsequent relations existed which were based on them as genuine, has no value as means of knowledge. Where there is no direct knowledge of handwriting, there must be something which assures the recipient of letters, in a responsible way, of their genuineness, before he can swear to their writer, or use them as comparisons of handwriting.

Had the proof been sufficient to go to the jury, it was their province, and not that of the court, to determine the facts; and the court had no right to pass upon any essential fact on the merits.

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

The other Justices concurred.

GEORGE W. PIERCE AND HARRIET E. MUNFORD, BY WILLIAM H. TUCKER, THEIR NEXT FRIEND, v. FRANCIS GRIMLEY AND JOSEPH BEITH.

Ejectment—Trust-deed—Mortgage by construction—Trustee—Can exercise powers granted only in behalf of beneficiary—Foreclosure by advertisement—Must conform to statutes.

1. The owner of 160 acres of land in Huron county, Michigan, before his patent was issued, conveyed the land to one Beeson, and to his heirs and assigns, describing him as trustee, and, after reciting grantor's indebtedness upon a note, authorized the trustee, in case it was not paid, on the application of the payee, or bearer, to enter upon the land and as the attorney of the grantor, or in his own name, to sell and dispose of the land, in whole or in part, at public auction, for the best price it would bring in cash, ten days' public notice having been given of the time and place of such sale, by advertisement in one of the public newspapers printed in the city of Detroit. Provision was made for the payment of the note and expenses of the proceedings, and for payment of the balance realized on such sale to the grantor, his heirs, etc. The trustee was to convey without personal covenants, so as to be a perpetual bar in law and equity, and on payment of the note was to reconvey to the grantor, who was to pay taxes. The land was wild and unoccupied until 1876, when the trustee conveyed 80 acres to one Grimley, by full warranty deed, who went into possession under it. In 1880 the grantee, purporting to act as trustee, executed a deed to one Van Dyke of the 160 acres, reciting the trust-deed and that he had caused the sheriff of Wayne county to expose the land for sale at auction, who struck it off to Van Dyke for a stated sum, as the highest bidder, and that, as such trustee, he conveyed to Van Dyke the property which the grantor had in the land at date of said trust-deed. The deed to Van Dyke contained no recitals of the time or place of sale, was not signed by the sheriff, and was absolute in form, with no period of redemption. Van Dyke afterwards conveyed to Grimley. An action of ejectment was brought by some of the heirs of the grantor against Grimley, and, in reversing a judgment in his favor, the Court hol.

a—The instrument given to Jacob Beeson was a mortgage,

and its power of sale, which did not conform to our statutes, could not authorize the equity of redemption to be cut off by anything short of a sale in equity, or one in all respects conforming to the statutes. *Comstock v. Howard*, Walk. Ch. 111.

b—There is nothing in this mortgage repugnant to the foreclosure statute, except as *permissive*, and it would by its terms allow a proper advertisement in Huron county, with the additional advertisement in Wayne county, as no place of sale is made *imperative*.

c—When Grimley bought of Beeson, in 1876, this instrument was on record, and was Beeson's only source of title, if he had any. It only allowed him to enter, not merely on default, but on the demand of the owner of the note. It gave him no personal interest, and no power to convey without demand of the creditor to foreclose, and foreclosure. His warranty deed was *void*, as against said grantor and his heirs, and conveyed no legal title whatever.

d—The only color of title Grimley has was derived under Van Dyke's deed, whose title amounts to nothing. As a foreclosure, it is on its face imperfect, because it does not purport to be made under the statute. It therefore did not cut off the redemption, and, under our statutes, gave no right of entry. How. Stat. § 7847.

e—Beeson was not interested in his own right. No power was given to him to do any act under the mortgage except when requested by the owner of the note, which was outlawed in 1865, and there is no testimony indicating where it is, or that it exists at all. The attempted foreclosure in 1880 was more than 20 years after the note became due, and does not purport, and is not shown, to have been called for by the holder of the note, which by that lapse of time is beyond the presumable, if not the possible, faculty of aiding or justifying resort to the mortgage.

f—As Beeson never was a trustee to receive payment of the note, but only held title to the mortgage subject to the holder's order, a sale by him, not authorized by the creditor, could not pass the mortgage to Grimley, even if he held all the land mortgaged. But the mortgage sale of the 160 acres was made in one parcel, for one sum, and Grimley purchased only 80 acres. It would be impossible to hold him an assignee of the mortgage, had Beeson purported to act in accordance with the terms of the trust.

g—There is nothing in the defense which in any way interferes with plaintiffs' right to recover. What rights Grimley may have in the improvements are not involved in the present record.

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

a—Our statutes may, perhaps, authorize a power of sale in a mortgage, although in some respects variant, to be carried into effect by such notices and proceedings, and subject to such conditions, as are required by law.

b—The introduction of powers of sale into mortgages was, as is well known, a device to escape redemption; but in this country, from the beginning, the legislatures have stepped in, and so regulated the sales as to give them proper publicity, and usually made them subject to some reasonable redemption.

c—As in all other cases of remedy by act of the party, it has been held that every essential provision of law shall be complied with in executing a mortgage power of sale, and so appear. Parties may add to these conditions, but cannot dispense with them, and the case of a trust may add to, but it cannot take away from, them.

d—Where the trust appears on the face of a deed, it is notice to every one of the trustee's character and duties; and it is declared by statute that every deed in violation of such a trust shall be held absolutely void. How. Stat. § 5533.

e—Even under the old law a right of entry by a mortgagee must be exercised within 20 years. *Albright v. Cobb*, 34 Mich. 316.

f—A mortgagee's possession not obtained by license of the mortgagor is tortious, and he may be ejected. *Newton v. McKay*, 30 Mich. 380, and notes.

g—In ejectment, where the trial is by jury, no judgment against their verdict can be entered in the Supreme Court.

Error to Huron. (Beach, J.) Argued February 6 and 7, 1889. Decided November 8, 1889.

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

Elbridge F. Bacon, for appellants, contended:

1. It clearly appears from the instrument itself, that it was given as security for an alleged indebtedness, and this fact stamps it as a mortgage; citing *Enos v. Sutherland*, 11 Mich. 538; *Cowles v. Marble*, 37 Id. 158; *Cooper v. Brock*, 41 Id. 488; *Ferris v. Wilcox*, 51 Id. 105; *Jeffery v. Hursh*, 58 Id. 246; *Weed v. Mirick*, 62 Id. 414; *Hoile v. Bailey*, 58 Wis. 434; *Schriber v. LeClair*, 66 Id. 579.

2. The defeasance may be contained in the deed itself, or in a separate instrument, and may consist of a provision that upon payment the deed shall be void, or a provision that the estate shall be reconveyed upon the payment of the debt; citing 1 Jones, Mort. §§ 241, 242; 1 Hilliard, Mort. 39; nor does it change the character of the instrument as a mortgage that it is executed to a third party, in trust, to secure the payment of the debt; citing *Comstock v. Howard*, Walk. Ch. 110; *Bank v. Chappelle*, 40 Mich. 447; *Railway Co. v. Auditor General*, 41 Id. 635; *Cormerais v. Genella*, 22 Cal. 116; *Lawrence v. Loan & Trust Co.*, 13 N. Y. 200; *Union Co. v. Sprague*, 14 R. I. 452; *Austin v. Mfg. Co.*, Id. 464; *Chafee v. Bank*, 71 Me. 514; *DeWolf v. Mfg. Co.*, 49 Conn. 283; *Hoffman v. Mackall*, 5 Ohio St. 124; *Webb v. Hoselton*, 4 Neb. 308; *Turner v. Watkins*, 31 Ark. 429; 1 Jones, Mort. § 62.

3. The instrument being a mortgage, the legal title remained in Selph, and the conveyance from Beeson to Grimley conveyed no title whatever to the land, but, if it had any effect, it would only amount to an assignment of the mortgage, and would give the defendants no right to the possession of the premises in question; citing *Hazeltine v. Granger*, 44 Mich. 503; *Batty v. Snook*, 5 Id. 231; and such legal title could only be divested by a foreclosure and sale pursuant to the statute; citing Comp. Laws of 1857, § 5177; How. Stat. § 8497; *Lee v. Mason*, 10 Mich. 404; *Doyle v. Howard*, 16 Id. 264; *Hoffman v. Harrington*, 33 Id. 392; 2 Jones, Mort. §§ 1769, 1810, 1822, 1827; *Webb v. Haeffer*, 53 Md. 187; *Lawrence v. Loan & Trust Co.*, 13 N. Y. 200.

4. The requirements of the statute must be strictly followed, whatever may be the terms of the power, which may impose additional obligations, but cannot take away any of those required by the statute; citing 2 Jones, Mort. §§ 1822, 1827; *Lawrence v. Loan & Trust Co.*, 13 N. Y. 200; *Webb v. Haeffer*, 53 Md. 187.

Atkinson, Vance & Wolcott, for defendants, contended:

1. In support of the claim that the instrument executed by Selph is a deed and not a mortgage, counsel cite *Goddard v. Coe*, 55 Me. 358; *Wetherbee v. Green*, 22 Mich. 321; *Bennett v. Robinson*, 27 Id. 26; *Jeffery v. Hursh*, 42 Id. 563; and title has been held to pass under similar instruments; citing *Adams v. Stevens*, 49 Me. 362; *Bank v. Vose*, 23 Id. 98.

2. If the title passed to Beeson, trustee, the question of whether he sold rightfully or wrongfully cannot be inquired into in an action of ejectment, the remedy being in equity; citing *Dawson v. Hayden*, 67 Ill. 52; *Graham v. Anderson*, 42 Id. 518; *Railroad Co. v. Kennedy*, 70 Id. 366; *Goddard v. Coe*, 55 Me. 358.

3. When the mode or manner of sale is left in the discretion of the trustee, and there has been an honest exercise of that discretion, the sale may be voidable, but not void, and then only in proper proceedings for that purpose; citing 2 Jones, Mort. §§ 1778, 1907; *Ingle v. Culbertson*, 43 Iowa, 265, 273.

4. In support of the proposition that, Grimley's entry not being wrongful, and Selph having abandoned the land as a satisfaction of the debt, Grimley was entitled to notice to quit before ejectment would lie, counsel cited *Reading v. Waterman*, 46 Mich. 109; *Sinclair v. Larned*, 51 Id. 342; *Baldwin v. Cullen*, Id. 35.

CAMPBELL, J. These infants bring ejectment for their portion, as heirs at law, of the estate of Harriet Pierce, their mother, who was daughter of the original patentee, George W. Selph. George W. Selph, on October 10, 1859, obtained a patent from the United States of 160 acres of land, included in four 40-acre lots, where four sections met, no two being in the same section. Two of these 40-acre parcels are claimed by defendant Grimley, and this action is brought for four-ninths of this property. George W. Selph died in 1866, and Harriet Pierce in 1871, being then about 26 years old. Charles Selph, a brother of Harriet Pierce, and one of George W. Selph's heirs, died in 1881. His age does not appear. Plaintiffs inherited one-ninth from him.

The defendants set up claim from Jacob Beeson, and whatever claim of right they have depends on his action. On September 20, 1858, before the patent issued, George W. Selph executed an instrument which was a trust-mortgage to Jacob Beeson, trustee, and which plays a prominent part in the controversy. It began with a recital that Selph was indebted on a note running to Strother M. Beeson or bearer, for $164.50, payable one year after date, at the Michigan Insurance Company Bank, Detroit, with interest after maturity, if unpaid, at 10 per cent. Thereupon it conveys to Jacob Beeson, as

trustee, and to his heirs and assigns, the 160 acres referred to.—

"In trust, in case default shall be made by the said George W. Selph, his heirs, executors, or administrators, to pay the said promissory note to said Strother M. Beeson, or the bearer or holder thereof, or his or her executors, administrators, or assigns, according to its tenor and effect; then and in that case, on the application of the said Strother M. Beeson, or the bearer of said note, her or his legal representatives or assigns, it shall and may be lawful for the said party of the second part, or his personal representatives, to enter into and upon all and singular the premises, * * * and, as the attorney of the said party of the first part, for such purposes duly constituted, irrevocably, or in the name of said party of the second part, his executors or administrators, or in such other manner as the said party of the second part, or his legal representatives, shall judge best, to sell and dispose of the same, or any part or portion thereof, and all right, benefit, and equity of redemption of said party of the first part, his or her heirs and assigns, therein, at public auction, at such time and place as the party of the second part, or his legal representatives, may deem proper, and to adjourn said sale from time to time, as said party of the second part, or his legal representatives, may think proper, for the highest and best price the same will bring in cash; ten days' public notice having been previously given of the time and place of such sale, by advertisement in one of the public newspapers printed in the city of Detroit," etc.

The remainder of the mortgage provides for payment, from the proceeds, of the Strother M. Beeson note to him or the bearer, with expenses of proceedings, and the balance to go to the grantor, his heirs, etc., and to convey without personal covenants, so as to be "a perpetual bar in law and equity." But, on payment of the note, etc., to reconvey, etc. The grantor was to keep taxes paid.

There was no testimony or stipulation as to what became of this note, or who owned it.

It was conceded of record—

"That the land in question in this case was wild and unoccupied until August 30, 1876, when the defendants went into possession."

The taxes appear to have been assessed as non-resident, and paid up to that time by Jacob Beeson, except two years.

On August 30, 1876, Jacob Beeson, in his individual capacity, gave a full warranty deed to Grimley, who obtained his possession under it. On February 9, 1880, a deed was made by Jacob Beeson, purporting to act as trustee, to Philip J. D. Van Dyke, reciting the trust-deed and setting forth that he had caused the sheriff of Wayne county to expose the property for sale at auction, who struck off the land covered by the mortgage, amounting to 160 acres, to Van Dyke, for the sum of $547.84, as the highest bidder; and that he, as trustee, in pursuance of the sale, thereby conveyed to Van Dyke the property which George W. Selph had therein on September 20, 1858. This deed contains no recitals of the time or place of sale, and is not signed by the sheriff, and is absolute in form, with no period of redemption. Van Dyke conveyed to Grimley. Some affidavits were produced from the deputy-sheriff and the printer of the notice of sale, objection to which was made in connection with the whole attempted foreclosure, as not making out a valid sale.

This completed defendants' show of right against plaintiffs, and the court below held that there was no question for the jury, and that for various reasons named Grimley had a good, legal title, as against plaintiffs.

The instrument given to Jacob Beeson was a mortgage, and not an absolute conveyance; and its power of sale, which did not conform to our statutes, could not authorize the equity of redemption to be cut off by anything short of a sale in equity, or one in all respects conform-

ing to the statutes. *Comstock v. Howard,* Walk. Ch. 111. Our statutes may, perhaps, authorize a power of sale, although in some respects variant, to be carried into effect by such notices and proceedings, and subject to such conditions, as are required by law. There is nothing in this mortgage repugnant to the foreclosure statute, except as permissive, and it would by its terms allow a proper advertisement in Huron county, with the additional advertisement in Wayne county, as no place of sale is made imperative. The introduction of powers of sale into mortgages was, as is well known, a device to escape redemption; but in this country, from the beginning, the legislatures have stepped in, and so regulated the sales as to give them proper publicity, and usually made them subject to some reasonable redemption. As in all other cases of remedy by act of the party, it has been held that every essential provision of law shall be complied with, and so appear. Parties may add to these conditions, but cannot dispense with them.

The case of a trust may add to, but it cannot take away from, these conditions. Where the trust appears on the face of a deed, it is notice to every one of the trustee's character and duties; and it is declared by statute that every deed in violation of such a trust shall be held absolutely void. How. Stat. § 5583.

When Grimley bought of Jacob Beeson, in 1876, this instrument was on record, and was Beeson's only source of title, if he had any. That only allowed him to enter, not merely on default, but on the demand of the owner of the note. It gave him no personal interest, and no power to convey without demand of the creditor to foreclose, and foreclosure. His warranty deed was void, as against Selph and his heirs, and conveyed no legal estate whatever. While it might operate by way of estoppel against any future-acquired title of Jacob Beeson, it

passed no present title, because he had none to pass. This would be true, whether it is regarded as a deed or as a mortgage. Jacob Beeson never acquired any title afterwards. The only show of title Grimley has was derived under Van Dyke's deed. While he was, no doubt, honestly supposing he had a title, it was only through ignorance of the record, or mistake concerning its legal effect.

The Van Dyke title amounts to nothing. As a foreclosure, it is on its face imperfect, because it does not purport to be made under the statute. It therefore did not cut off the redemption, and, under our statutes, gave no right of entry. How. Stat. § 7847. Even under the old law a right of entry by a mortgagee must be exercised within 20 years. *Albright v. Cobb*, 34 Mich. 316.

A mortgagee's possession not obtained by license of the mortgagor is tortious and he may be ejected. *Newton v. McKay*, 30 Mich. 380, and notes to annotated ed. And in this case the admitted facts show that no possession was ever had until Grimley's entry in 1876, and there is nothing whatever to show a license to him or Beeson. Mere absence or talk to third persons about abandonment cannot amount to a license to any one to enter, and if there were any evidence here of such dealings between Selph and Beeson as would create a license, which I think cannot be found, it would have been for the jury and not for the court.

Jacob Beeson was not, so far as this record shows, interested in his own right. No power was given to him to do any act under the mortgage except when requested by the owner of the note. That note was outlawed in 1865, and there is no testimony indicating where it is or that it exists at all. The attempted foreclosure in 1880 was more than 20 years after the note became due, and does not purport, and is not shown, to have been

called for by the holder of the note, which by the lapse of 20 years is beyond the presumable, if not beyond the possible, faculty of aiding or justifying resort to the mortgage.

As Jacob Beeson never was a trustee to receive payment of the note, but only held title to the mortgage subject to the holder's order, a sale by him, not authorized by the creditor, could not pass the mortgage to Grimley, even if he held all the land mortgaged. But the mortgage sale of the 160 acres was made in one parcel, for one sum, and Grimley purchased only 80 acres. It would be impossible to hold him an assignee of the mortgage, had Beeson purported to act in accordance with the terms of the trust. There is nothing in the defense which in any way interferes with plaintiffs' right to recover. What rights Grimley may have in the improvements are not involved in the present record. As the trial was by jury, no judgment against their verdict can be entered here.

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

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

SHERWOOD, C. J., *(dissenting)*. Plaintiffs bring ejectment to recover an undivided four-ninths of 80 acres of land, situate in the town of Sherman, in the county of Huron. The plaintiffs are infant heirs, and the suit is brought by their next friend. The defendants pleaded the general issue, with notice of the statute of limitations, and filed a claim for improvements. The plaintiffs then requested a finding as to what would have been the value of the land if no improvements had been made. The cause was tried in the Huron circuit, before a jury, and the learned circuit judge, after the testimony had all been given, directed a verdict for the defendants. The plaintiffs bring error.

From the record it appears that George W. Selph located the lands September 20, 1858, and received his deed for the same October 10, 1859. That Selph died in 1866, leaving three children, Charles Selph, Mary McLean, and Harriet Pierce, and his widow, Nancy Selph, his only heirs at law; that Harriet Pierce was the mother of the plaintiffs; that she died in 1871, leaving her son George and Harriet E. Munford her only heirs at law; that Charles Selph died in 1881, leaving his mother, Nancy Mary McLean, and the plaintiffs his only heirs at law; that the plaintiff Mrs. Harriet E. Munford is now 18, and George W. Pierce is 20, years of age.

It further appears in testimony that the value of the land, if no improvements had been made, would have been $800, and that the improvements increase the present value of the land $3,000; that the land was wild, and unoccupied by any one, until August, 1876, when the defendants went into possession, and have ever since been in possession, claiming title thereto.

From the record it further appears that on September 20, 1858, George W. Selph executed to S. M. Beeson a promissory note for the sum of $164.50, payable one year from date, with 10 per cent. interest; and on the same date made and executed to Jacob Beeson a certain instrument, whereby he conveyed the lands in question, with others, in trust, upon condition that upon payment of the amount of the note and interest in one year said Jacob Beeson would reconvey the lands to George W. Selph, or to his assigns, and, if default was made in such payment to the said S. M. Beeson of the said note, or to his assigns, or bearer of the note, it should then be lawful for the said Jacob Beeson, or his personal representatives, to enter upon said lands, and, as agent of George W. Selph, and in his name, or the name of his assigns, sell said lands, or any part thereof, and all right to redeem

the land of the said Selph, or his assigns, at public auction, at such time and place as said Jacob Beeson, or his assigns, might deem proper, and adjourn the sale from time to time as he might desire, on giving ten days' notice of such sale, by advertisement in one of the newspapers in Detroit; and out of the proceeds of the sale, after paying all the costs and expenses thereof, and all other expenses of the trust, he should first pay said S. M. Beeson, or the bearer of said note, the amount due on the same; and, second, pay to said George W. Selph, or to his representatives or assigns, such surplus, if any, as should remain.

And it is further declared by such instrument that no duty should rest upon the purchaser at such sale to see that the proper application of the proceeds thereof should be made; and the said Jacob Beeson, or his legal representatives, in the name of the said George W. Selph, or his legal representatives, was authorized to make and deliver deeds of the lands sold to the purchaser, without personal covenants; and such sale, it was agreed, should be a bar in law and equity against said George W. Selph, his heirs and assigns, and all persons thereafter claiming under him or them. The following is a copy of said instrument:

"This indenture, made the twentieth day of September, eighteen hundred and fifty-eight, between George W. Selph, of Huron county, Michigan, of the first part, and Jacob Beeson, trustee, of Detroit, party of the second part, witnesseth:

"That whereas, the said George W. Selph is justly indebted in the sum of one hundred and sixty-four 50-100 dollars, secured further by a promissory note of the said George W. Selph, dated September 20, 1858, for the sum of one hundred and sixty-four 50-100 dollars, payable to Strother M. Beeson, or bearer, one year from the date hereof, at the banking office of the Michigan Insurance Company, Detroit, with interest at the rate of ten per

cent. per annum after maturity, if said note should not be promptly paid when due.

"Now, therefore, these presents witnesseth: That the said party of the first part, in order to secure the prompt and punctual payment of the said promissory note above mentioned, according to its tenor and effect, and in consideration of the sum of one dollar in hand paid by the said party of the second part to the said party of the first part, the receipt whereof is hereby acknowledged, have and do by these presents grant, bargain, and sell unto the said party of the second part, his heirs and assigns, forever, all that certain piece or parcel of land situate, lying, and being in the county of Huron, State of Michigan, and described as follows, to wit: The south-west quarter of south-west quarter of section twenty-three, and south-east quarter of south-east quarter of section twenty-two, and the north-west quarter of north-west quarter of section twenty-six, and north-east quarter of north-east quarter of section twenty-seven, of township fifteen north, of range fifteen east, containing one hundred and sixty acres.

"To have and to hold the said premises, as described, with the hereditaments, tenements, and appurtenances thereunto belonging, to the said party of the second part, his heirs and assigns, forever, in trust, nevertheless, to wit:

"In trust, in case default shall be made by the said George W. Selph, his heirs, executors, or administrators, to pay the said promissory note to said Strother M. Beeson, or the bearer or holder thereof, or his or her executors, administrators, or assigns, according to its tenor and effect, then, and in that case, on the application of the said Strother M. Beeson, or the bearer of said note, her or his legal representatives or assigns, it shall and may be lawful for the said party of the second part, or his personal representatives, to enter into and upon all and singular the premises hereby granted or intended to be, and as the attorney of the said party of the first part for such purposes duly constituted, irrevocably, or in the name of said party of the second part, his executors or administrators, or in such other manner as the said party of the second part, or his legal representatives, shall judge best, to sell and dispose of the same, or any part or portion thereof, and all right, benefit, and equity of redemption of said party of the first part, his or her

heirs and assigns, therein, at public auction, at such time and place as the party of the second part, or his legal representatives, may deem proper, and to adjourn said sale from time to time, as said party of the second part, or his legal representatives may think proper, for the highest and best price the same will bring in cash; ten days' public notice having been previously given of the time and place of such sale by advertisement in one of the public newspapers printed in the city of Detroit, in the county of Wayne and State of Michigan, and out of the proceeds and avails of such sale, and the purchase money paid thereon, after paying all costs of advertising and sale thereof, and making all proper conveyances to the purchaser or purchasers at such sale, as aforesaid, and all other expenses of this trust, shall pay unto the said Strother M. Beeson, or the bearer of said note, he or his executors, administrators, or assigns, all such sum or sums of money as shall be due upon said above described promissory note, or on account thereof; and rendering the surplus, if any there be, unto the said George W. Selph, his heirs, executors, administrators, or assigns; and in every such case it is hereby declared by the said party of the first part that no duty or liability shall rest on the purchaser or purchasers at such sale to see to, or be responsible for, the application of the purchase money.

"And the said party of the second part, or his legal representative, as attorney for the said party of the first part, for such purpose by these presents duly constituted, irrevocably, or in the name of the said party of the second part, or his legal representatives, or in such other manner or form as may be legal and proper, shall make and deliver to the purchaser or purchasers at such sale a good and sufficient deed or deeds of conveyance for the same in the law, without personal covenants, which sale, so to be made, shall be a perpetual bar in law and equity against said party of the first part, his or their heirs and assigns, and all persons claiming or to claim the same by, through, or under them, or either of them.

"And upon the further trust that, after and upon full payment of consideration of said promissory note, the fee of the recorder, the expenses of this trust, and after and upon receiving satisfactory notice from the said Strother M. Beeson, or the bearer of said note, her or his executors, administrators, and assigns, the said party of the

second part shall convey back to the said party of the first part, his or their heirs and assigns, the above-described premises, or such part thereof as shall remain unsold, after the full satisfaction and discharge of the trust herein first above mentioned, and the expenses thereof.

"And the said George W. Selph, the party of the first part, for himself and his heirs, executors, administrators, doth covenant and agree to and with the said party of the second part, his heirs, executors, and assigns, that at the time of the ensealing and delivery hereof he is well seised of the premises above conveyed, as of a good, sure, perfect, absolute, and indefeasible estate of inheritance in the law, in fee-simple, and has good right, full power, and lawful authority to grant, bargain, sell, and convey the same, in manner and form aforesaid, and that the same are free and clear of all incumbrances of what kind and nature soever, and the above-bargained premises, in the quiet and peaceable possession of the said party of the second part, his heirs, executors, administrators, and assigns, against all and every person claiming or to claim the whole, or any part thereof, will forever warrant and defend; and, furthermore, that George W. Selph, the said party of the first part, his heirs and legal representatives, shall and will pay, or cause to be paid, all and every tax and assessment, and assessments ordinary and extraordinary, that have been already, or that may be hereafter, levied and assessed upon said premises, until the sum or sums of money hereby secured by this deed, and the expenses of this trust, shall be fully paid, or the said premises be sold under and by virtue hereof; and, in case of any proceedings to sell said premises under this trust-deed, twenty dollars shall be allowed to said party of the second part by the said party of the first part, in full for his personal services in the premises.

"In witness whereof, the said party of the first part has hereunto set his hand and seal, the day and year first above written.

"GEORGE W. SELPH. [L. S.]
"JACOB BEESON, Trustee. [L. S.]

"Signed, sealed, and delivered in presence of
"T. H. HARTWELL,
"ELISHA TAYLOR."

It further appears that on August 30, 1876, Jacob

Beeson conveyed the lands in question by warranty deed to the defendant Francis Grimley, and on the same day, and in the same manner, conveyed the rest of the lands covered by the instrument above mentioned to Thomas Clark; that on February 9, 1880, Jacob Beeson, in pursuance of a foreclosure of the instrument given by Selph to him, above mentioned, executed a deed to Philip J. D. VanDyke, conveying all the lands described in that instrument, under sale of the same made at Detroit, after advertisement as provided in the trust-deed; and that on the next day said Van Dyke quitclaimed the lands to said Grimley described in the deed from Beeson to himself. At the time of the commencement of this suit the defendants claimed title to the lands in question, under the foregoing conveyances.

The trust-deed gave the right of possession to Jacob Beeson, on default of payment of Selph's note.

Eight errors are assigned for reversal upon the record, and all were relied upon in the argument of plaintiffs' counsel. Only those bearing upon the direction of the verdict need be considered.

The defendants, in putting in their testimony, offered in evidence the deed from Jacob Beeson to Van Dyke. This was objected to, for the following reasons:

1. The mortgagee named in the mortgage had conveyed away all his interest in the mortgage prior to the commencement of the foreclosure proceedings.

2. The mortgage contained no valid power of sale, by virtue of which the mortgage could be foreclosed by advertisement.

3. The notice of sale was not published in Huron county, where the land was situated, as required by law.

4. The notice of sale does not give the name of the assignee of said mortgage.

5. The notice of sale was not published 12 weeks, as required by law.

6. The land was not sold in the county of Huron,

where it was situated, as required by law, but in the county of Wayne.

7. It does not appear that the foreclosure was made on the application of Strother M. Beeson, or any other person entitled to have said mortgage foreclosed.

8. The debt for which said mortgage was given was barred by the statute of limitations.

9. At the time said foreclosure proceedings were commenced, the mortgage was barred by the statute of limitations.

10. The sale was not made by the proper person.

11. The deed on the foreclosure of the mortgage was not executed by the person making the sale, as required by law.

12. The land, although composed of four distinct tracts, was sold upon one bid, and for one sum.

The objection was overruled by the court, and the plaintiffs excepted to the ruling. The trust-deed to Beeson had already been placed before the jury; and this objection and exception makes the proper construction of that instrument necessary.

Defendant Grimley, when upon the stand as a witness, was asked when he first learned of the claimed defect in his title to the land in question; and, under objection by plaintiffs, was allowed to answer. There was no error in this ruling.

It appears from a statement contained in the charge that after the testimony was closed it was conceded by counsel for both parties that there was no question of fact for the jury to pass upon in the case; therefore neither party could claim error on the part of the court for directing the verdict of the jury, whatever errors might be insisted upon in the directions given.

The facts being uncontroverted, the questions of law arising therefrom, as given in this charge of the court in directing the verdict, are in effect so many findings; and I can see no good reason why they may not be so

regarded. The following is the charge of the court, given at the time he directed the verdict for the defendants:

"In this cause, both counsel have said to me that they conceive that there is no question of fact for the jury to pass upon, and I will say, also, that I am of that opinion, —that there is no question of fact for the jury in this case. I am of the opinion that the conveyance from George W. Selph to Jacob Beeson, trustee, is a mortgage, and the proceedings to foreclose the same, under the power of sale therein, were so defective as to be of no avail as a foreclosure; but it appears from the uncontradicted testimony that Selph abandoned his claim upon the land as far back as 1860. The transaction between Beeson and Selph is clouded by the lapse of time; and it would be drawing no very violent inference from the few facts in the case to hold that Beeson treated the instrument in question as a deed, and Selph's abandonment of the land as satisfaction of his debt.

"If that inference can be fairly drawn, from the meager facts in evidence,—and I am of the opinion that it can be,—it would follow, from Beeson's conveyance to Grimley, that Grimley's entry upon the land was not a wrongful entry, and that Grimley was entitled to notice before ejectment was brought.

"It may, perhaps, also follow from this long, undisturbed holding by Grimley and assumed control by Beeson, that, if this instrument is a mortgage, the remedy in ejectment is not proper. The adjustment in this suit of the claim for improvements, if the plaintiffs should recover, would not give the defendants pay for the mortgage claim which was acquired by the conveyance from Beeson. If this instrument is a legal or equitable mortgage, ejectment is not the remedy, under the facts developed in this case.

"If the instrument is to be construed as a trust-deed, the plaintiffs have no remedy, as the terms of the power of sale seem to have been fairly complied with in such sale by Beeson, and it inures to Grimley's benefit.

"You are therefore directed to find a verdict for the defendants in this case."

Defendant Grimley was sworn as a witness in his own

behalf, and testified that he bought 80 acres of the farm in July, 1876; that he was not acquainted with the situation of the title at the time; that he paid $400 for it,—gave $200 down, and a mortgage on another piece of land for the other $200, and paid it; that the mortgage was due in a year; that he went into possession of the land the same fall, and has since cleared the land all up, and put buildings and fences upon it; that it is all cleared and well improved, except five acres; and that he has paid the taxes upon it ever since he bought it; that the defendant Joseph Beith is his tenant upon the farm; that he went in the neighborhood of the land in 1870; that Charles Selph was in the neighborhood when he first went there; that the land was entirely unimproved when he bought it; that he saw Charles frequently, and was acquainted with him until he died, in 1881; that Selph lived about three or four miles from the farm; that Charles never said anything to defendant about the land, or the title; that he knew defendant Grimley was living upon the land, and claimed title to it; that he frequently saw Charles Selph, and talked with him about the land, —saw him most every week.

The testimony offered by the defendants, and which is uncontradicted, as well as that on the part of the plaintiffs, is to the effect that when George W. Selph located the land in question it was with a view of obtaining the benefit of the homestead law; that he built some sort of a shanty upon it, and made a few shingles upon it; then left it and went to White Rock, and, abandoning such intention, went to S. M. Beeson, and obtained the money of him to enter the land in question, and, to secure the money thus obtained, subsequently gave the conveyance referred to, to Jacob Beeson; that, after receiving the patent for the land, George W. Selph never gave any more attention to it, but left it, and went away,

and homesteaded another piece of land, saying several times, and on different occasions, and to different persons, that he could not pay for the land, and had given it up; and said he did not consider he had any claim on it whatever; gave it up because he could not pay for it.

George never laid any claim to it after Grimley bought it, nor did either of his children or grandchildren, for a period of over 27 years, when this suit was commenced by the plaintiffs, without ever having made a demand for the possession.

It further appears that, after George W. Selph made default in the payment of his note, Jacob Beeson paid the taxes upon, and, with the consent of Selph, took such possession of the land, and control thereof, as any person could, owning the same, where the land was wild and unimproved. Besides paying the taxes, he asserted his title, and the right of possession which his trust-deed gave him; offered the land for sale; and, believing that said deed conveyed to him the land, and transferred to him the title thereto, as well as the right of possession, sold and conveyed, by full covenant warranty deeds, all the lands mentioned in Selph's conveyance to him; and all these things were done with the apparent knowledge of Selph, and with his consent; and it was under such warranty deed, thus obtained, that defendant Grimley made his purchase of the land in question; took possession of the same; cleared the land; brought it under a high state of cultivation; erected thereon a valuable set of all kinds of farm buildings,—thereby making it a pleasant and desirable home. This was all done with the full knowledge of the plaintiffs and their ancestors, through whom they claim, and who, during all the time the dealings were had and these things were done, lived in close proximity to the land, and who never made a protest, or

pretended that they had or claimed any interest in the farm.

Neither is it pretended by any one of the descendants of George W. Selph that Jacob Beeson and these defendants have not acted in all these transactions in the utmost good faith, and, so far as George W. Selph is concerned, with his expressed wish and desire, both by parol and in writing; and the question now is, under all these circumstances, should this trust-deed, or mortgage, or by whatever name we may call it, be so construed as to defeat the understandings and unquestionable intentions of these several parties, whose interests have been involved so many years, and under whose action, if not altogether regular, the rights and equities of the defendants in this property have grown up and matured by the consent of plaintiffs, and those they represent? Shall all the understandings and agreements be construed to mean just what the parties, and their heirs and assigns, intended they should mean, for more than thirty years after they were had and made, and which have secured perfectly, and to the satisfaction of all the parties interested, the objects intended when they were had and made, or shall the holding of this Court (because in some similar case, arising in this or some other court, though not entirely upon the same state of facts, it has been held otherwise, and without serious consequences flowing from the decision) be such as will not only destroy the intention of such agreement and understanding of the parties to them, and all the rights and interests arising thereunder, and work absolute and irreparable injury to the defendants, in their old age? I do not think any such result is necessary; nor does the law require any such sacrifice to be made, when properly administered.

The law, when adjudicated, becomes of very great importance in our system of jurisprudence. Its stability

rests largely upon the observance of such precedents, and, when they are controlling, the rights and equities of the parties must be preserved; and in any case where in their application this cannot be done they cease to become precedents governing that particular case, and their controlling power may well be doubted.

Each of the parties in this case have sought to fortify their positions by precedent authorities in this Court.

It is the contention of the plaintiffs' counsel that the conveyance from Selph to Beeson is a mortgage, and nothing more; that the legal title to the land described therein remained in Selph, and that the conveyance from Beeson to Grimley conveyed no title to the latter, and, if it had any effect at all, it could only operate as an assignment of the mortgage to Beeson, and would give to him no right to the possession, and therefore Beeson could convey no such right to Grimley; that, under said conveyance to Beeson by Selph, the title of the latter and his heirs could only be divested by a proper foreclosure of the mortgage, either by advertisement under the statute, or by foreclosure in equity; that the statute in this matter must be followed, whatever may be the terms of the power; that, while the power given in the instrument may impose additional obligations, it cannot vary, or modify, or take away those given by statute; and five decisions of this Court, viz., *Batty v. Snook*, 5 Mich. 231; *Lee v. Mason*, 10 Id. 403; *Doyle v. Howard*, 16 Id. 264; *Hoffman v. Harrington*, 33 Id. 392; *Hazeltine v. Granger*, 44 Id. 503 (7 N. W. Rep. 74), are cited to sustain these views, besides several others, from different states.

On the other hand, it is claimed by counsel for defendants that the instrument under consideration is something more than a mortgage; that it has every element of a deed; that—

"It conveys and warrants an absolute title in fee-sim-

ple to Beeson, as trustee, his heirs, executors, administrators, and assigns. It warrants the quiet and peaceable possession of the land in Jacob Beeson, trustee, his heirs, executors, administrators, and assigns. It provides that the conveyance is in trust to secure the payment of his note to Strother M. Beeson. It appoints Jacob Beeson, grantee, his attorney irrevocably, to sell and convey the premises for that purpose, and directs the manner of advertisement, but leaves in the possession of the trustee all other matters pertaining to the sale. It provides that the sale thus made 'shall be a perpetual bar, in law and equity, against said party of the first part, his or their heirs and assigns, and all other persons claiming, or to claim, the same by, through, or under them, or either of them.' It provides that the surplus, if any, arising from such sale shall be paid to the grantor, George W. Selph. It also provides that, if any of the land is left after the note is paid, it should be conveyed back to him. It does not contain the ordinary defeasance clause found in mortgages."

And, while the defeasance clause is not conclusive, they submit it affords proper matter for consideration in the construction of the instrument, which they affirm was sufficient to pass the title to the land to Jacob Beeson, as trustee; and that the manifest intention of the parties was to constitute a fund, or means of ready payment, from which to satisfy the note given to S. M. Beeson, if it was not paid at maturity, or to place such fund or means beyond the control of either party; that the fact that the instrument provides for a reconveyance of the land left, after paying the note and completing the trust, tends strongly to show that, as they understood and intended the effect of the same, a reconveyance would be necessary to re-invest Selph with the title, and, with this understanding by Selph, he abandoned it as a homestead, and took up other lands upon which to make his home; that not only did the instrument pass the title to Jacob Beeson, but it was intended it should by the parties. Such is the contention of the defendants.

This Court held, in *Wetherbee v. Green*, 22 Mich. 321, that,—

"When a deed absolute is given to secure a debt, the purpose generally is to vest in the grantee a larger power of control and disposition than he would have by statute under an ordinary mortgage; and we are not prepared to say that the statute (Comp. Laws, § 4614) which forbids ejectment by mortgagees before foreclosure was intended to reach a case of that description."

The same question was to some extent considered in *Bennett v. Robinson*, 27 Mich. 26. In that case, December 23, 1867, Bennett conveyed to Nichols a piece of land by warranty deed, which was recorded February 1, 1868. September 28, 1869, Bennett and Nichols entered into a written agreement, by which Nichols agreed to reconvey the land to Bennett at any time within three years, on Bennett's paying his indebtedness to Nichols and one Wheeler. This agreement was not acknowledged or recorded. May 21, 1870, Nichols quitclaimed to Robinson, Robinson having no notice of the agreement to reconvey. Robinson gave notice to quit, and brought summary proceedings to recover possession. This Court said:

"There is not enough in the evidence to show that, as between the parties themselves, the deed was reduced or amounted to a mortgage only, until after the execution of the agreement. Whether, when it was executed, it had the effect to make the whole transaction a mortgage only, or was more properly a contract for a resale, we need not determine, since, if the transactions, taken together, then amounted to a mortgage, so far as related to the right of redemption and the necessity of foreclosure to make an absolute title, yet it was not an ordinary mortgage, leaving the right of possession in the mortgagor, but one which placed the right of possession in the grantee or mortgagee. * * * The conveyance made by Nichols to the complainant operated at least as an assignment of this mortgage, if it were only such, and a transfer of the right of possession before vested in Nichols."

So, in the present case, I think the instrument cannot be regarded as an ordinary mortgage only. It, by express terms, places the possession and right of possession in Jacob Beeson. It also conveys to him, with warranty, the title to the property in trust, to be sold by him for the purpose of paying a note, and then provides for a reconveyance of the title to such portions of the land as it was not necessary to sell to raise money to pay the note; and afterwards Beeson took all the possession he could take of the land, so long as it remained wild and unimproved. He assumed control of it, and paid the taxes upon it, and asserted his ownership.

It was formerly held, before our present statutes upon this subject, that the mortgagee was owner of the land mortgaged, and entitled to possession until his estate was defeated by redemption under the defeasance; that the mortgagor could not bring ejectment, but must resort to his bill in equity to redeem, in order to regain the title to his property, and, in a case like the present, where a party conveys his property to another by deed, with covenants of warranty, containing all the elements necessary to pass the title in fee absolute to the grantee, although it includes a defeasance by which, upon the payment of a sum of money, the grantor shall become entitled to a reconveyance of the whole, or any part thereof, I think it should be held the title will pass to the grantee, notwithstanding the instrument is in the nature of a mortgage; and, in such case, when the defeasance includes a provision giving the possession, and right of possession, to the grantee, and makes him a trustee, and authorizes him to sell so much of the land as may be necessary to satisfy the debt, and if, in pursuance of such trust, he makes sale thereof, and pays the debt, the purchaser at such sale, if valid, will take the title to the property, freed from any equity of redemption created by the

defeasance; and, no matter how irregular such sale may be, and whether voidable or not, neither the grantor in such trust-deed, nor his heirs, will be allowed to maintain ejectment against the purchaser at such sale; but, if he or they wish to contest the validity of the purchaser's title, their remedy is by bill in equity to redeem, when the equitable rights of all the parties may be ascertained and protected. *Adams v. Stevens*, 49 Me. 362; *Bank v. Vose*, 23 Id. 98; *Dawson v. Hayden*, 67 Ill. 52; *Graham v. Anderson*, 42 Id. 514; *Railroad Co. v. Kennedy*, 70 Id. 366; *Goddard v. Coe*, 55 Me. 385; *Ingle v. Culbertson*, 43 Iowa, 265, 273.

In this case, sale was made of the entire 80 acres. As between these parties, this might be done. It was not necessary to offer it in parcels, as, at the time Grimley took his deed from Jacob Beeson, the land sold for all it was worth, and at the time it was sold at auction it was used and occupied as a farm, and the two 40-acre parcels adjoined.

It is claimed that the power of sale, as provided for in the defeasance contained in this trust-deed is defective. There can be no question, I apprehend, but that it appears from the testimony that Grimley was a purchaser in good faith, and for a valuable consideration. No fraud is claimed in the case, and our statute provides:

"Purchasers for a valuable consideration, claiming under the defective execution of any power, shall be entitled to the same relief in equity as similar purchasers claiming under a defective conveyance from an actual owner." How. Stat. § 5648.

If the position of plaintiffs' counsel is correct, this statute would seem to furnish an additional reason why their remedy should be in equity.

It appears no demand was ever made upon these defendants for the possession of the premises in question. The

deed from George W. Selph to Jacob Beeson, as well as the defeasance therein contained,—such as it was,—both gave the right of possession to Beeson, and he took all the possession under that instrument he could of wild land, and by his deed conveyed to Grimley the right to enter, possess, and occupy the land. His possession was therefore lawful. This rendered a demand of possession necessary before bringing this suit, in any event. *Reading v. Waterman*, 46 Mich. 109 (8 N. W. Rep. 691).

Certain it is there are no equities appearing upon this record requiring us to give to the law or practice any strained construction in order that the plaintiffs may maintain this action of ejectment to protect and preserve the rights of these plaintiffs; and especially should this be so held, when another form of remedy is open to them, wherein all the facts may be fully investigated, and the rights of all parties may be ascertained, and equitably adjusted between them.

Whether the views of the circuit judge were correct or not upon the subject of abandonment, it is not important now to consider. I am clearly of opinion he reached a correct result; and he committed no error in directing the verdict for the defendants.

The judgment should therefore be affirmed, with costs.

WILLIAM T. BOPE v. THOMAS H. FERRIS ET AL.

Equity practice—Foreclosure—Application for rehearing—Laches.

In this case a rehearing is held properly denied, and that no relief can be granted now which would not be practically allowing two applications for a rehearing,—one granted and not acted

on, and another a substantial repetition of it,—without a willingness to comply with the practice, and after a longer delay than would support an appeal.

Appeal from Huron. (Beach, J.) Argued October 11, 1889. Decided November 1, 1889.

Defendants Ferris appeal from an order dismissing a petition to set aside decree of foreclosure, and sale thereunder, and for a rehearing. Proceedings in lower court affirmed. The facts are stated in the opinion.

William T. Mitchell, H. L. Chipman and *William T. Bope, in pro. per.*, for complainant, contended:

1. A rehearing not being a matter of right, the order denying it is not appealable, and, if so, the former order denying substantially the same petition, or granting it on terms and passing on the same matters, and not appealed from, leaves this case within the rule announced in *Hack v. Norris*, 46 Mich. 587. The refusal to open a default is discretionary and not reviewable; citing *Voorhies v. Frisbie*, 25 Mich. 476.
2. The petition for opening and rehearing came too late. The case, by enrollment and lapse of time after final decree, had reached a stage in which it was subject to be opened for re-examination only on bill of review; citing *Maynard v. Pereault*, 30 Mich. 160; and a rehearing precedes (within time for appeal), and a bill of review follows, enrollment; citing *Mickle v. Maxfield*, 42 Mich. 304; *Benedict v. Thompson*, Walk. Ch. 446; *Warner v. Juif*, 38 Mich. 662; *Low v. Mills*, 61 Id. 35.

H. H. Hoyt, for defendants Ferris, contended:

1. In cases of this character this Court has decided that it will look closely to the objections to the order for a resale based upon the ground of inadequacy of the price bid; citing *Nugent v. Nugent*, 54 Mich. 559.

CAMPBELL, J. Under a decree of foreclosure in this cause, the mortgaged premises were sold in April, 1889. Within eight days after the order *nisi* for confirmation, defendants Thomas and Cynthia Ferris filed a petition to set aside the decree, and for a rehearing, and also to set

aside the sale. This was not served until 17 days after the rule was served. No exceptions were filed in any other shape. Counter-proofs were presented, substantially meeting the merits of the petition, and it was dismissed. An appeal is brought to this Court.

The bill was filed in July, 1887, in Huron county, to foreclose a mortgage for $200, made in June, 1884, to complainant and H. L. Chipman, payable in one year,—that is, in June, 1885,—and covers an 80-acre lot. Defendants appeared by counsel, within the proper time, and demanded a copy of the bill, which was duly served. They made default, and an order *pro confesso* was entered in September, 1887. Orders of reference were made, and in February, 1888, the report of amount due was filed, and a decree of sale was made at the same time, allowing sale after July 29, 1888. The property was advertised to be sold September 4, 1888. On August 16, 1888, a petition was filed for rehearing, by Thomas H. Ferris, sworn to also by Cynthia Ferris, accompanied by certificate of two counsel, not previously employed, Messrs. Babcock and Macklem. This petition relied on the assertion that the mortgage was given on the consideration that the mortgagees were to quiet the title to the land, and that they had not done so, but had, since the foreclosure suit was begun, bought up the alleged clouds, and taken assignments of them; that petitioners had employed counsel to answer the bill, and given him the necessary information for an answer, and supposed he would do what was necessary, and that they knew nothing of the decree until the notice of sale was published; that they had been willing and had offered to pay the mortgage whenever the title was cleared. No offer was made in this petition beyond asking the court to open the case on such terms as should be just. On filing this petition, the court, on August 16, 1888, without requiring security, or

imposing any terms, made an *ex parte* order that complainant should show cause on the first day of the next term, and that in the mean time all proceedings be stayed.

The first term thereafter was some time subsequent to the day fixed for sale, and the application was heard in November, and held over for decision till January, 1889. On January 10, 1889, the court held that the proceedings should be confirmed and sale made, unless defendants should within 10 days answer, and pay the taxed costs, amounting to $29.70, and deposit the amount reported due with the register, being $298.47, to abide the event of the suit; and that, if these conditions were complied with, the case should stand for hearing at the March term. Nothing was done by defendants to comply with this order, and on proof of default an order was made January 29, 1889, affirming the previous decree. On February 18, 1889, a new notice of sale was published, and on April 16, 1889, the premises were offered to the highest bidder, and sold to complainant for $348.92. The commissioner reported that he first offered for sale the south 40 acres of the 80 acres, and that Ferris and Nichols protested against dividing the land, and no bids were made on the 40. He then sold the whole premises, and complainant was the highest bidder. This sale was reported, and report filed, April 16, 1889. On May 8, 1889, the order *nisi* was entered, and May 9 it was served.

On May 14, 1889, the petition now before us was filed, but not served till May 26. It was signed by a new solicitor, not before in the case. It sets up chiefly matters existing, and most of them relied on, in the former petition against the decree itself, and gives no tangible reason why the deposit was not made, and asks that, if a deposit is now required as a condition of letting in the defense, complainant be required at the time of making

it to release all claims to the land, as petitioners cannot otherwise raise the money, and will lose land worth $1,800. It further shows that Cynthia Ferris has filed a bill for relief in the premises, and that such relief is necessary to save defendants' rights; that before the last sale defendants tried to get money from Peter Post, who promised to advance it, but failed to do so, and they did not know he would not till just before the sale, and claim he did not by reason of talk with persons in Bope's interest; that the property is worth $1,800, and, if the title were clear, would sell for $1,600. The petition is to set aside the sale and decree, and for leave to defend. An affidavit of H. H. Hoyt is appended, offering, if the land is again offered for sale, to bid $600, subject to any claims existing April 16, 1889. This application was denied.

It is hardly necessary to say that, under the rules relating to rehearings, the circuit court went to a great extreme in allowing the rehearing at all, and could not have done so without the deposit required. The original petition set up both ability and willingness to advance the money, and no reason whatever is given why it was not done. When the last petition was filed there was nothing shown of any consequence which was new or unknown originally, and there had been a new confirmation of the old decree, made more than five months previously. No reason was given why it was not made earlier. It was certainly beyond any power of the circuit court to allow a rehearing after this lapse of time; and, furthermore, the offer to make the deposit was practically on condition that complainant should in advance release rights which the petition proposed to introduce into the litigation. It also appeared that Cynthia Ferris had commenced an independent suit in equity for the same purpose.

The rehearing was properly denied. The application to open the sale was made subsidiary to it, and no reason is given which is of weight. Ferris and Nichols attended the sale, and interfered to prevent a sale in parcels, while they did not otherwise object to it, or ask a postponement. It is quite likely that they may have damaged the sale, but this does not appear. The bill filed by Cynthia Ferris would prevent her from complaining, as she seems to expect relief under it. But no relief can be granted now which would not be practically allowing two applications on the same ground for a rehearing,—one granted and not acted on, and another a substantial repetition of it,—without a willingness to comply with the practice, and after a longer delay than would support an appeal. There is not the least evidence of unfairness at the sale, and Mr. Post denies the charges of his colluding with complainant. He shows that he never was applied to until a few days before the sale, and was not supplied with evidence that he could advance the money safely, and made no agreement about it. Ferris and Nichols, by their conduct at the sale, influenced its being made as it was; and it was fairly made.

In our opinion there is nothing to justify us in opening this litigation. The facts, if we were to pass on them, are practically explained in such a way as to show the defense is not as alleged, and that defendants have been responsible for any loss they have suffered, if any has been suffered. They have thrown away such opportunities as were very liberally given them, and cannot be allowed to experiment indefinitely with the course of justice. Complainant has been put to great expense in advancing money and services for them, and they have re-imbursed nothing, and have put him to expense largely beyond any taxable costs besides. We do not feel disposed to interfere with the decree below, where the

circuit judge, if he erred at all, did so against complainant's rights under the course of practice.

The proceedings are affirmed.

The other Justices concurred.

77 305
86 148

M. CLEMENT PALMER v. JACOB SELIGMAN ET AL.

Principal and agent—Execution of sealed bond—May be ratified by parol—Question of fact for jury.

1. The execution by a traveling salesman of a non-resident firm of a bond of indemnity, under seal, in the name of the firm, in an attachment suit brought to collect a debt due the firm and contracted in the ordinary course of their business, although without express authority under seal, may be ratified by parol, which ratification may be shown by facts and circumstances; and the question of such ratification is for the jury, when there is testimony tending to show it, and inferences to be drawn from such testimony.
2. The Court does not depart from *Fox v. Norton*, 9 Mich. 207, but distinguishes that case from the one at bar in that in that case the execution of the bond by Gilbert & Co., as *sureties*, was not within the scope of their business, and to bind the partner who did not execute the instrument, in the absence of authority under seal, some previous assent or subsequent ratification as the act or obligation of the firm was requisite to be shown.

Error to Wayne. (Gartner, J.) Argued October 15, 1889. Decided November 1, 1889.

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

McGarry & Ford (*W. W. Mitchell*, of counsel), for appellant, contended:

1. The rule contended for by defendants' counsel that the authority of Pollasky should have been under seal is a purely technical one, and the disposition of American courts is to relax its strictness, especially in its application to partnership and commercial transactions; citing *Starkweather v. Martin*, 28 Mich. 471–479; *Worrall v. Munn*, 5 N. Y. 229, 239; Story, Part. §§ 121, 122; *Anderson v. Tompkins*, 1 Brock. C. C. Rep. 462; *Tapley v. Butterfield*, 1 Metc. 515; *Everit v. Strong*, 5 Hill, 163.
2. The addition of a seal to an instrument valid without it, by one without special authority, does not vitiate the instrument; citing *Milton v. Mosher*, 7 Metc. 244.
3. If an agent unnecessarily affixes a seal to an instrument which is not required by law it may operate as an unsealed instrument, and the ratification need not be by seal; citing *Ledbetter v. Walker*, 31 Ala. 175; *Despatch Line v. Bellamy Co.*, 12 N. H. 205; *Cooper v. Rankin*, 5 Binn. 613.
4. Absence of a seal from a bond in this State does not invalidate the instrument; citing How. Stat. § 7778; *Bank v. Ziegler*, 49 Mich. 157; *Lockwood v. Bassett*, Id. 549; *Fowler v. Hyland*, 48 Id. 181; *McKinney v. Miller*, 19 Id. 151.
5. L. Newbauer & Sons evidently knew that the bond had been given, and that proceedings were being carried to effect in reliance upon it. Pollasky, and their attorneys, knew it had been given, and it was their duty to have informed their principals of the fact, and, in the absence of contrary proof, they will be presumed to have performed their duty; citing *Sutton v. Dillaye*, 3 Barb. 529; *Meehan v. Forrester*, 52 N. Y. 277; *Ingalls v. Morgan*, 10 Id. 178; *Hovey v. Blanchard*, 13 N. H. 145; *Smith v. Commissioners*, 38 Conn. 208; *Philadelphia v. Lockhardt*, 73 Penn. St. 217; *Slater v. Irwin*, 38 Iowa, 261; and upon principles of policy it must be taken for granted that the principal knows whatever the agent knows; citing Story, Ag. § 140; *Jeffrey v. Bigelow*, 13 Wend. 518; *Bank v. Davis*, 2 Hill, 461.
6. A person whose agents and representatives are competent and well informed as to all matters affecting their principal's interest, cannot well plead want of notice of anything which his agents know; citing *Morgan v. Railroad Co.*, 57 Mich. 431.
7. A principal who is informed of an unauthorized act done by his agent, must give notice of his dissent within a reasonable time or his assent and ratification will be presumed; citing *Cairnes v. Bleecker*, 12 Johns. 300; *Jarvis v. Hoyt*, 2 Hun, 637; *Johnson v. Wingate*, 29 Me. 404.

Wisner & Draper, for defendants Seligman and Doyle, contended:

1. An authority to an agent to execute an instrument under seal, in the absence of the principal, must in all instances be under seal, and can be conferred in no other way; citing Bishop, Cont. § 1045; *Wheeler v Nevins*, 34 Me. 54; *Hanford v. McNair*, 9 Wend. 54; *Blood v. Goodrich*, Id. 68; *Graham v. Holt*, 40 Am. Dec. 480; and the rule is also well settled that the act of an agent in executing a sealed instrument for the principal cannot be ratified by parol; citing *Blood v. Goodrich*, 12 Wend. 525; *Heath v. Nutter*, 50 Me. 378.
2. The law in this State is, that one partner cannot authorize an agent to execute a bond so as to bind the firm, without special authority; citing *Fox v. Norton*, 9 Mich. 207; *Russell v. Annable*, 109 Mass. 72.
3. This Court has said that the statutes referred to by counsel for appellant have not made an unsealed instrument a sealed one; citing *McCormick v. Bay City*, 23 Mich. 460.

CHAMPLIN, J. The bond in suit was given to the sheriff of Montcalm county to indemnify him against loss, costs, and damages in case he would levy an attachment issued out of the circuit court for the county of Montcalm, wherein Lewis Newbauer, Nathan Newbauer, Edward Newbauer, and Charles Newbauer were plaintiffs, and Louis Simon was defendant, upon certain goods and chattels which appeared to belong to Louis Simon, but which were claimed by Isabella Lewis, of the village of Edmore. The plaintiffs in the attachment suit composed a partnership under the firm name of L. Newbauer & Sons, and their place of business was Milwaukee, Wisconsin.

The bond stated that L. Newbauer & Sons as principals and Jacob Seligman and Edward H. Doyle as sureties, were held and firmly bound unto John Q. Crippen, Esq., sheriff of the county of Montcalm, State of Michigan, and was signed as follows:

"L. NEWBAUER & SONS. [L. S.]
"Per M. E. Pollasky.
"JACOB SELIGMAN. [L. S.]
"E. H. DOYLE. [L. S.]"

After the bond was delivered to the sheriff, the attach-

ment was levied upon a stock of goods as being the property of Louis Simon; and thereupon one Isabella Lewis brought trover against the officer levying the attachment, and recovered judgment. The goods seized were sold under an order of the court, and the proceeds held until final judgment was obtained, and the avails were then paid over to the attorneys of L. Newbauer & Sons. This suit is brought by the assignee of the sheriff upon the indemnity bond. It appeared that M. E. Pollasky was a traveling salesman for L. Newbauer & Sons, in Michigan, who were non-residents of the State of Michigan, and that he employed attorneys, and instituted the attachment suit. The sheriff refused to levy upon the goods mentioned until he was secured, and the aforesaid bond was given. In this suit the members constituting the firm of L. Newbauer & Sons were made parties defendant, but were not served with process. The sureties were served, and appeared, and defend upon the ground that they were induced to sign the bond as sureties by the representations made to them that said bond had been duly signed and executed by the principals therein named, and that such representations were false and fraudulent.

Upon the trial the plaintiff introduced testimony showing the circumstances under which the bond was given, and also testimony tending strongly to show ratification of the act of Pollasky in executing the bond, on behalf of the principals.

The deposition of Mr. Pollasky was taken in behalf of the plaintiff, and we must say that his testimony does not impress us that he testified with candor. Whether he did or not was a question for the jury, but the circuit judge did not permit the case to go to the jury. Pollasky testified that, at the time he signed the bond in the name of L. Newbauer & Sons, he had no written

authority under seal to do so. At the close of the testimony the plaintiff offered the bond and assignment thereof in evidence. The counsel for defendants Seligman and Doyle objected, on the ground that the authority of the agent to sign the bond for the principals had not been shown. The court sustained the objection, excluded the bond and assignment from the evidence, and directed the jury to render a verdict for defendants.

Although no express authority under seal was shown by which Pollasky was authorized to execute the instrument, yet his act in so doing could be ratified by parol, and this ratification may be shown by facts and circumstances; and the question of ratification, where there is testimony tending to show it, and inferences to be drawn from it, is for the jury. We do not depart from *Fox v. Norton*, 9 Mich. 207. There is, however, a material difference between that case and this. In that case the bond was executed to procure the discharge of a steam-boat which had been attached under the boat and vessel law, and Gilbert & Co. signed as sureties. Going security upon such a bond was not in the scope of their business; and to bind the partner who did not execute the instrument, in the absence of authority under seal, some previous assent or subsequent ratification as the act or obligation of the firm was requisite to be shown.

In this case the firm is the principal named in the bond, and it was given in a suit instituted by them to collect their own debt due from a creditor. To entitle the plaintiff to recover, however, in this suit, it is incumbent upon him to show that the principals executed the bond, as well as that the sureties did; for the action is brought jointly against the principals and sureties. But the plaintiff may show the execution by showing either that Pollasky was duly authorized by them to execute the bond in their name, at the time, or that they have sub-

sequently ratified his act; and this latter he may show by facts and circumstances by which the jury may find ratification.

We think there was testimony which should have been submitted to the jury upon this question; and therefore reverse the judgment, and direct a new trial.

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

JOHN VERDINE v. FRANCIS E. OLNEY ET AL. (ORIGINAL BILL), AND FRANCIS E. OLNEY v. ABRAM A. POST ET AL. (SUPPLEMENTAL BILL).

Mortgage—Identity of mortgagee—Authority of agent—Equity practice—Bond—Construction of terms of payment.

1. Where a bond is conditioned for the payment of a sum of money "in five years" from date, the natural acceptation is that it *may* be paid *inside* of the five years, and *must* be paid at the expiration thereof, but this will not warrant payment in installments without the consent of the obligee.
2. In this case it is *held* that if a father, who bore the same christian name as his son, was the real owner of a mortgage taken by the son in the *common* name, without any distinguishing affix thereto, the conduct of the son in reference to this and all other loans made, and securities taken, and the consent and acquiescence of the father in such conduct, were sufficient to authorize a subsequent purchaser of the mortgaged premises to treat the son as the owner of the mortgage, and to deal with him and his agent on the supposition of such ownership, it appearing that the son managed all loans for his father, and that the mortgagor, and the said subsequent purchaser, supposed that the son was the owner of the mortgage in question.
3. Where, in *such* a case, the subsequent purchaser filed a bill to enjoin a statutory foreclosure of said mortgage, and interpleaded his grantor, alleging payment in full of the mortgage debt to

the son and his said agent, and an answer was filed in the name of the mortgagee, in which the agency was denied, and the grantor also answered admitting such agency, and claiming that such payments had been made as charged in the bill, and further answered claiming the benefits of a cross-bill, under the rules, and set up affirmatively such agency and payments, and his rights in the land, and, upon the hearing of the case, the son testified that his father was the owner of the mortgage, and that he had died since the filing of said bill, whereupon the suit was revived on the petition of the complainant against the father's personal representatives, who filed an answer, previous to which there was nothing in the proceedings to indicate whether the father or son owned the mortgage, after which the said grantor filed a supplemental bill in the nature of a bill of revivor against the son, and said administrators, and said subsequent purchaser, alleging that the son had always held himself out as the owner of the mortgage until said hearing, to whom and his agent the payments aforesaid had been made in reliance upon such ownership, the bill in other respects making the same case as was made in the answer of said grantor, to which supplemental bill the administrators filed a plea setting up the first suit by the subsequent purchaser as a bar to the new suit by said grantor, coupled with a disclaimer on the part of the son, said plea and disclaimer are properly overruled, the right to file said supplemental bill under the circumstances being undoubted. And it is further *held* that said subsequent purchaser had a right, under the circumstances, to deal with said agent in the relation in which the son held him out to the public, to wit: as a general agent, authorized to receive principal and interest at any time upon the mortgage.

Appeal from Barry. (Hooker, J.) Argued October 11 and 15, 1889. Decided November 1, 1889

Bills for an accounting, and to discharge a mortgage claimed to have been paid. Defendants Post appeal from a decree granting the relief prayed for. Decree affirmed. The facts are stated in the opinion.

C. G. Holbrook, for complainant Verdine.

Stuart, Knappen & Van Arman, (*Austin Blair,* of counsel), for Francis E. Olney.

Grove H. Wolcott and *Mark S. Wolcott*, for defendants Post.

MORSE, J. This controversy concerns the payment and discharge of a real-estate mortgage.

June 1, 1877, Jared C. Thompson, then the owner of the east half of north-west quarter of section 23, in the township of Barry, Barry county, in this State, loaned $800 of Abram A. Post, of Penn Yan, New York, securing the same with a bond and mortgage, which were dated of that date, but the mortgage was not acknowledged until June 15, 1877. There were two Abram A. Posts living at this time, father and son, who are known in the record as Abram A. Post, Sr., and Abram A. Post, Jr. Some time in 1878 Jared Thompson sold the land to John Thompson. February 27, 1879, John Thompson conveyed the same premises to Francis E. Olney, who deeded to John Verdine on December 13, 1882.

In the month of January, 1886, Abram A. Post, claiming to be the owner of the mortgage, commenced a statutory foreclosure of the same in Barry county, and stated in the notice of sale that there was due on the mortgage January 21, 1886, the sum of $836.81.

February 17, 1886, Verdine, the complainant in the first cause, filed his bill of complaint in the circuit court for the county of Barry, in chancery, to restrain the proceedings to foreclose such mortgage, averring that one Anderson, residing in the city of Jackson, Michigan, was the agent of said Post in Michigan, and authorized to make loans for him, and to collect and receive moneys due and payable upon the mortgages and other securities taken to secure said loans, and that Olney, of whom Verdine purchased the premises, claimed to have paid the mortgage on this land in full. Verdine therefore prayed

that an account might be taken as to the money actually due upon the mortgage, if any, to said Abram A. Post, and, if any was found due, that he might be permitted to redeem the land, and apply the amount of such redemption money upon a purchase-money mortgage held by said Olney against him, and on said premises.

To this bill Abram A. Post answered, denying any authority in Anderson to collect either the interest or principal upon said mortgage, and averring that if Olney or any one else made payments to Anderson, they were not authorized by him, and that there was due the said sum of $836.81, as stated in his notice of sale on statutory foreclosure.

Olney also answered. He averred his purchase of John Thompson, and admitted, on information and belief, that George F. Anderson was authorized to receive the payments made on the mortgage, and claimed that he and Thompson together had fully paid and discharged the mortgage, and that he held the receipts and vouchers therefor. Defendant Olney further answered, claiming the benefits of a cross-bill, under the rules. He set out the conveyance from Jared Thompson and wife to John Thompson, and from the latter to him, both conveyances being subject to the unpaid balance of said mortgage to Post. He alleged, on information and belief, the agency of Anderson, and that he was the duly constituted attorney of Post as to the collection of this mortgage; and that, from the entire period of the giving of said mortgage until after December 20, 1880, the said George F. Anderson, with the consent and acquiescence of Abram A. Post, collected and received, as his agent and attorney, the installments of interest as they matured, also a portion of the principal of said mortgage. He set forth the payments made by himself to Anderson, and further averred the payment to said Post by a New York draft,

duly transmitted to him at Penn Yan, of the sum of $381.47, on June 1, 1882, which was then sufficient to pay and satisfy in full the said mortgage, and all that was due or to become due upon the same, both of principal and interest.

He asked as relief that the court should determine the amount actually paid by him and Thompson; that Anderson was authorized as agent of Post to receive the same; that the payments made to Anderson be applied upon said mortgage, and the same decreed to be fully paid and satisfied, and ordered to be discharged of record.

Issue was joined in the cause, and hearing begun in open court at the February term in 1887, when it became known to the court for the first time that Abram A. Post, Sr., died in the month of June, 1886. An order was afterwards made reviving the suit. Then the administrators of Post filed their answer. Previous to this there was nothing in any of the pleadings to show whether Post, Sr., or Post, Jr., owned the mortgage or commenced the foreclosure; the name "Abram A. Post," without further designation, being used in all the proceedings.

November 14, 1887, Olney filed a supplemental bill, in the nature of a bill of revivor, against Abram A. Post, the son, individually, and the administrators of Abram A. Post, the father. In this bill Olney alleged that Abram A. Post, the son, had held himself out as the owner of the mortgage until the death of his father, and that the payments were made in the full belief that the son, and not the father, was the mortgagee, and that nothing was ever known to the contrary until the partial hearing of the first cause in February, 1887, when the son testified that he was not the owner of the mortgage, and that the same had always belonged to his father, and that his father was dead. The bill, in other respects, made the

same case, in fuller detail, as made in the answer of Olney in the first case.

The defendants Post's administrators filed a plea, setting up the first cause as a bar to the new suit, coupled with a disclaimer on the part of the living Abram A. Post. By stipulation the two causes were heard together. The chief issues in dispute were:

1. Who owned the mortgage, the father or the son?
2. The amount of the payments made to Anderson.
3. Was he authorized to receive them as the agent of Post?

A jury was demanded and ordered, and it was stipulated that the jury should—

"Try the issues contained in both cases together, * * * and that said verdict stand as a verdict in each cause."

Testimony was then taken in open court, in the presence of the court and jury, and submitted by the court in a charge to them, in which they were required to answer three questions as follows:

"1. Which one of the Abram A. Posts was the owner of the mortgage in question at the time of the commencement of the suit first entitled above, to wit, March 22, 1886? *A.* A. A. Post, Jr.

"2. Was the mortgage mentioned and described in the pleadings in these causes as given by the said Jared C. Thompson to the said Abram A. Post, upon the land described in the pleadings in said causes, fully paid and satisfied previous to the commencement of the suit first above entitled? *A.* Yes.

"3. What amount, if anything, of principal and interest upon the mortgage in question is actually owing and unpaid at the date of the rendition of this verdict? *A.* Nothing."

This verdict was rendered November 24, 1888. On the 27th of the same month Judge Hooker made a decree confirming the findings and verdict of the jury, and declared in said decree that the said mortgage was fully

paid, satisfied, and discharged, and gave Olney his costs against the defendants Post, who appeal to this Court. Verdine also, in effect, had his costs decreed from the Posts.

The only material question at issue was the authority of Anderson to receive the payments made upon the mortgage. Enough money was paid to Post and to Anderson to discharge the mortgage beyond all question. Whether Abram A. Post, Sr., or Abram A. Post, Jr., owned the mortgage was not material, except as bearing on the question of Anderson's agency. It is admitted by Abram A. Post, the son, that he managed the loans for his father in Michigan, and that while in Michigan he signed his name as "Abram A. Post." He used the "Jr." only in New York. There can be no doubt upon this record that the Thompsons and Olney supposed that the son was the owner of this mortgage until he testified to the contrary, and that he gave them reason for believing so. The testimony shows that Abram A. Post, Jr., made all the loans in Michigan for his father, came to this State and looked the lands over before making the loans, and attended to the correspondence, signing the name "Abram A. Post." In the present case he saw Thompson and looked over the land before making the loan, and Thompson and every one else supposed that he was the Abram A. Post with whom he was dealing. He conducted all the correspondence, and made all the indorsements upon the mortgage except the last payment, which his father indorsed. While in Michigan he deposited the money he brought with him, and what he received while in this State, in the name of Abram A. Post, and drew the checks upon which it was disbursed, signing them "A. A. Post." If Abram A. Post, the father, was the real owner of this mortgage instead of the son, we think the conduct of the son in Michigan in reference to all loans made

and securities taken here, and the consent and acquiescence of the father in such conduct, were sufficient to authorize the defendant Olney in this case to treat the son as the owner of the mortgage, and to deal with him and his agent, Anderson, on the supposition of such ownership.

Under the circumstances, we have no doubt of the right of the defendant Olney to file the supplemental bill when he learned for the first time that the estate of the father claimed the ownership of the mortgage.

The plea of the administrators and the disclaimer of Abram A. Post were properly overruled. As far as the purposes of this suit are concerned, the son must be considered as the owner of the mortgage, and it may be here remarked that the testimony strongly tends to establish it as the fact. Upon the bond is indorsed the following payments:

"$36.00. Oct. 1, 1887, received on the within bond $36, being interest up to date.

"Interest paid up to June 1, 1878, $36.00.

"Interest paid up to December 1, 1878, $36.00.

"November 1, 1879, received on bond and mortgage $72.00.

"June 3, 1882, received three hundred and eighty-one dollars and fifty cents on the within, $381.50.

"A. A. Post."

The payments established by Olney were as follows:

"December 12, 1878, $36, interest.

"June 25, 1878, $36, interest.

"March 19, 1879, $36, interest.

"Nov. 21, 1879, $433.75 to apply on principal, and $30, interest in full to date of payment.

"August 5, 1880, $18, interest.

"December 20, 1880, $50 on principal."

These payments were all made to George F. Anderson, and were evidenced by his receipts in the possession of Olney, and also shown by other testimony.

Abram A. Post, Jr., testified that Anderson was not

authorized to collect either principal or interest upon this mortgage, but it will be noticed that he indorsed on the bond the interest up to November, 1879, which he must have received through Anderson, as there is no proof that any of it was paid Post, or any person save Anderson. Post finally admitted that some of this interest money was sent to him by Anderson. The fact is established, we think, that Anderson, with the knowledge and consent of Post, collected the interest on this mortgage. Jared Thompson also testifies that Post, Jr., directed him to pay the interest to Anderson when it became due, and Thompson understood from him that he was his agent, and that any business that Thompson might have to transact on account of the mortgage should be done with Anderson. We are satisfied that Anderson had authority to receive the interest, and that all the payments to him on account of interest should be credited upon the bond and mortgage.

Mr. Olney made the payment of March 19, 1879, and all the payments thereafter. After the last payment to Anderson, when Olney wanted to make a payment of interest on the mortgage, Anderson refused to receive any more money, on the ground that he and Post were having trouble, and he was acting as his agent no longer. Up to this time Olney had never seen Post, and had had no correspondence with him. Being desirous of paying his interest, he wrote two or more letters to Post at Penn Yan, but received no reply to any of them. In August, 1881, he met Post and his father. Olney testifies that he spoke to the younger Post about his payments, stating the payments he had made. Post told him he would have to pay twice. Olney replied he "wouldn't pay twice until he had to." The old man said:

"Young man, you will never have any trouble from me,—from us."

This interview was at Jackson, and Olney claims that before Post went away he promised when he returned to Penn Yan to write, directing Olney where to pay his interest. Receiving no letter, he wrote, September 18, 1881, that he wanted to know what his interest was, and wanted to pay it. He afterwards received a letter, dated August 29, 1881, which for some reason had been delayed. This letter was in answer to one written for Olney by Mr. Hall, and stated that he had no agent at Jackson, and closed as follows:

"When you do business, I want you to do it with me. My address is A. A. Post, Penn Yan, Yates Co., N. Y."

The letter was dated and mailed at Jackson. Olney received no answer to the letter of September 18, 1881. He afterwards wrote another letter to Post at Penn Yan, asking for a statement of the amount due on the mortgage, to which he received no reply

June 1, 1882, Mr. Knappen, on behalf of Mr. Olney, procured a New York draft for $381.50, payable to the order of L. E. Knappen, and by him indorsed to the order of A. A. Post, and sent the same in a letter to said Post at Penn Yan. The letter set forth the payments claimed to have been made, and that this draft was forwarded to pay the balance of principal and interest on the bond and mortgage. A discharge drawn ready for execution was also inclosed, with one dollar in currency to pay expenses of such execution. No reply was ever received to this letter, or to another sent July 13, 1882, by Mr. Knappen, inquiring why the remittance was not acknowledged. The draft was received at Penn Yan and indorsed, June 3, 1882, as a payment, in the handwriting of the elder Post. No acknowledgment seems to have been made of the dollar in currency by indorsement or otherwise. Nothing was heard from this draft by

Olney or Knappen, or in reference to the mortgage, until January 2, 1885, when Mr. Knappen received a letter from G. H. & M. S. Wolcott, attorneys at Jackson, stating that the mortgage had been left in their hands for collection.

It is admitted that if the payments of both principal and interest made to Anderson are allowed, the draft sent June 1, 1882, and received by Post, was sufficient in amount to fully pay and discharge this mortgage. But it is vigorously contended by the counsel for the defendants Post that there is not sufficient evidence to show that Anderson had any authority to receive the payments upon the principal, to wit, $433.75, November 21, 1879, and $50, December 20, 1880. It is claimed that the principal, or any part of it, was not due until June 1, 1882; and that there is no testimony that Anderson had any right to receive any of the principal before due, except the letter of Anderson to John Thompson, which cannot be used as evidence to prove his authority as agent. But it appears from the bond and mortgage that the principal was payable "in five years" from their date, and it would seem that although the payment of the principal, or any part of it, could not be enforced until the expiration of the five years, still it was at the option of the mortgagor to pay it at any time within such period. The definition of "in" by Webster is "within; inside of;" and with such meaning the preposition is commonly and generally used. When the bond reads that the $800 is to be paid "*in* five years," the natural acceptation is that it may be paid inside of the five years, and must be paid at the end thereof. But this would not warrant the payment in installments without Post's consent.

Independently, however, of the question whether the principal, or any part of it, was due before June 1, 1882,

we are satisfied that George F. Anderson was held out to the public in Michigan by Post as his general agent to transact any and all business pertaining to the loans in Michigan, and that Olney was justified in making the payments to him.

The evidence is overwhelming that, for a period from the inception of this mortgage up to 1881, Anderson was the acknowledged agent of Post in his loans, and in the collection and payment of interest and principal upon them; and that Anderson had general authority to transact business as to the bonds and mortgages taken in Michigan, as shown by the statements of Post to a number of persons who had given such securities for loans made by him, and also by two letters written by Post to such persons. As Thompson testified, we think Post gave the parties loaning money from him to understand that Anderson was his agent, and that any business that they might have to transact on account of their mortgages should be done with Anderson. It may be, as between Post and Anderson, that it was understood that Anderson should not receive any of the principal sums of said loans without first obtaining his consent, but that cannot alter the situation. Olney had a right, under the circumstances, to deal with Anderson in the relation that he was held out by Post to the public, to wit, as a general agent, authorized to receive principal and interest at any time upon the mortgage. Anderson, at the time of the taking of the proofs, was absent, and supposed to be in some prison in England, and his testimony was not obtained.

We think the decree was right, and it will be affirmed in both cases, with costs.

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

CAMPBELL, J. I concur in all but the construction of the terms of the bond, on which I reserve my opinion, as payments were so accepted as to make it immaterial.

JOSEPH STOINSKI AND MARY STOINSKI v. ANTON PULTE AND JOSEPH BERLITZKEY.

Ejectment—Amendment of declaration—Joinder of parties.

1. An amendment of the served copy of a declaration in ejectment which made it correspond as to description with the original on file, and which could not have misled the defendants, is held properly allowed on the trial.
2. It is the first duty of the plaintiff in ejectment to prove a title, and identify the land sought to be recovered.
3. Where two brothers and their wives occupied a lot of land within the constitutional requirements necessary to constitute a homestead, *all* of said persons are necessary parties to an action of ejectment to recover said premises.

Error to Wayne. (Brevoort, J.) Argued October 16, 1889. Decided November 1, 1889.

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

M. B. Breitenbach and *B. T. Prentis,* for appellants.

Edgar Weeks and *D. F. Glidden,* for defendants.

CAMPBELL, J. Plaintiffs brought ejectment for what they claimed to be a strip five feet wide, belonging to the west part of lot 1, of outlot 188, of the Rivard farm, in Detroit, bordering on the Louis Moran farm. The court properly allowed an amendment of the served copy

of the declaration which made it correspond with the original on file, and which could not have mislead defendants. [1]

Plaintiff testified he purchased lot 1 in Tait's subdivision of that part of outlot 188 of the Rivard farm lying north of Fremont street. He produced his title, which was an executory contract from William Tait, dated June 1, 1886, providing for its purchase for $500 and interest, in eight half-yearly payments, and for a conveyance with mortgage back on the completion of a house therein described. No deed was shown from Tait. Nothing was offered to show title in Tait, or to show where lot 1 was, or what were its dimensions. An attempt to have plaintiff swear to the size of his lot by parol, and without reference to Tait's plan, was properly shut out.

Plaintiff testified that John Derlitzkey lived next to him, and that Joseph Derlitzkey also lived with John. He testified that the declaration was served on John, and not on Joseph. Joseph defends the case. Plaintiffs' counsel, in one of the rather confused discussions, stated that the question was whether an amendment should not be made substituting John for Joseph as defendant. No ruling seems to have been asked or made. On cross-examination, it appeared that John was married and lived on the premises with his wife, as his home, and that Joseph was also married, and lived with his wife in the same house; and that plaintiff knew this when suit was commenced; and that the premises on which they lived were worth $700 or $800.

No further testimony was offered. Upon a suggestion from the court that under plaintiffs' case, as presented,

[1] The land was described by metes and bounds in the declaration, and some of the courses and distances were omitted in the copy served.

there could be no recovery, counsel said he had not yet rested; and, on the further claim of defendants' counsel that no further testimony would change the facts already shown by plaintiff, Mr. Prentis said that was all he had to say. The court said he did not see how plaintiffs could recover under the testimony given, and charged the jury to find for defendants. Mr. Breitenbach said they had not rested, but made no offer to prove anything more, and did not state he could do so. The jury found for defendants.

It was the plaintiffs' first duty to prove a title, and identify their land. This was not done, and there was no offer to do so, or statement that it could or would be done.

But, having affirmatively proved that both John and Joseph Derlitzkey, and their wives, occupied the property in question, it is manifest that plaintiffs could not amend so as to bring in John and put out Joseph from the record, without new pleading and appearance by John, who was not before the court. But it is also plain that the case was defective without having both of them impleaded, and, according to plaintiffs' testimony, their wives were equally necessary parties. It was therefore impossible that plaintiffs could recover at all on the record, or any amendment that could be granted during a trial; and the court properly so ruled.

The judgment must be affirmed, with costs of both courts, and the record remanded, under the statutes.

The other Justices concurred.

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CHARLES WEISE AND CHARLES REESE v. CHARLES A. RICH AND SYLVESTER L. RICH, TRUSTEES, ETC.

Leases—Executors and trustees—Liability as lessors.

1. It may well be doubted whether a declaration in a suit against executors and trustees in their official character, for damages arising by reason of alleged leakage from the roof of a store leased by them to plaintiff, can be amended on the trial by striking out the word "executors," and leaving defendants charged as trustees.
2. There is no legal theory on which either executors or trustees can *presumably* bind their estate by a five-years' lease, or by verbal representations concerning the condition of the estate, resulting in unliquidated damages to a large amount.
3. The precise character of the powers granted by the will to executors and trustees cannot be shown by parol.
4. An action cannot be made out against executors and trustees, as such, for damages arising by reason of alleged leakage from the roof of a store leased by them to the plaintiff, without proof of the precise character of the powers granted to them by the will of the testator.

Error to Wayne. (Reilly, J.) Argued October 17, 1889. Decided November 1, 1889.

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

Corliss, Andrus & Leete, for appellants.

John A. McLennan (*Charles Flowers,* of counsel), for plaintiffs.

CAMPBELL, J. This suit was brought against defendants for damages arising to the goods of plaintiffs by reason of alleged leakage from the roof of their store, rented from defendants, during a great storm in August, 1888. Several errors are assigned, partly on the state of the record,

and partly on rulings at the trial. The jury found a verdict for $1,000, which does not appear to be founded on any precise testimony. We shall not find it necessary to consider many of the assignments of error, inasmuch as there are some which lie at the foundation of the case.

The declaration in the first two counts sets out a leasing of the premises in November, 1887, upon the alleged false inducement that the building was in good repair, whereas the roof was leaky, and, on or about August 3, 1888, the goods were damaged by water caused thereby.

The third and fourth counts set up no representations in advance, but aver the leasing, and the bad state of the roof; and allege, in different ways, the undertaking by defendants to repair, and their failure to do so properly, and their misleading representations to the effect that it was properly done.

Upon the trial, an attempt was made, and allowed, to prove by parol their character of executors and trustees, and their discharge as executors. This was excepted to. There was, however, no attempt to prove the contents of the will, or what authority it gave defendants in either capacity. There was no testimony of any joint action or representation by more than one of the defendants at any time. The court, against objection, allowed the declaration to be amended by striking out the word "executors," and leaving defendants charged as trustees.

Whether such an amendment, which might have changed the character of the litigation, could be allowed on trial, may be doubted. The court below intimated a doubt whether it appeared they were not still executors; and it is evident that, if one character was succeeded by the other, the powers of the two offices could not be presumed identical. The suit is not brought against defendants personally, but officially. There is no legal theory on

which either executors or trustees can presumably bind their estate by a five-years' lease, or by verbal representations concerning the condition of the estate, resulting in unliquidated damages to a large amount. Without evidence of the precise character of the powers granted by the will to executors or trustees, there was nothing to found an action; and this could not be shown by parol, and was not shown at all. In the absence of any such evidence, it could not be known how far, if at all, one of the defendants could bind the other, personally or officially.

These objections, therefore, were not formal or technical, but essential; and, without a showing of what was not attempted to be shown, no case could be made out.

Whether the declaration would have sufficed had the proofs been full need not be considered. The bearing of much of the testimony might have been changed by a different showing on the primary facts, and we do not care to pass on questions which are possibly not essential. We are not to be regarded as overruling the assignments not noticed.

Judgment must be reversed, with costs, and a new trial ordered.

The other Justices concurred

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GERRIT S. WARD v. JOHN W. DOANE AND JEHU E. PARKINSON.

Promissory note—Good-faith purchaser—Liability of indorser of void note—Evidence—Charge to jury.

1. It is a fact of which courts may take knowledge that notes known as "Bohemian Oat Notes" are all obtained and given upon a similar scheme or arrangement, and are void, as against public policy, between the maker and payee, or any other person having knowledge or information of the scheme upon which they are based, and by which they are procured.[1]
2. Where the testimony in a suit by an alleged *bona fide* holder of a "Bohemian Oat Note" tended to show that the plaintiff had knowledge of the true character of the paper, *before* its purchase, he may be cross-examined touching his knowledge, before or at the time of such purchase, of Bohemian oat notes in general, or as to his information or knowledge specially in regard to any such note which had come into his hands or to his attention.
3. Where, in a suit upon a Bohemian oat note purchased by a firm composed of five members, only two of the partners were shown to have taken any part in such purchase, or to have known anything about it until after it was made, the presumption is that the remaining members were ignorant of the consideration of the note.
4. A Bohemian oat note is void as to all parties acquainted with its character (*McNamara v. Gargett*, 68 Mich. 454), and no new liability can be created upon it; not even a contract of indorsement between the payee and one acquainted with its fraudulent character.
5. Where the purchaser of a Bohemian oat note testified that he had read of this Bohemian oat note scheme, and knew that some farmers were getting into it, in the absence of a denial on his part that said scheme was a fraudulent one, the jury and court have the right to presume that it was the same old fraud with which the whole State is now familiar, and in such

[1] See *Sutton v. Beckwith*, 68 Mich. 303, *Mace v. Kennedy*, Id. 389, *McNamara v. Gargett*, Id. 454, *Davis v. Seely*, 71 Id. 209, for "Bohemian oat note cases."

a case the jury should be instructed that if they found that the plaintiff knew that the note was given for Bohemian oats, or was so informed before its purchase, he could not recover.

Error to Gratiot. (Hart, J.) Argued October 17, 1889. Decided November 1, 1889.

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

C. J. Willett, for appellant, contended:

1. The indorsement of Parkinson constitutes a new and independent contract, supported by a full consideration, and is not affected by prior equities; citing 2 Pars. N. & B. 25; *Church v. Edson,* 39 Mich. 113.
2. The jury should have been instructed that knowledge or notice that the note was given for Bohemian oats was enough to make the purchaser guilty of that bad faith which will prevent him from claiming the protection of innocence; citing *Converse v. Blumrich,* 14 Mich. 120; *Peabody v. McAvoy,* 23 Id. 530; *Burroughs v. Ploof,* 73 Id. 607; *Moore v. Township of Kenockee,* 75 Id. 332.

James L. Clark, for plaintiff, contended:

1. The rule, that after the illegality of a note has been shown the burden of proof shifts to the plaintiff to show that he is a *bona fide* holder for value, only extends to such persons as have some knowledge of or participation in the transaction, or the negotiation of the paper, and in this case cannot extend to the members of the firm who are shown to have had no such knowledge or participation; citing *Shaw v. Clark,* 49 Mich. 384.
2. An indorsee, having knowledge or notice of the fraud connected with a negotiable paper, or being privy to it, cannot recover on his contract of indorsement; citing *Turner v. Keller,* 66 N. Y. 66; *Ackland v. Pearce,* 2 Camp. 599.

MORSE, J. This controversy grows out of an attempt to collect a Bohemian oat note now owned by the firm of W. S. Turck & Co., said firm consisting of Gerrit S. Ward, William S. Turck, Ammi W. Wright, Charles E. Webster, and Joseph H. Seaver. The plaintiff is the

collecting agent of the firm, and sues as such; the note being indorsed over to him for collection.

The note bears date of September 25, 1885, payable 15 months after date to J. E. Parkinson or bearer, and is for the sum of $500, with interest at 7 per cent. after January 1, 1886. The note was executed at Forest Hill, Gratiot county, by the defendant Doane, and delivered by him to the payee, the defendant Parkinson, who indorsed it in blank, and transferred it to W. S. Turck & Co., before due, on January 21, 1886, for $450. The usual bond was given to Doane at the time of the making of the note, and the illegality of the note between the original parties thereto was recognized on the trial, under the former rulings of this Court. The only issue was the good faith of the plaintiff's firm in its purchase. Ward testified that he was the cashier of the firm, and the one who purchased the note, and was not informed by any one, previous to its purchase, as to the consideration of it, and had no knowledge of what it was given for; that when it was first presented to him he refused to buy it, and referred Parkinson to Turck. Parkinson went in, and had some conversation with Turck; that after Parkinson went away, Turck told Ward, if Parkinson brought the note in, to give him $450 for it. Turck testifies that Parkinson came into the back office, to see him. No one else was present. Parkinson wanted to sell the note. Turck said the note ought to be good, with Parkinson's indorsement. Parkinson said:

"It is on long time, and Ward will not take it."

Turck said:

"We don't want to handle any long-time notes in the bank. It is not business for bankers to handle long-time notes."

Parkinson replied that it would be quite an accommo-

dation to him; and Turck finally told him that he would take it, but he could give only $450 for it. None of the rest of the firm had anything to say or do about the buying of this note. A few days thereafter, Turck went south, and did not return until the middle of April, 1886. He did not learn that Ward had taken the note until he came back. He testifies he did not know what the note was given for until after his return. He further testified, on cross-examination, that he knew before this note was purchased something about Bohemian oat notes; had read about the scheme, and knew that some farmers were getting into it.

Parkinson testified, for the defense, that his recollection was that he told Turck, in his conversation with him in the bank, what the note was given for, and showed it to him, and that, before or at the time he presented the note to Ward, Ward told him that he had advised the firm not to buy any Bohemian oat notes. Does not remember whether or not he told Ward what the note was given for. On cross-examination, he said that his recollection was poor, he had had trouble with his head; that he could not be positive that he had this conversation, in which he told Turck that the note was given for Bohemian oats, before or after he negotiated the note to Ward; and further said:

"It always looked to me as though it was before, but I wouldn't make it certain.

"*Q.* You wouldn't be positive?

"*A.* No, sir; but I lean to the opinion that it was before."

Turck and Ward both deny the testimony of Parkinson, that he said anything to them, or they to him, about this being a note for Bohemian oats, or anything in relation to Bohemian oat notes before the purchase of the note in suit.

There was testimony of other persons—farmers who had given notes for this kind of oats—to the effect that Ward had told them after the purchase of these notes, and while he was urging the payment of them, that he advised his folks not to have anything to do with Bohemian oat notes, and one Mr. Ring testified that, while talking with him about a note of Ring's, which W. S. Turck & Co. held, he asked Ward if, when he bought these notes (referring to all the Bohemian oat notes the firm held), he did not know all about them, and Ward replied that he did. These conversations were denied by Ward, who testified that he told Ring that if he had known there would have been any trouble connected with these notes he would not have bought them.

The jury found a verdict for the plaintiff for the full face of the note and interest.

Four errors are claimed to have been made by the circuit judge in the trial of this case:

First. It is contended that the defendants were not permitted to go as fully as they desired into the question of the witness Turck's general information or knowledge of Bohemian oat transactions, and of the consideration of other Bohemian oat notes discounted by him.

We think the defendants were entitled, on cross-examination, to ask the witness any proper question touching his knowledge, before or at the time of the purchase of the note in suit, of Bohemian oat notes in general, or as to his information or knowledge specially in regard to any Bohemian oat note which had come into his hands or to his attention. It is a fact of which courts may take knowledge that notes known as Bohemian oat notes are all obtained and given upon a scheme or arrangement similar one to the other, and void, as against public policy, between the maker and payee, or any other person having knowledge or information of the scheme

upon which they are based, and by which they are procured. There was testimony in the case tending to show that Turck knew this note was a Bohemian oat note before his firm purchased it. If this testimony were true, his knowledge of Bohemian oat notes in general and in particular was material.

We are not prepared to say from the record that the defendants were denied the privilege of a full investigation of the witness' knowledge in this respect. In connection with his testimony that he knew some farmers were getting into this Bohemian oat note scheme, he was asked the following question:

"Do you swear that you didn't know that these notes, and the consideration of them, was Bohemian oat business?"

It was ruled out, the court saying:

"I don't see the materiality of any other notes than the one in question."

If it was desired by this question to show that Turck knew that the consideration of other notes that he had purchased, or that had been presented to him before he bought the note in suit, was for Bohemian oats, the defendant was entitled to the testimony; but if the notes were so presented or purchased afterwards, it was immaterial. What he knew or learned about Bohemian oat notes after he bought this note was of no consequence.

The *second* error assigned is that the court erred in not instructing the jury that the burden rested on the plaintiff to show that no member of the firm of W. S. Turck & Co. had knowledge of the consideration of this note before or at the time it was purchased by said firm. Turck and Ward being shown to be the only members of the firm taking any part in the purchase of this note, and the only ones shown to have known anything about

its purchase until after it was bought, the presumption would obtain, we think, in the absence of any proof to the contrary, that they (the remaining members) were ignorant of its consideration.

Third. The court instructed the jury that Parkinson could not be held upon the note in this suit, unless Doane was also found liable.

It is claimed that this was of injury to Doane, as the jury might think it unjust that Parkinson, who received $450 for this note, should avoid liability, and therefore be influenced to hold Doane, so that Parkinson might not escape. It is also contended that Parkinson's indorsement was a new and independent contract, not subject to the equities of Doane.

As a general rule, an indorser, knowing that a note is not genuine, or that it is invalid, when he disposes of it, by reason of such indorsement, is held liable upon his indorsement for the full face value of the note, and to have guaranteed its validity thereby; and this rule is a just and equitable one. But in the present case we think the court was right. This note was defended by Doane on the ground that it was a Bohemian oat note, and consequently void as against public policy, between Doane and Parkinson, the maker and payee, and that it was also void in the hands of plaintiff, because the firm of W. S. Turck & Co. had knowledge before purchase of the fraudulent and illegal consideration of the note. Being void in its inception, and a contract not enforceable by any of the immediate parties to it, no other person, having knowledge of its invalidity, can enforce it. And, if the firm of W. S. Turck & Co. knew that it was a Bohemian oat note when they purchased it, and bought it of the payee, Parkinson, then public policy also requires that any contract between them and Parkinson, the object and purpose of which was to give life

to this illegal paper, shall be also void, upon the same grounds as those which destroyed its validity at its inception. This note is void as to all parties acquainted with its character (*McNamara v. Gargett*, 68 Mich. 454 (36 N. W. Rep. 218), and no new liability can be created upon it; not even a contract of indorsement between the payee and one acquainted with its fraudulent character. For instance, if all of the $450 had not been paid to Parkinson at the time he delivered this note to Ward, he could not have recovered from W. S. Turck & Co. the balance of the price agreed to be paid for the note, as the transfer of the note would have furnished no consideration for the agreement. Nor can W. S. Turck & Co., if they had knowledge of the illegal character of this note, recover back from Parkinson, in any form of action, or upon any theory of the law, the $450 they have paid him. Both parties, W. S. Turck & Co. and Parkinson, in such case are engaged in a transaction against public policy, and therefore void; and the law will leave each of them where they have placed themselves, without redress. The benefits and burdens growing out of the illegal business cannot be disturbed or equalized. The law will have nothing to do with the transaction in any way, except to declare it void.

The *fourth* assignment of error relates to the charge of the circuit judge as to the effect the knowledge on the part of W. S. Turck & Co. that this note was given for Bohemian oats would have upon the plaintiff's right to recover. The court stated in the general instructions, in speaking of notice to the purchaser:

"The knowledge or notice the purchaser should have must be of such facts as will bring to their notice and knowledge that it was an illegal and fraudulent transaction. Perhaps, before these transactions became so notorious and generally understood,—that a note given for

the purchase of Bohemian oats was connected with an illegal transaction,—the same knowledge would not carry with it notice of its illegality, at least, would not be as likely to carry such notice as after their character became so notorious that every one may be presumed to know something of the contracts that accompanied the giving of the notes. It is not the fact that Bohemian oats enter into the transaction alone that makes the note illegal, for these oats may be subject to sale, the same as any other grain; but it is the character of the contract that is made in connection with the sale of these oats, namely, the fictitious price and giving a contract or bargain back to sell to others double the amount of grain at such fictitious price, that constitutes the illegality."

This was all that was said in relation to this subject before the jury retired to deliberate upon their verdict. The court had properly instructed the jury that, if they believed the testimony of the defendant Doane, the note was fraudulent and void, as between him and Parkinson; and that, if plaintiff's firm had notice or knowledge before purchase of its illegality, he could not recover; and that the burden of proof was upon plaintiff to show that they did not have such knowledge or notice. But, in regard to such firm's knowledge that the note was given for Bohemian oats, the above excerpt contains all of the court's remarks thereon.

After the jury had been out for some time they returned into court, and the foreman said:

"We don't agree in regard to the bank knowing whether that was a Bohemian oat note or not."

The court then read over that part of his charge bearing on this question. The following colloquy between the court and jury then took place:

"*Foreman.* Didn't you say in your charge that if this jury find that the plaintiffs—this banking firm—knew that that note was a Bohemian oat note when they

bought it, the note would be void? Was there not something like that in your charge,—and they could not recover?"

"*The Court.* Not in that language. I don't think you could have understood what I just read.

"*Foreman.* I understood that part very well.

"*The Court.* If you find that the bank knew at the time the note was given the facts which constituted,—at the time they purchased the note; if they knew the facts that made the note illegal; knew the terms of the contract that constituted the illegal part; that made the note illegal,—the bank couldn't recover.

"*Foreman.* I understood you in your charge to say, if the jury find that the plaintiffs knew of that being a Bohemian oat note, they couldn't recover.

"*The Court.* You perhaps misunderstood me. The simple fact of knowledge that a note was given for Bohemian oats would not carry with it notice of its illegality."

We think the court erred in the statement to the jury, under the testimony—especially that of Turck—in this case, that the simple fact of knowledge that a note was given for Bohemian oats would not be notice of its illegality. As an abstract question of law, perhaps, or as applied to some cases, this instruction might be correct; but as applied to the case at bar, it was wrong. W. S. Turck testified that he had read of this Bohemian oat note scheme and knew that some farmers were getting into it. In the absence of any denial on his part that the scheme which he had read and heard of was a fraudulent one, the jury had the right to presume, as did also the court, that the scheme he was acquainted with was the same old fraud with which the whole State is now familiar. The jury should have been plainly told, in view of Turck's testimony, that if they found that Ward or Turck knew this note was given for Bohemian oats, or were so informed before the purchase of it, the plaintiff could not recover, and the verdict must be for the defendants.

By reason of the errors above noticed the judgment of the court below must be set aside and a new trial granted, with costs of this Court to defendants.

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

SHERWOOD, C. J. I agree with my brethren in this case, that notes procured as this was are void on the ground of public policy. The transaction out of which it grew, and which constitutes its only consideration, is now made a crime by statute. The defense urged goes to the very essence of the paper, and renders it void, and should be held to prevent any one from acquiring a legal title thereto, or any right to enforce it. The manner of obtaining it should be held a species of duress, involving a degree of turpitude scarcely less dangerous in business transactions than that of forgery; and paper obtained as this was should be subjected to the same rules in commercial dealings. In no other way can a community be protected against the effect of such an outrageous swindle. For the reasons I have stated, I concur in the reversal.

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FREDERICK BASSETT AND CHARLES BEEMAN v. BERTHA M. BUDLONG AND AARON BREWER.

[See 66 Mich. 509.]

Deed—Fee-simple—Reservation—Construction.

1. In this case a quitclaim deed from a husband purporting to convey to his wife, and to her heirs and assigns, forever, the farm on which they resided, but which was declared to be upon cer-

tain express conditions and reservations following the *habendum* clause, namely:

a—That the grantee should not convey or mortgage the land during the life-time of the grantor, without his written assent, or his joining in the conveyance; and,—

b—That, in case of the death of the grantee prior to the grantor's decease, the land should revert to him and to his assigns,—

Is *held* not to convey the land to the grantee in fee-simple absolute, but that the effect of the arrangement entered into was that the title should, in the event of the death of *either* of the parties, pass to the *survivor*.

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

a—The proposition that a condition, reservation, or exception which restricts a grant of a fee-simple absolute title to land, being repugnant to the granting part of the deed, is void, can only be true in those cases where the repugnancy is such that the intention of the parties cannot be ascertained from the whole instrument, or, if ascertained, cannot be carried into effect in accordance with established principles of law.

b—Every deed or contract is supposed to express the intention of the parties executing it, and when the object or purpose of such instrument is called in question in a court of justice the first inquiry is, what is the intention of the parties, as expressed therein, and it is the duty of the court to so construe said instrument as to carry out such intent, if no legal obstacle lies in the way.

c—In *Williams v. Bentley*, 27 Penn. St. 294, it was held that the strongest words of conveyance in the present tense will not pass an estate, if from other parts of the instrument a contrary intention appears.

d—Where a husband and wife desire that real estate, owned by the husband, shall in the event of the death of either go to the survivor, a simple way to accomplish this object is to unite in a deed to a third party, and have him reconvey to them jointly, and the survivor under the statute will succeed to the whole title and estate. How. Stat. §§ 5560, 5561; *Fisher v. Provin*, 25 Mich. 347; *Ins. Co. v. Resh*, 40 Id. 241; *Allen v. Allen*, 47 Id. 74.

Error to Kent. (Grove, J.) Argued October 16, 1889. Decided November 1, 1889.

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

Godwin, Adsit & Dunham, for appellants, contended for the doctrine stated in the opinion.

Maher & Felker, for plaintiffs, contended:

1. Where a testator who had devised land to a devisee, "her heirs and assigns, forever," cancelled the quoted words, it was held that the previous devise in fee was cut down to a life estate; citing *Swinton v. Bailey*, 1 Exch. Div. 110; 1 Jarm. Wills (R. & T. ed.), 292, 293; and see *Zinc Co. v. Franklinite Co.*, 13 N. J. Eq. 322, 328.
2. 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; citing *McConnell v. Rathbun*, 46 Mich. 305; *Smith v. Smith*, 71 Id. 633.
3. If, after considering the language used, in the light of existing circumstances, the interpretation of the deed still remains doubtful, the court will adopt that construction most favorable to the grantee; citing *Waterman v. Andrews*, 14 R. I. 589; *Ryan v. Wilson*, 9 Mich. 262; 4 U. S. Dig. (1st series) § 1355; 2 Devlin, Deeds, § 848; and this rule applies with especial force to conditions, exceptions, restrictions, and reservations, which are to be considered as the language of the party for whose benefit they are made; citing *Klaer v. Ridgeway*, 86 Penn. St. 529; *Jackson v. Hudson*, 3 Johns. 375; *Duryea v. Mayor*, 62 N. Y. 597; *Wiley v. Sirdorus*, 41 Iowa, 224.
4. Subject to the rule of a favorable construction in favor of the grantee, a reservation in a deed is to be construed in the same way as a grant by the owner of the soil of a like privilege or estate; citing *French v. Carhart*, 1 N. Y. 103; *Waterloo v. Union Mill Co.*, 59 Iowa, 443; 3 Washb. Real Prop. (4th ed.) 435; Boone, Real Prop. § 303; *Iron Co. v. Iron Co.*, 107 Mass. 321, 322; in which no estate can pass not plainly embraced in the words of the grant; citing *Ryan v. Wilson*, 9 Mich. 262.
5. At common law words of inheritance in a deed were necessary to the conveyance of a fee, and, in the absence of the statutory provisions to the contrary, the rule still prevails; citing Cruise, Dig. 294, 295; 2 Black. Com. 107; 1 Washb. Real Prop. 82, 84; 1 L. C. Am. Law Real Prop. 53; Hilliard, Real Prop. (3d ed.) 617.

6. The use of the words "forever," or "assigns," have no effect in limiting or defining the estate granted; citing 1 Washb. Real Prop. 82; *Sedgwick v. Laflin*, 10 Allen, 430; *Buffum v. Hutchinson*, 1 Id. 58; *Clearwater v. Rose*, 1 Blackf. (Ind.) 137; *Miles v. Fisher*, 10 Ohio, 1; *Dennis v. Wilson*, 107 Mass. 593.

7. Exceptions to the rule requiring words of inheritance to pass a fee have been made in respect to legislative grants, devises, grants to corporations, and conveyances to trustees where an estate in fee was necessary to the execution of the trust. But whenever this rule has been departed from in other cases, it has been where it was manifest that a conveyance in fee was intended, and in deference to the rule that a deed is to be construed most favorably to the grantee; citing *Arms v.* Burt, 1 Vt. 303; *Stevens v. Dewing*, 2 Id. 411; *Propagation Society v. Sharon*, 28 Id. 603; *Chaffee v. Dodge*, 2 Root (Conn.), 205; *True v. Nicholls*, 2 Duvall (Ky.), 547; *Saunders v. Hanes*, 44 N. Y. 358; *Merritt v. Disney*, 48 Md. 351; *Phillips v. Davis*, 69 N. C. 117; *Phillips v. Thompson*, 73 Id. 543; or where there were words of direct reference to such an estate expressed in some other written instrument, which thus became incorporated in the deed, or where a grantee in fee reconveyed the same lands to his grantor, "as fully as they were granted to him," and referred to the former deed; citing *Wickersham v. Bills*, 8 Ind. 387.

8. A conveyance without words of inheritance will not be enlarged into a fee by a reference to a will, which created a fee without such words; citing *Lytle v. Lytle*, 10 Watts (Penn.), 259; nor by a covenant of warranty in fee, or for quiet enjoyment to the grantee and his heirs; citing 4 Kent, Com. 468 (note h); *Seymor's Case*, 10 Coke, 97; *Snell v. Young*, 3 Ired. (N. C.) 379; *Roberts v. Forsythe*, 3 Dev. (N. C.) 26.

9. A reservation in a deed, being in the nature of a grant from the grantee to the grantor, requires the same words of limitation as in the direct grant, and unless the reservation be to the grantor and his heirs, only a life estate will be reserved; citing 3 Washb. Real Prop. (4th ed.) 435, 436; Boone, Real Prop. § 303; *Curtis v. Gardner*, 13 Metc. 457; *Aqueduct Corp. v. Chandler*, 9 Allen, 159; *Ashcroft v. Railroad Co.*, 126 Mass. 199; *Bean v. French*, 140 Id. 229; *Hornbeck v. Westbrook*, 9 Johns. 73; *Hornbeck v. Sleight*, 12 Id. 199; *Keeler v. Wood*, 30 Vt. 242.

10. The conveyance to Annette Budlong was not of a determinable fee, there being no qualification to the words of limitation in either the granting or *habendum* clause of the deed; citing 4 Kent, Com. 9; 1 Washb. Real Prop. 88, 89; Challis, Real

Prop. 183, 189; *Curtis v. Gardner*, 13 Metc. 457; *Aqueduct Corp. v. Chandler*, 9 Allen, 159; and it was such a deed as the statute declares "shall be sufficient to pass all the estate which the grantor could lawfully convey by a deed of bargain and sale;" citing How. Stat. § 5653.

11. If an exception extends to the whole of the thing granted, it is void; citing 4 Cruise, Dig. 289; 4 Kent, Com. 468; or if the part excepted was specifically granted, or if a person grants ten acres in specific terms, excepting one of them, the exception is repugnant to the grant, and void; citing Boone, Real Prop. § 303; 4 Kent, Com. 468; and a reservation as large as the grant is void; citing *Shoenberger v. Lyon*, 7 Watts & Serg. 184; as is one repugnant to the estate granted; citing *Erickson v. Land & Iron Co.*, 50 Mich. 604; *Mandlebaum v. McDonell*, 29 Id. 78; *Smith v. Smith*, 71 Id. 633; *Campau v. Chene*, 1 Id. 400, 410; nor can a grantee or devisee be restrained from alienating the land; citing *Mandlebaum v. McDonell*, 29 Mich. 79; *Oxley v. Lane*, 35 N. Y. 346, 347; *Lovett v. Gillender*, Id. 620; *Roosevelt v. Thurman*, 1 Johns. Ch. 228; *De Peyster v. Michael*, 6 N. Y. 467, 493; *Gleason v. Fayerweather*, 4 Gray, 348; 2 Jarm. Wills, 528; nor can a testator, after making an absolute gift or devise of property, provide that it shall not descend according to law; citing *Karker's Appeal*, 60 Penn. St. 141; *Hill v. Downes*, 125 Mass. 509.

12. Provisions following conveyances in fee have been held void for repugnancy in the following cases: *Outland v. Bowen*, 115 Ind. 150; *Edwards v. Edwards*, 2 Strob. Eq. (S. C.) 101; *Case v. Dwire*, 60 Iowa, 442; *Littlefield v. Mott*, 14 R. I. 288; *Winter v. Gorsuch*, 51 Md. 180; *In re Young*, 11 R. I. 636; *Canal Co. v. Hewett*, 55 Wis. 96; *Miner's Appeal*, 61 Penn. St. 283; *Daniel v. Veal*, 32 Ga. 589; *Blair v. Muse*, 83 Va. 238; *Keaton v. Jordon*, 52 Ga. 300; *McDowell v. Brown*, 21 Mo. 57; *Cook v. Walker*, 15 Ga. 457; *Harvesting Machine Co. v. Gates*, 75 Iowa, 343.

CHAMPLIN, J. This is an action of ejectment to recover possession of the east half of the south-west fractional quarter, and the south-west quarter of the south-west fractional quarter, of section 18, township 5 north, range 11 west, which lands plaintiffs claim in fee.

The case was tried before the court without a jury, and upon request of the parties the court made a written finding of facts; from which it appears that on August

15, 1873, one William H. Budlong was the owner in fee of the premises, and resided thereon with his wife, Annette Budlong. He also at that time owned considerable personal property. He had no children, and on the day aforesaid executed and delivered to his wife, Annette, a quitclaim deed, therein expressed to be for "the love I have for her, as my wife, and for divers other reasons, and for the consideration of $10," by which he purported to convey to his wife, her heirs and assigns, forever, the premises above described. Following the *habendum* clause of the deed was the following proviso:

"Provided, always, and this indenture is made (in all respects) upon these express conditions and reservations, that is to say:

"*First*, it is reserved that said party of the second part shall not, at any time during the life-time of the said party of the first part, convey to any person or persons, by deed, mortgage, or otherwise, the whole or any part of the said premises, as above described, without the written assent of the said party of the first part, or his joining in such conveyance.

"*Second*, it is further reserved that, in case of the decease or death of the said Annette Budlong, party of the second part, at any time before the decease or death of the said William H. Budlong, party of the first part, then, in such case, and upon such decease, the said premises, as above described, with all and singular hereditaments and appurtenances thereunto belonging, or in any way appertaining, shall forthwith, upon such decease, revert back unto the said William H. Budlong, of the first part, and to his assigns forever."

As originally prepared, the above deed contained the word "heirs" before the word "assigns" in the last clause, and, upon its being read over to Mr. Budlong, he inquired of the scrivener who would be his heirs, as he and his wife had no children, and was told that his brothers and sisters, nephews and neices, would be his heirs. He thereupon declared that he did not want any of them to have any of his property, and asked if the

instrument could not be made so as not to mention his heirs, and was told by the scrivener that he could get rid of it by erasing the word "heirs," and Budlong directed him to do so, which was done; and the instrument was thereupon executed and delivered, and was afterwards recorded on March 27, 1874.

Both parties continued to reside upon the premises until about April 7, 1886, at which time Annette Budlong died intestate as to said real estate, leaving no parent or child surviving her. Budlong continued thereafter to occupy the premises until June 25, 1886, when he died. Previous to his death, but the time is not stated, he made a last will, devising said lands to Bertha M. Budlong, her heirs, representatives, and assigns, forever, which will was admitted to probate, and the defendant Brewer was appointed administrator with the will annexed, who took possession of the premises, and was holding the same at the commencement of this suit. The plaintiff Bassett is a brother, and plaintiff Beeman is a nephew, of Annette Budlong, and are the only surviving next of kin and heirs at law of her.

It is found as a fact by the circuit judge that, in the spring of 1885, William H. Budlong stated to one Greeman that he did not own a dollar's worth of property there, and that the property was all his wife's. The testimony upon which this finding is based is not returned in the record, and the circumstances and occasion is not stated.

One other fact was found by the court, to wit: That on the same day the deed was executed a bill of sale of all the goods and chattels which William H. Budlong then owned was executed to Annette Budlong. The consideration was stated to be—

"The natural love and affection which I have and bear to my wife, Annette Budlong, and for and towards the

better support and maintenance of her after my decease, and for divers other good causes, and valuable considerations to me thereunto especially moving."

The sale was made subject to a proviso therein contained, as follows:

"Provided, always, and these presents are upon this special trust and confidence, and upon this express condition, that she, the said Annette Budlong, her heirs, executors, administrators and assigns, shall and do permit and suffer me, the said William H. Budlong, to use, keep, and enjoy all and singular the said goods and chattels during my natural life, without paying or yielding anything for the same, or in respect thereof, and not otherwise; and that from and after my decease she, the said Annette Budlong, her heirs, executors, administrators, or assigns, shall or lawfully may have, hold, and enjoy the same, and every part and parcel thereof, and convert the same to her or their own proper use and behoof, as she or they may think fit."

This bill of sale was admitted in evidence against the objection of defendants' counsel, and constitutes one of their assignments of error.

The circuit court found, as conclusion of law from the foregoing facts, that the plaintiffs were entitled to recover.

It is urged on the part of the plaintiffs that the deed from Budlong to his wife contains an absolute grant of the real estate therein described to Annette Budlong, and to her heirs and assigns, forever,—thus conveying to her the fee-simple absolute; and that the portion of the deed which restricts this absolute conveyance of the fee-simple, whether it be called a "condition," "reservation," or "exception," being repugnant to the granting part of the deed, is null and void. There are many authorities to be found in the reports of decided cases which support the proposition; but we apprehend that it can only be true in those cases where the repugnancy is such that the

intention of the parties cannot be ascertained from the whole instrument, or, if ascertained, cannot be carried into effect in accordance with established principles of law.

Every deed or contract in writing is supposed to express the intention of the parties executing it, and when the object or purpose of such deed or contract is called in question in a court of justice the first inquiry is, what is the intention of the parties, as expressed in the written instrument? It is very plain, upon the face of the instrument, that Mr. Budlong did not intend to convey to his wife the title to the premises in fee-simple absolute. She was precluded from conveying in any manner the premises described without his written assent, or joining in the conveyance; and, if she died before he did, she was to have no further interest in the land. If he died before she did, then the title in fee-simple absolute should pass and become vested. Such is the apparent intention of the parties, as expressed in the deed. It is the duty of the court to so construe the instrument as to carry out the intent of the parties making it, if no legal obstacle lies in the way.

In *Williams v. Bentley*, 27 Penn. St. 294, it was held that the strongest words of conveyance in the present tense will not pass an estate, if from other parts of the instrument the intention appears to be otherwise.

In *Ogden v. Brown*, 33 Id. 247, it was said.

"Whether an informal instrument transferring an interest in real estate shall be held a conveyance, or only an agreement for a conveyance, depends, not on any particular words or phrases found in it, but on the intention of the parties, as collected from the whole contract." *Jackson v. Myers*, 3 Johns. 388; *Neave v. Jenkins*, 2 Yeates, 107; *Sherman v. Dill*, 4 Id. 295; *Kenrick v. Smick*; 7 Watts & S. 41; *Stouffer v. Coleman*, 1 Yeates, 393; *Earle v. Dawes*, 3 Md. Ch. 230.

We do not think it is necessary to resort to the surrounding facts and circumstances in order to discover the intent of the parties. If, however, we look to the surrounding facts and circumstances, we find them all affording evidence of the intent expressed in the instrument. By the bill of sale, executed at the same time, he bargained and sold to his wife absolutely all of his personal property, consisting of farming utensils, horses, cattle, household goods, etc., but reserved therein the use and enjoyment of all and singular such goods and chattels during his natural life, without paying anything for such use and enjoyment. When it is considered that he was a farmer and a householder, and continued his residence upon the premises until his death, and retained the use and enjoyment of his personal property, it is evident that, by executing the deed to his wife, he did not intend to part with the title to his real estate unless the contingency should occur of his dying before his wife died. That event did not occur, and the estate never vested in his wife. The condition in the deed that his wife should not convey or mortgage the land without his written assent, or joining in the deed, is a clear indication that the title should not pass, because if it was the intention that it should pass, and the estate vest in his wife, the condition would be nugatory; and no force or effect be given to this part of the instrument. To hold that the title did pass by the absolute words of the granting clause would violate that rule of construction which requires that every portion of the instrument should be given effect according to the intention of the parties. When we consider the intimate relation of the parties to the instrument,—that of husband and wife,—the effect of the arrangement entered into was that the title of the real estate should, in the event of the death of either, go to the survivor. Doubtless a simpler way to accom-

plish the object would have been for them to have united in a deed to a third party, and for him to have conveyed to them jointly, and then, under the statute, the survivor would have succeeded to the whole title and estate. How. Stat. §§ 5560, 5561; *Fisher v. Provin*, 25 Mich. 347; *Ætna Ins. Co. v. Resh*, 40 Id. 241; *Allen v. Allen*, 47 Id. 74 (10 N. W. Rep. 113).

It follows, from the construction we have given to the deed under which the plaintiffs claim, that the judgment should be reversed, and a new trial ordered.

SHERWOOD, C. J., MORSE and CAMPBELL, JJ., concurred.

THE PEOPLE v. FRANK TREAT.

Criminal law—Argument to jury.

In this case a statement made by the prosecuting attorney in his argument to the jury, entirely outside of the record, is held to have been erroneous, and, there being no means by which the Court can ascertain whether the error was cured by the instruction to the jury to disregard the statement, the conviction is set aside and a new trial granted.

Error to Barry. (Hooker, J.) Argued October 24, 1889. Decided November 1, 1889.

Respondent was convicted of engaging in the business of selling intoxicating liquors, without having executed the required bond. Reversed. The facts are stated in the opinion.

Smith & Colgrove, for respondent.

S. V. R. Trowbridge, Attorney General, and *C. H. Van Arman,* Prosecuting Attorney, for the people.

CHAMPLIN, J. We discover but one error in this case, and that is of such a serious nature as calls for a reversal of the conviction.

Treat was informed against for engaging in the business of selling spirituous liquors without having first executed and delivered the bond required by law. He was complained of by one Charles W. Smith, the president of the village of Nashville, in Barry county, where it was alleged the illegal business was carried on. He was defended by Mr. Smith, of the law firm of Smith & Colgrove, of Hastings. After Mr. Smith had addressed the jury in behalf of his client, the prosecuting attorney of the county followed, and in his closing argument the record discloses that the following occurred: Mr. Van Arman, addressing the jury, said:

"Judge Smith said to you that Charles Smith is an honorable man, and that a bargain could not be made with him. That is true. I may not be permitted to make the statement, but Mr. Smith whispered in my ear [referring to Charles W. Smith], 'That statement of Mr. Smith is true, for he wanted to have Mr. Treat plead guilty and then not try Dunham.'"

Respondent's counsel took exception to the remark. The court thereupon rebuked the prosecuting attorney, and told him that he was certainly jeopardizing the people's interest by going out of the record; and, upon the close of the argument, and before instructing the jury upon the merits of the controversy, requested the stenographer to read the remark made by the prosecuting attorney in relation to what Mr. Smith had whispered in his ear, and then said to the jury:

"I will premise my charge by an illusion to this matter as, it is a fact that you probably know, you are here

to try this case upon the law and the evidence, and not upon statements made between counsel. Counsel sometimes make remarks that are clearly inadmissible and unauthorized. I instruct you that that is one of that character which is to be disregarded, and whatever may have passed between him and Judge Smith upon the subject is not proper here, and could not be made the basis of a verdict. The verdict in the case is to be based upon the evidence of witnesses, and not those things."

It is thus seen that the circuit judge did all in his power to obviate the error committed by the prosecuting attorney. But it was impossible for him to eradicate the evil effect of such statement to the jury. The effect of such statement was to influence the jury to believe not only that Treat was guilty, but to destroy entirely the force of the argument which his counsel had made in his favor, and make it appear that he was rendering his client a merely perfuntory service; that while he was urging upon the jury the innocence of his client, the prisoner at the bar, he believed him to be guilty of the offense charged. No amount of caution that the jury should disregard such statement could prevent its having some weight with them. As a statement of fact it could not have been introduced in evidence against the prisoner, and, as made, could not be contradicted. It was admitted upon the argument that making such statement to the jury was erroneous. We have no way of ascertaining whether it was cured by the instruction of the court to the jury to disregard it.

For this error the conviction must be set aside, and a new trial ordered.

The other Justices concurred.

THE PEOPLE v. GORDON CONGDON ET AL.

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Criminal law—Abduction—Constitutional law—Title of act—Adoption of minor children.

1. Act No. 26, Laws of 1861 (being chapter 242 of Howell's Statutes), which provides for the adoption of minor children, is plainly in violation of the constitutional provision that the object of an act shall be expressed in its title.
2. How. Stat. § 9099, does not cover a case where the person charged to have been *abducted* (a girl about fourteen years of age), went from this State to Chicago, freely, and out of her natural love for her mother, she having been adopted under the law of Michigan some six years before, since which she had lived with her foster parents; it not appearing that any fraud or duress was used, nor any flattery, allurements, or promises, even, employed, to get the girl away from them, beyond the mere asking if she wanted to go.

Exceptions from Berrien. (O'Hara, J.) Argued October 24, 1889. Decided November 1, 1889.

Respondents were convicted of abduction. Conviction reversed, and respondents discharged. The facts are stated in the opinion.

C. B. Potter (*J. C. Fitz Gerald,* of counsel), for respondents.

S. V. R. Trowbridge, Attorney General, *George W. Bridgman,* Prosecuting Attorney (*G. M. Valentine,* of counsel), for the people.

MORSE, J. This is a very singular case, and the result of the trial in the court below is astonishing, and almost incomprehensible. Gordon Congdon is the grandfather and Desire Rosenbach the mother of Lizzie Austin, a girl about 14 years of age at the time of the trial.

Charles Rosenbach is the husband of Desire Rosenbach. The defendants were informed against in the circuit court for the county of Berrien, under the statute, for the abduction of the said Lizzie Austin.

Section 9099, How. Stat., reads as follows:

"Every person who willfully, and without lawful authority, shall forcibly or secretly confine or imprison any other person within this State against his will, or shall forcibly carry or send such person out of this State, or shall forcibly seize or confine, or shall inveigle or kidnap, any other person, with intent either to cause such person to be secretly confined or imprisoned in this State against his will, or in any way held to service against his will, shall be punished by imprisonment in the State prison not more than ten years, or by fine not exceeding one thousand dollars."

The information was filed October 9, 1888, and consisted of three counts.

The first count charged a conspiracy to commit the criminal acts mentioned in the statute.

The second count charges that the respondents, on July 22, 1888, at Benton township,—

"Willfully, and without lawful authority therefor, did forcibly and secretly inveigle and kidnap one Lizzie Austin, with intent to cause the said Lizzie Austin to be secretly confined in the State of Michigan, to wit, at Benton township, in said county, against her will, and to be held to service against her will."

The third count charges that the respondents, on July 22, 1888, at the town of Benton,—

"With force and arms, in and upon one Lizzie Austin, did make an assault, and the said Lizzie Austin then and there, willfully and without lawful authority therefor, and without the consent and against the will of the said Lizzie Austin, did forcibly seize and secretly confine for a long space of time, to wit, for the space of one day, at the township of Benton, in said county, with intent then and there to cause the said Lizzie Austin to be sent out of the State of Michigan, and did then and there, after-

wards, to wit, on the twenty-third day of July, 1888, forcibly send the said Lizzie Austin out of the State of Michigan."

The trial commenced January 22, and closed January 23, 1889. All three of the respondents were found guilty.

Lizzie Austin was the daughter of John and Desire Lawrence. When she was eight years old she was adopted by Stephen M. and Kate M. Austin, husband and wife. The proceedings for this adoption were in the probate court, under Act No. 26, Laws of 1861 (How. Stat. § 6379), and the articles of adoption were signed by the Austins and Lawrences, and acknowledged by them. Lizzie made her mark under the name of Mary E. Lawrence, and it is certified by the notary that she also acknowledged the instrument. July 9, 1883, the probate court entered its decree, changing the name of the child from Mary E. Lawrence to Mary E. Austin, and declaring her to be the heir at law of said Stephen M. and Kate M. Austin. From that date until about July 22, 1888, she lived with the Austins as their child. Her mother procured a divorce from her father in the meantime, and remarried and moved to Chicago. The mother had some correspondence with Mrs. Austin looking towards the restoration of her child to her, but Mrs. Austin wanted $250, which Mrs. Rosenbach thought to be too high.

On Sunday, July 22, 1888, Mr. and Mrs. Rosenbach were staying at the house of one Fleming, in Benton Harbor, at which place the Austins resided. Congdon, the grandfather, also lived at Benton Harbor. Saturday night, Lizzie stayed overnight at the residence of a brother of Mrs. Austin. On her way to the Austins on Sunday she met her grandfather, who told her her mother was at Fleming's and asked her if she did not wish to see her. Lizzie answered, "Yes," and went with her grandfather

to visit her mother. At Fleming's she also met Mr. Rosenbach. Her mother asked her if she would go to Chicago, and live with them. Lizzie willingly consented. Rosenbach went to get a team; but, being unable to procure one, he and Lizzie traveled on foot into the country towards Three Oaks, a station on the Michigan Central Railroad. They stopped at several farm-houses, seeking a conveyance, and finally found one. A farmer drove them to Three Oaks, where they took a train for Chicago. Lizzie remained at Chicago about a week, when Austin, with a deputy-sheriff of Berrien county, took her forcibly from the custody and care of her mother, and brought her, against her will, to Mrs. Austin's, where she has ever since remained.

Upon the trial, Lizzie, then about 14 years old, was sworn by the prosecution, after they were forced to do so by the demand of the defense and the reluctant ruling of the court that they must obey the law in this respect, and she testified that no force, threats, promises, or other inducements were used by her mother, or any of the respondents, to compel, or even to coax, her to go to Chicago; that she had long wished to leave the Austins, and go to her mother; that she gladly and willingly went; and that if she had her own way she would at the time she was testifying go home with her mother.

No evidence was adduced to show any force used, or any undue means of any kind resorted to, to take this girl away from the Austins "against her will," which is the gist of the offense under the statute, nor was she confined or deprived of her liberty for a moment. It is true, one witness swore that while she was going with her grandfather to Fleming's, to see her mother, Congdon had hold of her arm; but the witness did not notice that the girl was manifesting any unwillingness to go

with him. All the other testimony in the case is overwhelmingly to the effect that the child went gladly with her grandfather to see her mother, as would have been natural; and that she went willingly, on foot, with her stepfather, until a team was procured to take them to a station.

The case seems to have been tried from the beginning by the prosecution and the court on a wrong theory. The question submitted to the jury, in effect, was who had the best right to the custody of the child. The court told the jury, in substance, that Mr. and Mrs. Austin were to be considered the real parents of the child, and that, while the own mother had a right to see the child, yet she had no right to seek to estrange the child from its foster-parents—

"And she must, however hard it may be, have a due regard for the feelings and rights of the foster-parents, and, if there should be reason or cause for the child's being taken away from the care, custody, or control of the foster-parents, there is another remedy to be pursued. * * * While we have no law so harsh that it will forbid the mother to look upon or see her child, and talk with her, * * * yet she must, when she so converses with this little girl, have a due regard for the feelings of the Austins; and she must not have sought to estrange the love or feelings of that little girl in any way or particular."

The court also said:

"As to the influence exercised by the defendants, gentlemen, if any, with Lizzie Austin, to create a desire in her mind to go to Chicago, to live with her mother, I instructed you this morning, and I now repeat it: In case you find that there was a consent on the part of this little girl to go to Chicago,—if she was willing, if she went of her own free will and accord,—then it becomes your duty to find a verdict of not guilty. But if you find that that consent, even if there was a consent, was brought about by reason of force, or promises, or anything of that sort; for instance, if these defend-

ants, or any one of them, having in mind a common object, and each of them seeking to carry out that object, had purposely gone to this little girl at the time and place charged or testified to, and, knowing her age, and knowing that what they might say to her might tend to influence one of that age, and have an undue influence upon her,—then, in case they held out any inducement in the way they would clothe her; if they instituted comparisons between the house she then lived in and the home they would give her; if they did this, intending to destroy her love for her foster-parents, or cause her to form an intent or desire to go; if they did anything of that kind,—then they would be guilty.

"If, as I said before, you find that she consented, and that, even though they made inducements, those inducements had nothing to do with her going away, then your duty is to find a verdict of not guilty. You look at the testimony in the case, and it is for you to say whether or not there was undue influence of that kind, with the intent to cause her to leave her foster-parents."

There was no evidence in the case that anything was said to her about how she would be clothed, or what kind of a home her mother would give her, and nothing in the case to warrant this reference in the charge. This was after the jury had been out, and returned for further instructions. A juryman asked:

"Would any influence, under the circumstances, brought to bear upon this little girl by any of the defendants be regarded as undue influence?

"*Court.* No, gentlemen. There might be such a thing as a good influence, as an effort upon their part to influence her for the better or for good; and a bad influence is one such as I have instructed you upon."

Under this charge the jury were justified, if they followed the instructions, in finding the mother guilty of the crime charged, if they found simply that she asked Lizzie to go home with her, and such asking induced her to go. There was no evidence in the case tending to show that any fraud or duress was used, nor any flattery, allurements, or promises, even, employed, to get this girl

away from the Austins, beyond the mere asking if she wanted to go. The record shows that she went gladly and freely, out of her natural love for her mother, and for no other reason. She wants to live with her mother now; and there appears no good reason why she should not do so, except the articles of adoption, and the action of the probate court thereon.

The jury should have been directed, on the facts, to find a verdict of not guilty as to all of the defendants. The statute was not intended to reach a case like this. There is a statute designed to meet cases of this kind, where the child is under 12 years of age (How. Stat. § 9104, as amended by Pub. Acts of 1885, p. 275), and referring especially to adopted children. It punishes the father or mother, as well as any other person, for violation of the statute. But it wisely limits the age of the child to 12 years, recognizing the fact that above that age the wishes of the child have some standing in the courts, as well as its welfare.

The question of the constitutionality of the law under which Lizzie was adopted was argued before this Court in *Morrison v. Sessions' Estate*, 70 Mich. 297 (38 N. W. Rep. 249). It is also again urged upon us in this case. As intimated on the argument, the question was passed in the *Sessions Case*, because not necessary in the determination of the matter there involved; but in this case the rights of the child, Lizzie, as well as of the mother and foster-parents, require that we should pronounce the decision that we arrived at, but did not announce, in the *Sessions Case*. The law is plainly in violation of the constitutional provision that the object of the act shall be expressed in its title. The title of this act, as passed and adopted, is—

"An act to provide for changing the names of minor adopted children, and of other persons."

There is no reference whatever in the title looking towards, or hinting at, any procedure in the body of the act for adoption, or any declaration that such adoption shall constitute the child an heir at law. The title looks only to a change of name of minor adopted children and other persons, while the body of the act (section 1) provides for articles of adoption of minor children, and a change of name, as an incident of such adoption, to be confirmed by the probate court, and also declaring that—

"The person or persons so adopting such child shall thereupon stand in the place of a parent or parents to such child in law, and be liable to all the duties, and entitled to all the rights, of parents thereto; and such child shall thereupon become an heir at law of such persons, the same as if he or she were in fact the child of such person or persons."

Section 2 provides for the changing of the name of an adult person by certain proceedings in the probate court. See *Morrison v. Sessions' Estate,* 70 Mich. 297 (38 N. W. Rep. 250); Laws of 1861, p. 22; How. Stat. §§ 6379, 6380. If the title of this act could possibly be construed so that it could be held to express the adoption of minor children as its object, then the act would be open to the charge that it violated the Constitution, in that it would embrace more than one object in its title, as the title and act both clearly provide for the changing of the names of adult persons, which is certainly an object entirely different from the adoption of a minor child as heir at law.

It is claimed that the long standing of this law, without question, upon the statute-books, and the probability of many vested rights of long existence under it, should be weighed in its favor, and that it should be saved, if possible. We are dealing now, however, with a case involving present rights of great importance to the parties interested; a case in which this statute has been

made the basis of a criminal proceeding which has resulted in the conviction of three persons who could not have been convicted, even under the instructions of the court below, if this law is invalid. The question also affects the future of the parties, and especially of the girl, Lizzie, who is the ward of the courts. The mandate of the Constitution is plain, as can at once be seen, even by a layman. We cannot hesitate as to obeying it, and in declaring the statute null and void. The Legislature has also taken a step in the same direction, and repealed the act, without any saving clause. See Act No. 171, Laws of 1887, p. 180.

The conviction of the respondents must be set aside, and each of them discharged from further custody or prosecution under the information filed in the court below.

The other Justices concurred.

THE MICHIGAN LAND & IRON COMPANY, LIMITED (A CORPORATION), v. WILLIAM A. DOHERTY ET AL.

Contract for sale of timber—Forfeiture—Equity practice.

The principles enunciated in *Pendill v. Mining Co.*, 64 Mich. 172, are held to be applicable to this case; and a decree, declaring that the defendants were in default for not making the payments required by their contract for the purchase of certain timber of the complainant, and requiring such payment by a given date, in which case their rights under the contract should be in full force, but in default thereof forfeiting and annulling all of defendants' rights thereunder not already secured, and restraining their after assertion, except the right to cut and remove the timber already selected and

paid for under the terms of the contract, which right is expressly maintained for their benefit, is held more favorable to the defendants than they were entitled to, and is affirmed.

Appeal from Marquette. (Grant, J.) Argued October 25, 1889. Decided November 1, 1889.

Bill to enforce specific performance of a contract for sale of pine timber. Defendants appeal from a decree providing for forfeiture and annulment of contract without foreclosure. Affirmed. The facts are stated in the opinion.

E. E. Osborn (*B. J. Stevens,* of counsel), for complainant.

F. O. Clark and *Fletcher & Wanty,* for defendants.

CHAMPLIN, J. In October, 1885, an agreement was entered into between the Michigan Land & Iron Company, Limited, and William A. Doherty and George S. Baars, for the sale of pine timber upon a tract of land in Marquette county for $107,000, of which $26,750 was paid down, and the balance was agreed to be paid in three equal annual payments, with interest at 7 per cent. The first of these three payments was duly made, but the purchasers made default in the payment of the other two payments and interest; and after the last payment became due complainant filed a bill of complaint, in which it set out the contract and the default of the defendants, and prayed that the defendants, or some of them, be compelled by the decree of said court to specifically perform said agreement, and to pay the complainant the remainder of the purchase money, with interest due under said agreement, on or before a certain day, to be fixed, and offering to perform said agreement on its part, and in default of such payment either that the said defendants,

and any and all of them, be decreed to have forfeited all rights under said agreement, and enjoined from making any further claim thereunder, or that the court order the sale of said pine timber upon said land in accordance with the practice of the court in sales ordered in suits for the foreclosure of mortgages, and for the payment of such of the moneys arising from such sale to complainant for the remainder of such purchase money, with interest and costs, and, should there be any amount left unpaid, then that the defendants, or some of them, be decreed to pay such deficit to complainant, and that it have execution therefor, and for general relief.

A subpœna was issued and served, with an underwriting as follows:

"A personal decree is sought against none of the defendants, and the bill is filed to reach interests in property, and not to obtain any further relief against the remainder of the defendants."

The defendants did not appear, and complainant's solicitor entered an order *pro confesso* and of reference, and proofs were taken of the payments made, and of the amount past due and unpaid. On the coming in of the report the solicitor for complainant filed a paper purporting to be an affidavit of regularity, but it was undated and unsworn to.

The court entered a decree dated December 12, 1888, by which it was decreed that the defendants were in default for not making the payments required by the contract; that the defendants, or some of them, should pay to complainant $53,500, with interest at the rate of 7 per cent. from October 1, 1886, together with costs of suit, on or before March 31, 1889, in which case the rights of defendants under said contract should be in full force; but if defendants did not make such payment, as decreed, then, from and after March 31, 1889, the rights of defend-

ants to have or claim anything under and by virtue of such contract should be forever forfeited, annulled, and at an end, and the contract itself abolished, and they be forever restrained from asserting rights thereunder.

Notice of this decree was served upon the defendants, who petitioned the court to set aside the decree, and for a new decree to be entered, directing a sale as under mortgage foreclosures, in case payment is not made by a day fixed. The petition was based upon surprise, and upon irregularity in the proceedings, viz.: That when subpœna to answer was served upon them they examined the bill, and saw that it prayed for a sale in case the amount found due upon the contract was not paid at a certain time, to be fixed by the decree; that they had taken advice of counsel, and were advised that such was the practice in this State, and that a strict foreclosure in equity could not, under the decisions of the Supreme Court of this State, be had on a land contract, and when the copy of the decree was served upon them they were surprised that it did not provide for a sale of the timber; that the day fixed for a sale could not, under the statute, be earlier than October 2, 1889, as the bill of complaint was filed October 2, 1888; that no affidavit of regularity was filed; that they had paid $53,500 and accrued interest upon the contract, being one-half of the purchase price, and had cut and removed less than one-half of the pine timber that they were entitled to cut under the terms and conditions of the contract, and under the amount paid under the contract they have a very large equitable interest in the land, which should not be cut off and forfeited contrary to the provisions of law and rules of practice in this court.

It appears that another decree was entered, bearing date December 11, 1888, which modified the other decree in the following respects: It fixed the day of payment on

or before June 1, 1889, and, after decreeing the annulment of the contract in case default was made in such payment, it added these words:

"Save as to rights already secured by the defendants thereunder, and they, the said defendants, and each of them, and their attorneys, counselors, solicitors, and agents, forever restrained and enjoined from in any manner claiming or asserting any rights whatever thereunder, except the right to cut and remove the timber already selected and paid for thereunder, which right is expressly maintained for the benefit of the defendants, according to the terms of the contract."

It appears that this decree was filed in said cause on April 3, 1889, and the defendants appealed therefrom to this Court.

The agreement to sell the pine timber expressly reserved the title to the timber, and the product thereof, and declared it should remain in the Michigan Land & Iron Company, Limited, unless and until all paid for and removed as mentioned in the contract, and all pine timber and products thereof not removed by or before the time mentioned should continue to be and remain the property of the company. On making each payment and performing the other conditions of the agreement then required to be performed, the second party to the agreement was to have the right and be entitled to select, cut, and remove from the land a portion thereof, having pine thereon, bearing to the total quantity of pine upon all said lands the same ratio or proportion which such payment of principal bears to the total purchase price of said pine. Provision was made as to the manner of cutting and ascertaining the relative quantity of pine selected. The right of removal of timber which was selected and paid for was fixed at the first day of October, 1900. Time of performance by the parties of the second part of all the conditions and agreements by them to be per-

formed was declared to be of the very essence of the contract, and a condition precedent.

The complainant's counsel claim that the defendants never had possession of the half of the timber on the lands not paid for, and were not entitled to possession of such half of the timber; that, the time having passed when such payment should have been made, the contract, by force of its express terms, thereupon became and was null and void, and constitutes a cloud upon the complainant's title, and it seeks to quiet its title to premises and timber of which it is in possession; that the object is not to enforce a forfeiture, but to declare a forfeiture already legally affected, and prevent further claims on the part of the defendants; and they insist that this position is sustained by the case of *Pendill v. Mining Co.*, 64 Mich. 172 (31 N. W. Rep. 100), and say that the bill was drawn in reliance upon that case.

The principles of that case are applicable here. The agreement entered into was not a contract for the sale of lands, but of an interest in land, which required for its consummation a conversion of the things sold into personal property. The title passed only to such of the timber as had been fully paid for and selected under the agreement, and this right of property is fully protected by the decree appealed from. As to the timber not paid for, no title passed to the parties of the second part, and they have no equity of redemption in such timber. A bill to foreclose the equity of redemption would be improper where no such equity exists. It is not clear how the rights of the parties could be preserved by a sale of the timber under a decree of the court. If the timber should be offered in parcels, what rights would the purchasers acquire? They ought not to have any greater or better rights than the defendants had if the contract had remained in force. Such sale would not be made

under and by virtue of the contract, but independent of it. It would not be a sale by the parties, but by the court, and it is not for courts to make contracts for parties. Such sale would not be a sale of defendants' property to satisfy a debt due to complainant, but a sale of complainant's own property to satisfy a debt due to it.

The bill of complaint contains prayers for relief that are inconsistent and not suitable to the case made, but the defendants did not demur or answer, and complainant is entitled to such relief as the statements of the bill warrant. The main object of the bill is to remove an apparent cloud upon its title to the timber, and, under the underwriting to the subpœna to answer, it could not have taken a decree of sale and personal decree for deficiency.

We think the decree was more favorable to the defendants than they were entitled to, and that they have no just cause for complaint, and the decree will be affirmed, with costs.

SHERWOOD, C. J., MORSE and CAMPBELL, JJ., concurred

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RACHEL SOLOMON v. THE TOWNSHIP OF OSCODA.

Taxes—Assessment roll—Intentional omission of taxable property—Special questions to jury.

1. The *intentional* omission from the assessment roll of taxable personal property, the owners of which are known to the assessing officer, will entitle an individual tax-payer to relief from the excessive amount of his tax.

   So *held*, where by an agreement between the supervisor and

members of the board of review of a township, salt, lumber, and logs, valued at $800,000, and liable to assessment in said township, were not listed for taxation or assessment, and a tax-payer paid her taxes under protest, and brought suit for the recovery of the money; and a judgment in her favor is affirmed.

2. Only inquiry as to facts material to the issue should be submitted to the jury, and questions which merely inquire whether a witness testified to certain things are irrelevant.

3. Where the illegalties in a tax assessment are such that it is impossible to ferret out the legal from the illegal taxes which the tax-payer should pay, the general rule, requiring him to show the excess of taxes over those which he would have been obliged to pay had he been legally and properly assessed, does not apply.

Error to Iosco. (Simpson, J.) Argued October 25, 1889. Decided November 1, 1889.

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

McCutcheon & Elliott (*Pierce & Philbrick*, of counsel), for appellant.

Henry & Cornville, for plaintiff.

CHAMPLIN, J. This action was brought to recover certain moneys which the plaintiff had paid as taxes under protest, on the ground that they were illegally assessed.

The plaintiff was the owner of a stock of merchandise in the township of Oscoda, Iosco county, Michigan, and was by the supervisor assessed at a valuation of $1,500. This amount the board of review increased to $2,500. The State, county, town, highway, school, and one-mill tax extended against her property amounted to $114.65.

The supervisor and other members of the board of review were sworn in the cause, and from their testimony it appears that they had agreed between themselves that

salt, lumber, and logs should not be listed for taxation or assessed in that township, and it was shown by the testimony of one of their number that the value of salt, lumber, and saw-logs within that township, and liable to be assessed, but which was not, was at least $800,000. It appears that the omission to assess this large amount of personal property was not through accident, ignorance, or inadvertence, but was intentional, and was agreed upon by the board of review.

While no attempt is made to contradict this fact, the counsel for defendant insists that no recovery can be had, because the plaintiff did not show the actual value of her property, and the true sum at which it should have been assessed. He urges that, if plaintiff was not assessed more in proportion to others on the roll than she should be, she is not harmed by placing the assessable value of her goods at $2,500. These objections might be of value if the only ground of complaint was an excessive valuation, but they can have no weight where a very large amount of assessable property has been purposely omitted from the assessment roll; for, if the value of the property assessed to her was in due proportion to all others upon the assessment roll, still it must necessarily have been more than its just proportion of the public burden, where so large a portion of taxable property has been purposely omitted from the assessment roll.

No reason can be adduced to support the legality of an assessment, where so palpable fraud has been committed by the assessing officers of the township. Not only did these officers omit this large amount of personal property, but the supervisor testified that he intended to assess the property upon his roll at one-fourth of its cash value. In short, it seems that these officers had not the least regard for the law or the sanctity of their oaths. The respective owners of the personal property omitted were

known to the assessing officers, and, as no reason is given for the omission, it must have been done through favoritism to the owners. It was held in *Merrill v. Auditor General*, 24 Mich. 174, that any intentional favoritism, even though from motives of public interest, without express authority of law, will render void the tax proceedings. In *Walsh v. King*, 74 Mich. 350 (41 N. W. Rep. 1080), it was alleged that $400,000 worth of personal property had been purposely omitted from the assessment roll by a fraudulent undervaluation, and we held that an individual tax-payer was entitled to be relieved from the excessive amount of his tax. In this case the jury have found the fact that the board of review knowingly and purposely assessed and fixed the assessed value of the plaintiff's personal property higher and out of proportion to Pack, Woods & Co.'s personal property and other personal property, and rendered a verdict for the plaintiff for $47.37.

It was error to submit the fourth question to the jury, viz.:

"4. Did not Selig Solomon testify that he would rather others should testify to the value of plaintiff's personal property in Oscoda in 1887; that it was 65 per cent. higher than it should have been, to be in proportion to some other personal property assessed in said township?"

It is only inquiry as to facts material to the issue that should be submitted to the jury, and questions which merely inquire of the jury whether a witness testified to certain things are irrelevant. But we cannot see that this error prejudiced the defendant, as it does not appear that the jury acted upon such testimony. On the contrary, it does appear, from the amount found which the plaintiff recovered, that they did not allow her 65 per cent. of the taxes assessed to and paid by her.

It is urged by defendant that the plaintiff should, but

did not, show the excess of taxes over which she would have been obliged to pay had she been legally and properly assessed. Such, undoubtedly, is the general rule, but where the illegalities are such that it is impossible to ferret out the legal from the illegal taxes which the tax-payer should pay the rule does not apply. My brethren are of opinion that this case comes within the exception to the rule, and that the judgment should be affirmed.

Let judgment of affirmance be entered accordingly.

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

GEORGE GRUMMETT ET AL. v. VICTORIA GINGRASS ET AL.

Equity jurisdiction—Forfeiture—Agreement to give mining lease—Specific performance.

1. This suit, if all that complainants seek should be admitted, is neither more nor less than in a court of equity to enforce a forfeiture, and to do it in favor of a party out of possession against one in possession. Such a case has never hitherto been heard of, and is not within the jurisdiction of equity. The parties in possession have all the rights that the holders of the legal title could give them, and a plainer case of an attempt to enforce a forfeiture could not be presented, and it involves the still greater anomaly of such an attempt by a person who has no title at all.

2. Even if the complainants had acquired the right, which it is difficult to see how they could acquire, to enforce a forfeiture, if a cause of forfeiture existed, this is not a proceeding in which it can be done. There are different objections to it. In the first place, the only method of forfeiture mentioned in the lease is a re-entry, and at law there could be no completed

forfeiture without it. An agreement to give a lease in future is certainly no transfer of title, and could not authorize complainants to enter for that or any other purpose. Until they get their lease, if they have any interest in the land itself, which is, at least, doubtful, it is only such an interest as could be recognized in a court of equity.

3. Act No. 73, Laws of 1883, allowing specific performance of agreements to give revocable leases, does not undertake to otherwise enlarge the jurisdiction, and was adopted to remove the difficulty exemplified in *Rust v. Conrad*, 47 Mich. 449, in which it was held that equity would not enforce the execution of a lease which could at any time be terminated at the will of a party. But said act does not authorize the compulsory performance of an agreement with no valuable consideration, and with nothing done under it to put the complainants in the condition of losing the equivalent of solid values; but it is based on the idea that complainants have had some valuable thing to do and have done it so as to earn the performance.
4. A forfeiture is a strict legal right and can never be enforced except by the holder of the legal title.

Appeal from Marquette. (Grant, J.) Argued January 22, 1889. Decided November 8, 1889.

Bill to enforce specific performance of an agreement to execute a mining lease. Complainants appeal from decree dismissing bill. Affirmed. The facts are stated in the opinion.

Hill & Towne (Marston, Cowles & Jerome, of counsel), for complainants.

E. E. Osborn, for defendants Gingrass.

W. P. Healy and *F. O. Clark,* for defendant Foley.

Hayden & Young (James H. Hoyt, of counsel), for defendants White, Mather, and The Michigan Gold Company.

CAMPBELL, J. This suit was brought below to obtain specific performance of a contract for a lease of mining

lands in Marquette county. The court below dismissed the bill on the merits. The witnesses were examined in open court. In some things they were in conflict. In some there was no contradiction of facts.

The agreement in question was made in December, 1886. The land was owned by Victoria Gingrass, who is not able to read and write. The facts claimed on one side and the other are as follows: In 1885 Mrs. Gingrass made a mining lease to Miner and Jones of two detached parcels of 40 acres each,—one on section 35, township 48 north, of range 28 west, and the other on section 36, in township 48 north, of range 28 west. This lease was assigned by the lessees to Peter White for an actual consideration of $10,000, and this assignment was known to all parties. Mr. White paid taxes on the property, and did some exploring. In the early part of 1886 it was agreed that the lot on section 36 might be relinquished to Mrs. Gingrass if she desired it, the lessees retaining the parcel in section 35. By the terms of this lease, after August, 1886, the lessees were not bound to do any work, by exploring or otherwise, and were to pay at the end of each year a sum of $5,000 in case the lease was not terminated by themselves by notice. The uncontradicted testimony shows that Gingrass, before and up to August, 1886, purposely abstained from endeavoring to terminate the lease in order that this money rent might be secured. It is not set up in the bill that either he or Mrs. Gingrass had ever asserted any forfeiture of the lease, but the only reliance is that in December, 1886, they claimed it was abandoned. This, however, is not shown. The lease could not be abandoned by the lessees by mere inaction, although that, prior to August, 1886, might have been relied on had it existed, and had the lessors insisted upon it as they, according to undisputed testimony, did not. After August, 1886, they became entitled to receive, and

the lessees became bound to pay, the money rent, and the lease could only be terminated by notice, which no one claims was ever given.

In December, 1886, Grummett obtained a lease of the parcel in 36, with the usual mining clauses. There is a direct conflict of testimony as to how far the same transaction contemplated anything concerning 35. On this, Mr. and Mrs. Gingrass and another witness directly contradict Grummett. All agree that he knew of the Miner and Jones lease. He himself represents that he did not give Mr. and Mrs. Gingrass to understand he wanted 35 for mining purposes, but wished it for a stamp-mill. It was not claimed that any present interest could be or would be given in the land. An agreement was made for a lease after June 1, 1887, on the same terms as the one of 36. This agreement contains nothing to be done by Grummett, and the only agreements are by Mr. and Mrs. Gingrass, although signed by Grummett. The consideration was nominal. The agreement was not to have any effect till the next June, and no right of possession was given. Until that time arrived Grummett could do nothing to increase his rights or equities; and at that time he was not in possession, and had no right to be. When he subsequently undertook to put explorers or workmen on the land, Mr. White had men there at work, and Mr. Gingrass had already refused to give Grummett a lease. Gold had been discovered on adjoining property, and this discovery was evidently the occasion of Grummett's desire to get the lease.

It is not very important to consider how far this agreement could be enforced had no one been interested but Mrs. Gingrass. The statute of 1883, allowing specific performance of agreements to give revocable leases, does not undertake to otherwise enlarge the jurisdiction, and was adopted to remove the difficulty exemplified in *Rust v.*

Conrad, 47 Mich. 449 (11 N. W. Rep. 265), which led to it. It was held in that case that equity would not enforce the execution of a lease which could at any time be terminated at the will of a party. But the statute does not authorize the compulsory performance of an agreement with no valuable consideration, and with nothing done under it to put the complainants in the condition of losing the equivalent of solid values. It is based on the idea that complainants have had some valuable thing to do and have done it so as to earn the performance. This contract called for nothing, and nothing was done or to be done. And the testimony is not satisfactory that Mrs. Gingrass understood what she was signing as involving a positive agreement to lease. No one heard the paper read to her, and Gingrass is the only one who knows what she understood it to be. Her own testimony is quite clear that she did not fully comprehend it.

But, leaving her out of the question, there is no pretense that Grummett did not know that this lease was in existence and owned by White. He knew, also, that section 36 had been expressly released from it. He does not claim that he understood any proceedings had ever been had to forfeit or re-enter. He was not, by the agreement, authorized to go into possession himself. His agreement conveyed no present interest, and was not entitled to record, and could not override any action taken in ignorance of it; and before he asserted rights under it other rights had become fixed. The testimony is positive that he knew of the dealings of White in transferring his rights to the other defendants, and he made no objection. He did not take the stand to meet the testimony on this head, and his subsequent proceedings look very much like an after-thought. But the fact remains, in any event, that, before the agreement of December,

1886, the rights of the lessees had become fixed, so that they had until August, 1887, to pay their rent, and the lessors could not thereafter cut them off. There was no power after August, 1886, to forfeit the lease for any previous ground not acted on, and, as already stated, the bill does not aver that in December, 1886, any forfeiture had been enforced, or sought to be.

Even if the complainants had acquired the right, which it is difficult to see how they could acquire, to enforce a forfeiture, if a cause of forfeiture existed, this is not a proceeding in which it can be done. There are different objections to it. In the first place, the only method of forfeiture mentioned in the lease is a re-entry, and at law there could be no completed forfeiture without it. An agreement to give a lease in future is certainly no transfer of title, and could not authorize complainants to enter for that or any other purpose. Until they get their lease, if they have any interest in the land itself, which is, at least, doubtful, it is only such an interest as could be recognized in a court of equity.

This suit, if all that complainants seek should be admitted, is neither more nor less than in a court of equity to enfore a forfeiture, and to do it in favor of a party out of possession against one in possession. Such a case has never hitherto been heard of, and is not within the jurisdiction of equity. The parties in possession have all the rights that the holders of the legal title could give them, and a plainer case of an attempt to enforce a forfeiture could not be presented. It involves the still greater anomaly of an attempt to enforce a forfeiture by a person who has no title at all. A forfeiture is a strict legal right, and can never be enforced except by the holder of the legal title.

If complainants have rights under the contract against

Mrs. Gingrass, they have a legal remedy. But they have no standing in equity.

As all parties on either side derive title through White or Grummett, it is not necessary to refer to the *minutiæ* of the conveyances of their interests, except to point out that White's title stood clear upon the record, and was transferred to parties who paid value without knowledge of anything to defeat it, and who had the acquiescence of the owner of the fee and the silence of Grummett to justify their purchase. They are *bona fide* purchasers for value. But complainants made out no case against their grantor.

The decree below was correct, and should be affirmed.

SHERWOOD, C. J., and CHAMPLIN, J., concurred with CAMPBELL, J.

MORSE, J., *(dissenting)*. The complainants ask for the specific performance of a written contract, dated December 16, 1886, whereby Peter Gingrass and Victoria, his wife, agreed to lease to George Grummett, for a period of 30 years, 40 acres of land for mining purposes. Said contract is as follows:

"For and in consideration of the sum of one dollar, and other valuable considerations, we hereby agree to lease to George Grummett, for a period of thirty years from and after the first day of June, 1887, the following described lands, viz.: The north-west quarter of the north-east quarter (N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$) of section thirty-five (35), township forth-eight (48) north, range twenty-eight (28) west, in Marquette Co., Mich. Said lease, when given, will be for mining gold and silver, and the ores thereof, and shall conform and agree in all its conditions to the lease we have already given to said George Grummett on the north-east quarter of the north-west quarter (N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$) of section thirty-six (36), township forty-eight (48) north, range twenty-eight (28) west, in Marquette Co., Mich., and dated June 1, 1887.

"In witness whereof we have hereunto subscribed our

names and affixed our seals this sixteenth day of December, A. D. 1886.

"PETER E. GINGRASS. [Seal.]
"VICTORIA her X mark. GINGRASS. [Seal.]
"GEORGE GRUMMETT. [Seal.]

"Signed and sealed in presence of
"WILLIAM GARDNER.
"M. LOUISA GINGRASS."

The other complainants acquire their rights under an assignment of this agreement.

The complainants allege in their bill, in substance, than prior to December 1, 1886, the defendant Victoria Gingrass was the owner of this 40 acres of land, and also of the north-east quarter of the north-west quarter of section 36, same town and range, situated in the county of Marquette, and is still the owner of the same. The first description, the 40 in question, is spoken of in the record as the "west 40," and the last description as the "east 40." That Peter E. Gingrass is and was the husband of the said Victoria, and has had the charge of said lands for her, and has, at different times, carried on negotiations with parties touching the giving of mining options and mining leases of said lands, with the knowledge and approval of his said wife.

That in December, 1886, and prior thereto, George Grummett had several interviews with the said Peter E. Gingrass with the view of securing a mining lease of said premises. Gingrass offered to give a mining lease of the "east 40," but Grummett declined to lease it unless he could also lease the "west 40." That the object of Grummett, which was well known by the said Peter E. and Victoria Gingrass, was to secure leases of these lands for the purpose of exploring, for mining, taking out, and removing therefrom such gold and silver ores, minerals,

or quartz as might be found therein, and, upon taking a mining option or lease, it was known by them that the said Grummett would have to expend large sums of money in exploring for such minerals; that during these negotiations Peter E. Gingrass informed Grummett that a mining option to explore for iron upon said "west 40" had been given to some one, which would expire in June, 1887; that said Gingrass did not wish to give Grummett a lease of said 40 until such option expired, but he would give him a written agreement, contracting thereby to give him a lease upon June 1, 1887, such lease to conform in all respects to, and be like the lease of, the "east 40" to be given said Grummett.

That thereupon a lease of the "east 40" was prepared, and, although they bear different dates, the agreement being dated December 16, 1886, and the lease December 20, 1886, both were drawn at the same time, and constituted but one transaction, and were delivered at the same time; that after such execution and delivery of these instruments the said Grummett proceeded to explore for minerals according to the terms of said lease, and expended large sums of money in such exploration, and kept and performed his agreements in every respect; that afterwards, with the full knowledge and consent of Gingrass and his wife, Grummett entered into the possession of the said "west 40" in May, 1887, and commenced explorations thereon, and during said month, and since then, expended large sums of money in such explorations, all of which was well known to said Peter E. and Victoria Gingrass; that on June 1, 1887, the said Grummett applied to said Peter E. and Victoria Gingrass for a lease according to the terms of said agreement, and was thereupon requested by them to continue his explorations on said "west 40," and they would have a lease prepared and deliver the same to him.

That he afterwards applied for said lease from time to time, but, on various pretenses, the same was not executed or delivered, and finally Grummett had a lease drafted conforming to the terms of the contract, and presented the same to the said Peter E. and Victoria Gingrass for execution, and they refused to execute it.

Foley is made a defendant because he claims to hold a mining option antedating this agreement. Miner and Jones are parties to a mining lease of the "west 40," executed in 1885, which they assigned to Peter White. White assigned an interest in the same to the defendant Mather.

The bill prays a decree that Victoria Gingrass execute and deliver to the complainants a lease of the said "west 40," according to the terms of said agreement, and that the other defendants have no rights or privileges in said land as against the complainants.

The lease of the "east 40" is set out in an exhibit attached to and made a part of the bill. It is in the usual form of mining leases in the Upper Peninsula, and is duly executed and acknowledged, and was recorded in the resister of deeds' office of Marquette county on December 28, 1886. The agreement relied upon was also duly acknowledged on December 16, 1886, and recorded in the same office as the lease, on the same day and year as the lease. Victoria Gingrass, in her answer, admits that she was and is the owner in fee-simple of these lands, but says that on August 14, 1885, she and her husband executed and delivered a mining lease of the "west 40," with other lands, to the defendants Jones and Miner for 21 years, and that the same is now in full force and effect. She avers that at the time the agreement was given to Grummett he was informed of this mining lease, and knew it was in force, and he took the agreement with the understanding that he was not to have a lease of said

"west 40" until the Jones and Miner lease was surrendered or canceled; that the agreement as to the "west 40," had nothing whatever to do with the leasing of the "east 40," each transaction being independent of the other.

She claims that Grummett has not fulfilled the conditions of the lease, and has forfeited the same; that Grummett went upon the "west 40," and worked there without her permission or consent, worked there a few days, and then went away, removing his tools, and saying to defendant that—

"He did not wish anything further to do with said land; that it was of no value; and that he did not care for a lease thereon under any circumstances."

The defendant Joseph C. Foley answers, claiming the right to a lease of this land for gold and silver mining purposes, under an agreement in writing between himself and Peter E. Gingrass, dated September 12, 1884, at which time he avers the said Peter owned the premises. By the terms of this agreement, which, he alleges, he has fulfilled on his part, he was to have a lease for 20 years, beginning September 1, 1885.

Peter E. Gingrass answers, disclaiming any interest in the premises.

The defendant Anson B. Miner answers that the lease given to Jones and himself, August 14, 1885, is still in force; denies that Grummett has or ever had any interest in the premises; sets out the assignment of Jones and himself to Peter White, August 19, 1885, of all their interest in said mining lease to them, and says that thereby he parted with all his interest in the lease or lands, which the said Grummett well knew; and prays to be dismissed, with costs.

The defendants William G. Mather and Peter White answer at length, denying the claim of Grummett and his

associate complainants, and setting forth their rights in the premises; that the lease executed by Peter E. Gingrass and wife to Miner and Jones was duly recorded in the proper office on August 14, 1885, by which record constructive notice of its existence was given to all persons; that the assignment of said lease to said White was also duly recorded on August 19, 1885. White further avers that he knew nothing of Grummett's explorations upon said land, or that he had entered thereon, or of his claim to the premises, as alleged in his bill of complaint, at the time he acquired the assignment of the Miner and Jones lease, nor till long afterwards, and after he (White) assigned a certain interest in said land to the defendant Mather. White avers further that on August 1, 1887, he subleased this land to Mather; that White has been in continuous possession of this land since the assignment of this lease to him, until he delivered possession to Mather under this sublease; that, while in such possession, he was required to and did pay to Victoria Gingrass, under the terms of said lease, $5,000 for the rent of the whole premises; and that he has otherwise kept and performed his said lease in all things.

Mather says in this answer that before the commencement of this suit he assigned and transferred all his interest in said lease to the Michigan Gold Company, who have ever since been sole owners of the same, and in continuous possession of the land under the same.

The Michigan Gold Company were subsequently made parties to the bill, and adopted the answer of White and Mather as their own.

On the issue formed by these pleadings, testimony was taken in open court before Hon. C. B. Grant, circuit judge. Upon hearing, the bill was dismissed, with costs, and complainants appeal to this Court.

A careful examination of the record convinces me that

the main allegations of the complainants' bill are sustained by the proofs; that the lease of the "east 40" and the agreement for a lease of the "west 40" were executed and delivered upon the same day, and were substantially but one transaction; that Grummett was informed by Peter E. Gingrass, who was acting for, and had authority to act for, Victoria Gingrass, that the lease to Miner and Jones had been abandoned, and that there was nothing out against the land save an iron option to one Trathan, running for sixty days from November 16, 1886; that Peter E. Gingrass and his wife both believed and understood at the time they executed the lease and agreement to Grummett that the Miner and Jones lease had been forfeited, and that the "west 40," as well as the east one, was free and clear from all claims except the option of Trathan.

The testimony of Grummett is corroborated by that of Gardner, one of the subscribing witnesses to the agreement. The other, a daughter of Gingrass, was not sworn in the case. He is also corroborated by the testimony of T. J. Dundon, who drew and took the acknowledgment of the papers, in some particulars, and the fact that both of them were signed and delivered at one time is also confirmed by the evidence of Ashurst Bedford, who was present when they were executed and delivered.

The claim of Mr. and Mrs. Gingrass that the "west 40" was not talked about until after the "east 40" was leased, and that the arrangement was that the agreement for a lease of said "west 40" should be subject to the Miner and Jones lease, is not supported by the proofs, and is evidently an after-thought. I am satisfied that the agreement was made by Peter E. Gingrass and his wife at the time, in good faith, and so taken by Grummett. The proofs also show that Grummett entered into the good-faith possession of these lands, both under the lease

for the one, and the agreement for a lease of the other, and substantially kept and performed his part of the agreement under both instruments until he was prevented from so doing by the acts of Gingrass, White, and others.

Under the lease of the "east 40" the term was for 30 years, from and after June 1, 1887 (the day he was, under the agreement, to be given a lease of the "west 40"). No royalty or rent was to be paid upon the lease of this "east 40" until after June 1, 1887, except, if any ores were mined, one-tenth of the same were to be delivered to Gingrass. The taxes upon the land were not to be paid by Grummett except those assessed after June 1, 1887. Grummett agreed to commence exploring and searching for deposits or veins of gold and silver ores, minerals, and quartz, within 10 days from the date of the lease, and to prosecute such explorations vigorously and continuously with a force of not less than two men until a mine of these ores, quartz, or mineral should be discovered that could be worked to advantage. Cessation of work for 30 days should, at the option of the owners of the land, work a forfeiture of the lease.

There was no pretense on the trial that Grummett had forfeited his lease to this "east 40" or abandoned it. Indeed, both Peter E. Gingrass and Peter White were anxious, at the time the controversy about the "west 40" commenced, to waive all rights to this "east 40" in his favor, and White executed a lease of that 40 to Grummett. In consideration of this last lease, Grummett was asked to release or assign his interest in the "west 40," which he declined to do. While, under the agreement for a lease of the "west 40," Grummett was not required to make any explorations on the land until he received his lease, and then not until 10 days from its date, he nevertheless went onto this land and worked thereon, exploring

and digging for gold, before June 1, 1887, and afterwards.

There seems to be no reason, as far as the acts and conduct of Grummett are concerned, why he was not entitled to a lease on June 1, 1887, which lease he properly and sufficiently demanded. There was no perceptible default on his part. On the contrary, relying in good faith upon his agreement, which was recorded in the proper office, he expended time and money in working upon and prospecting this land with the consent and knowledge of both Gingrass and wife, and unmolested by any one, until the news went out that there had been a rich find of gold upon a piece of land adjoining this "west 40," and belonging to the Lake Superior Iron Company. This discovery became public on July 2, 1887. Great excitement ensued, and there was a general rush for property in that vicinity. On July 17, 1887, the defendant Foley put men at work on the "west 40," claiming under his option, and a few days later Peter White placed a force of men at work, also, on the land, claiming under his assignment of the Miner and Jones lease. A conflict for possession of the premises between Grummett, Foley, and White ensued, and several trespass suits were commenced. This bill was filed August 17, 1887.

Without at this time determining the rights of Foley, and those claiming under the Miner and Jones lease, let us see whether there is any legal reason why this agreement cannot he enforced in a court of equity as against the defendants Peter E. and Victoria Gingrass. There has been no default by Grummett, as before said. He has sufficiently kept and performed his agreement, and morally is entitled to a lease from the defendants Gingrass, in accordance with their written, solemn agreement, entered into without fraud on the part of the

complainant Grummett, and understandingly made by Gingrass and his wife.

Is there any reason in law or equity why Grummett should not have a specific performance of this agreement? I can find none. It is certain and specific as to all the details of performance, and nothing is left uncertain, or even to inference. It refers to the lease of the "east 40," and the lease to be given is to conform and agree in all its conditions to that lease. The lease intended by the parties of this "west 40" is therefore before the eye of the court, and the only function to be exercised is to decree its execution and delivery. There is nothing unfair or unequal about it, as it does not differ materially from the leases commonly and customarily used in the Upper Peninsula. Therefore, in my opinion, the complainants are entitled to the relief asked against the Gingrasses, unless, at the time of the agreement, the Miner and Jones lease was operative, and capable of enforcement by Peter White, the assignee of Miner and Jones.

It will be found from the record that Miner and Jones assigned their lease to Peter White on August 19, 1885, five days after its execution.

This lease also provided that the lessees should commence explorations within 10 days from its date, and should prosecute the same continuously with a force of not less than two men, until they had discovered and exposed a mine of good gold and silver, or gold or silver ore, quartz, or mineral, that could be worked to advantage, and that a cessation of work, for 30 days at any one time by the lessees, before such minerals were discovered, should work a forfeiture of the lease, at the option of the lessors, and that upon the failure of the lessees to keep any of the covenants or conditions of this lease the lessors might re-enter, with or without notice, and dis-

possess the lessees and all persons claiming under them.

The lessees commenced work on the land in the last of August or first of September, 1885; that is, Mr. White employed men and set them at work upon the premises. It is not shown that this work continued beyond November, 1885, and it is certain that White did no work of any kind upon the land under the Miner and Jones lease during the year 1886, nor until July, 1887, and after the find of gold, heretofore noted. Mr. White himself testifies that he did no more work upon the premises for the reason that he had done all that he felt called upon to do under the lease.

"I had found the vein of gold, and I intended to do so much work, or to pay the royalty when it came due the fourteenth of August, or abandon it,—one of the two,—whichever should be most favorable, I intended to pay it."

He further testifies that he did not develop the mine because he was in expectation all the time that the Lake Superior Company, owning the property immediately adjoining this land, would go ahead and improve it; and, if they did, it would save him a large amount of expense in developing this tract, for the vein could be traced right across from one to the other. Mr. White does not testify that he had any agreement with the Gingrasses that he might stop work and wait upon the luck of the Lake Superior Company, and he swears that he had no personal intercourse or correspondence with them about the matter until in June or July, 1887, when he was trying to fix the matter up with Grummett. In August, 1887, he paid to them $5,000 as royalty. This was after the discovery of gold by the Lake Superior Company.

According to his own evidence, he was waiting, without doing any work upon the land, from November, 1885, to

June or July, 1887, to see what the Lake Superior Company might find on their land, having it in his mind to throw up the lease or pay the royalty as might, under the developments in the future, seem best for his interests. He did not obtain the consent of Gingrass or his wife to this action, or, rather, non-action, of his, nor is it at all likely that they would have consented to such an arrangement as this, by which, if gold was found by the work of the Lake Superior Company so as to make the lease profitable to White, he should have it; but, if not, he might abandon it, without any payment of royalty to them, or any explorations upon the land.

White certainly, from his own testimony, forfeited his lease, and it was at the option of the Gingrasses, at any time after at least January 1, 1886, to re-enter and take possession of the premises without notice to White. And when they gave the agreement to Grummett, and Grummett went upon the land to work under it, in my opinion they exercised this option. The Miner and Jones lease was forfeited, and White dispossessed of all right and interest in the lands under it.

Foley is in the same condition as White. On September 12, 1884, he obtained from Peter E. Gingrass a mining option, giving him the right to explore for gold and silver thereon, and to take a lease of said lands for 20 years from September 1, 1885, at a royalty of 10 per centum of the gross receipts of the product of the mine or mines thereon. Foley took possession of the land, and did some work or exploration upon it that fall. August 24, 1885, he demanded a lease in writing, and claims that he had twice before that time made an oral demand. On the same day he posted notices on the premises that the land belonged to him under an option given him by Peter Gingrass. August 27, 1885, he mailed a notice of

like import to Miner and Jones, and also to Jopling and Hall, who were supposed to be representing Peter White.

At the time this demand was made by Foley the Miner and Jones lease had been executed 10 days, and also assigned to White. White soon after took possession under the Miner and Jones lease, excluding Foley. Foley seems to have been content with his demand for a lease, and its refusal, and the posting and mailing of the notices aforesaid, and took no further steps to enforce his claim, or to hold any interest in the land until after the gold discovery, when he appeared upon the ground, claiming possession, and the right to a lease under his option. For nearly two years he seems to have abandoned his claim to the land, and to have left it in the possession of White, Gingrass, and Grummett. It is claimed by his counsel that Grummett had notice of his option, but the notice he had was that such an option had been given, but that it had been thrown up and abandoned.

The option of Foley expired, by its own terms, on September 1, 1885. I am satisfied from all the evidence in the case that Foley abandoned all claim to the land, and intended to do so after the fall of 1885, and that he would never have renewed his claim had it not been for the find by the Lake Superior Company. His claim that he discovered a paying vein of gold is not borne out by the proofs. Neither is the claim of White, that he had discovered such a vein, established by the evidence. On the contrary, the conduct of each of them shows that they did not consider that it was worth their while to do any more work upon the premises, or to be at any further expense to hold or reclaim their rights until the work of others upon an adjoining piece of land had made a possibility a probability. At least the conduct of Foley was such that he cannot equitably defend against the relief asked in this case by Grummett. His laches

in not moving sooner against Gingrass to enforce his demand for a lease, while Gingrass was denying his right to a lease, and leasing to Miner and Jones, and agreeing to lease to Grummett, and in permitting the possession of the premises to be taken by Grummett without protest, must be regarded as an abandonment of his right to such lease, at least as far as Grummett is concerned. It is not necessary, therefore, to inquire whether or not his option was enforceable in case he had not abandoned it.

It is claimed that the defendant Mather, the assignee of White, is a purchaser in good faith, and that Grummett cannot have the relief prayed for on that ground. But Mather cannot be a purchaser in good faith, as this agreement of Grummett's was properly of record, and Grummett was also on the land, contesting the possession with both White and Foley, about the time White made his assignment to Mather. The Michigan Gold Company stands in the shoes of Mather.

The objections to granting the relief asked for by complainants in this suit, principally urged, are two,—

1. There is no mutuality in the agreement; and,—
2. Because the court could not adequately enforce the provisions of the lease if its execution were ordered.

The case of *Rust v. Conrad*, 47 Mich. 449 (11 N. W. Rep. 265), is relied upon to support these objections. But the Legislature of 1883, doubtless with the intention of meeting the decision of this Court in that case, provided by statute for the specific enforcement of options and mining agreements in a court of chancery. This act gives the holder of the option or agreement the—

"Absolute right to have such option or agreement specifically enforced in the circuit court, in chancery, of the county where the whole, or any portion, of such lands are situated, if not in default himself, and in such case the court shall have full power to compel the person giving such option, his heirs or assigns, to execute a lease

or license according to the terms thereof; and such court shall shall have the usual powers to enforce its decree as in other cases."

The act also provided that such options and agreements should be assignable. See Laws of 1883, pp. 57, 58. See, also, Id. pp. 152, 153.

I agree fully with the views of Mr. W. P. Healy, one of the counsel for the defendant Foley, in his brief filed in this case, that this law is a beneficial and equitable one, and one in harmony with the mining conditions of the Upper Peninsula. As Mr. Healy says:

"The Legislature could do no less. Nearly all the iron mines of the Upper Peninsula have been discovered by explorers,—poor men, who would be cheated out of their discoveries unless ample means were provided for compelling the land-owners to live up to their agreements. An action at law for damages would be entirely illusory, and the result would be that the development of the mineral wealth of the Upper Peninsula would be greatly retarded, if the law, as laid down by the Supreme Court [in *Rust v. Conrad*], had not been changed by the Legislature."

This act can be of no damage to the land-owner; for if it be true that there is no mutuality in the contract because the holder of the option may take a lease, or not, as he sees fit, yet, if the explorations of such holder (which he is generally obliged to make) result in the discovery of valuable mines upon the land, the land-owner is greatly benefited, whether the lease is taken or not; and, if no mines are found, the land-owner is to no expense, and has in either case the value of his land settled without cost or trouble to him. And if a lease is taken under the option, which can be surrendered by the lessee at any time by giving 30, or any other number of, days' notice, still the lessor has the benefit of the discoveries without expense; and if he is shut off from his royalty under that lease by its surrender, if his mine is

worth anything, he has the mineral open to be worked by himself or others; or if the vein is exhausted he has received all that in equity he ought to receive.

This act of 1883, to my mind, completely and rightfully removes these two objections to the specific enforcement of the Grummett agreement. And I think, also, that as far as options or agreements are concerned, given since the law of 1883 took effect, the section of the act making them assignable is constitutional and valid, in the absence of any clause in such option or agreement preventing such assignment. The party giving such option, or executing such agreement, must be presumed to know the law, and to act upon his knowledge of it, and if he does not insert therein a prohibition against an assignment without his consent, it will be taken for granted that he has no objection to its assignment.

The conclusion, therefore, is that the complainants are entitled to the relief asked by them. The other objections urged against the specific enforcement of this agreement are all based upon a supposed or claimed state of facts, which I do not find in the record, and therefore will not be noticed.

In my opinion the decree below should be reversed, and a decree entered here in conformity to the prayer of complainants' bill, with costs of both courts against the defendants.

LONG, J., concurred with MORSE, J.

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THEODORE S. BARNES v. KOSCIUSKO P. PEET AND DANIEL C. JOHNSON.

Promissory note—Ownership of—Burden of proof—Charge to jury.

1. Where, in a suit upon a note delivered to the secretary of an insurance company as security for a loan made by him, the question of fact to be determined by the jury is whether the money loaned belonged to the secretary or to the company, they can determine such issue without any special instructions as to the law of ownership, or as to what would constitute an ownership of the note either in the secretary or in the insurance company.
2. While the unexplained possession of a note, indorsed in blank, is presumptive evidence of ownership and sufficient to warrant a recovery in a suit by the holder thereon, the introduction of evidence tending to show that the note belongs to an insurance company of which the holder is the secretary and treasurer, and *ex officio* the proper custodian of the note if it belongs to the company, will destroy such presumption, and cast the burden upon the holder to show his ownership. *Bank v. Seymour*, 64 Mich. 59.

Error to Gratiot. (Hart, J.) Argued January 30, 1889. Decided November 8, 1889.

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

H. & E. L. Walbridge and *Huntington & Henderson*, for appellant, contended:

1. The jury should have been instructed as to the rules of law by which they were to determine under what circumstances the note should be regarded as the note of the company, and of which company, or of the plaintiff; citing Sacket, Inst. Juries, chap. 35, §§ 1, 2; *Provision Co. v. Tilton*, 87 Ill. 547, 553; *Kendall v. Brown*, 74 Id. 232.
2. The jury should have been told that the burden of proof was with the defendants; citing *Hovey v. Sebring*, 24 Mich. 232,

233 (note); *Knapp v. Lee*, 42 Id. 43; *Burson v. Huntington*, 21 Id. 415; *Sewing Machine Co. v. Spears*, 50 Id. 534–536; *Hays v. Hathorn*, 74 N. Y. 486.

3. The fact that the plaintiff paid for the note wholly with the funds of the company would be no legal defense unless the possession was obtained *mala fides*; citing 2 Pars. N. & B. 437–443.

4. It is undisputed that the plaintiff was in the actual possession of whatever funds may have belonged to the first company at date of the note, and with the approbation of all parties concerned in the note; and, whether he made use of company funds or not, the legal title at least of the note went to the plaintiff; citing *Boyd v. Corbitt*, 37 Mich. 52; *Moore v. Hall*, 48 Id. 143–145; Story, Prom. Notes, 3, § 3; 2 Pars. N. & B. 436; and, assuming that the legal title was held in trust for the company, it would prevail until the equity was in some way asserted; citing *Moore v. Hall*, 48 Mich. 143–145; and the legal owner may bring suit; citing *Thompson v. Hoagland*, 65 Ill. 310; *Palmer v. Gardiner*, 77 Id. 143; *Hotchkiss v. Thompson*, 1 Morris (Iowa), 156.

5. Plaintiff was the secretary, treasurer, and general manager of the company, and, as such, could sue upon the note in his individual character and recover judgment, even though not the owner; citing *Brigham v. Gurney*, 1 Mich. 348; *Boyd v. Corbitt*, 37 Id. 52; *Sanford v. McCreedy*, 28 Wis. 103; *Robinson v. Crandall*, 9 Wend. 425; *Gage v. Kendall*, 15 Id. 640.

James L. Clark and *George P. Stone*, for defendants, contended:

1. Plaintiff alleged, and before resting his case offered evidence to prove, that he was the owner of the note at time suit was commenced, and the burden was upon him to establish such ownership; citing *Stewart v. Ashley*, 34 Mich. 183; *Spicer v. Smith*, 23 Id. 96; and if plaintiff thought he was entitled to a more specific charge on this branch of the case, he should have requested it; citing *Rankin v. West*, 25 Mich. 196; *Driscoll v. People*, 47 Id. 414.

2. There can be no question but that the non-ownership of a note at the time of the commencement of suit is a full defense and can be shown under the general issue; citing *Reynolds v. Kent*, 38 Mich. 246; *Hovey v. Sebring*, 24 Id. 232; *Brigham v. Gurney*, 1 Id. 351; *Spicer v. Smith*, 23 Id. 96; and, if the testimony is conflicting as to such ownership, the question is for the jury; citing *Davy v. Kelley*, 66 Wis. 452.

MORSE, J. Plaintiff sued defendands in the circuit court for the county of Gratiot upon the following promissory note:

"1,000. ITHACA, MICH., July 10, 1883.

"One year after date, for value received, I promise to pay to the order of R. A. Peet one thousand dollars, at the banking office of Steel, Turck & Co., Ithaca, Mich., with interest at 8 per cent.

"K. P. PEET.
"D. C. JOHNSON.

Indorsed on back: "R. A. PEET."

The defense on the trial of the case was substantially as follows: At the time the note in suit was made K. P. Peet was president, and Barnes the secretary and treasurer, of a mutual life insurance company, doing business at Ithaca, and known as "The Michigan State Mutual Relief Association." Peet wanted to borrow some money of Barnes, who said he had none of his own, but that he had some belonging to the company which Peet might have. The note in question was executed, and the money was drawn therefrom—from the company funds—and the note handed over to Barnes as secretary of the company; that the note was the property of the insurance company; that the old company was, after the note was given, merged in a new company, known as the "Peninsular State Mutual Benefit Association." Peet also claimed that he had paid the note, not by money, but in services for the company, for payment of which service Barnes said to him he should consider the note paid. The court, however, did not submit this defense to the jury. Barnes claimed the money was his own, and that the note had not been paid. Upon this issue the case went to the jury, who returned a verdict in favor of the defendants. The record, as presented to us, is very unsatisfactory, and the claims of both parties not made as clear by the testimony as it seems they ought have been. Several objections

were urged against the rulings of the court during the trial, and his charge to the jury.

It is assigned as error that the court improperly instructed the jury that there was but a single question in the case,—to wit, whether the note in question, at the commencement of the suit, belonged to the plaintiff or the insurance company,—without also instructing them in relation to the rules of law by which such ownership could be determined by them upon the evidence before them; and in also charging that, should they find that the note belonged to the insurance company at the commencement of suit, the defendants were entitled to a verdict, and that the burden of proof to show ownership was on the plaintiff.

The plaintiff's counsel, in this Court, do not point out the rules of law applicable to the facts in the case which they desire the court below to specify as governing such facts; nor was the trial court informed by the plaintiff's requests, or in any other way, of the instructions desired in this respect. It was a question of fact, it seems to me, to be determined by the jury, whether the money loaned to Peet, which formed the consideration of this note, belonged to plaintiff or the insurance company. If it belonged to plaintiff, that settled the question in his favor. If it belonged to the insurance company, and was so treated by the parties to the instrument, and Barnes had not acquired the title to the note after its inception, and before suit, he could not recover upon it. There was no testimony in the case tending to show that Barnes afterwards acquired any other or better title to the note than he had when he paid the money to Peet and received it. Therefore the only question to be determined was, to whom did the note belong when it was passed to Barnes, —to him or to the insurance company? And whoever owned it at that time owned it when the suit was com-

menced. I think a jury could determine this issue of fact without any special instructions from the court as to the law of ownership, or as to what facts would constitute an ownership either in Barnes or the insurance company.

The court correctly charged the jury that the burden of proof was upon the plaintiff. It is true the possession of the note, unexplained, was presumptive evidence of ownership, and sufficient; but when evidence was introduced tending to show that the note belonged to the insurance company, and it was conceded, as it must have been upon Barnes' own testimony, that he was secretary and treasurer of the insurance company, and the person in whose possession the note would lawfully and naturally be as the property of the insurance company, then there remained no presumption in plaintiff's favor on account of such possession, and the burden was upon him to show that he was the owner of the note. *Manistee Nat'l Bank v. Seymour*, 64 Mich. 59 (31 N. W. Rep. 140).

I find no evidence in the case, or any claim upon the part of the plaintiff, that he was an indorsee in the sense as indicated in the opinion of Mr. Justice CAMPBELL. K. P. Peet was the maker of this note. Johnson was an accommodation maker, and R. A. Peet was an accommodation indorser. The note was not taken by Barnes as indorsee in the usual course of business in the purchase of commercial paper. It was delivered to him at its inception, as security for the loan made by him. The question at issue was, did he make this loan for himself or for the insurance company, and did he take the note as his property or as the property of the company, of which he was an officer and agent? There was no obstacle in the way of this question being litigated in this suit any more than there would be in case a thief should attempt to sue the maker upon the note which he had stolen. Barnes was the first and only holder of this note,

and the question was, for whom did he hold it,—himself or the insurance company? This could be litigated in the present suit. *Hillman v. Schwenk,* 68 Mich. 293, 297, 301 (36 N. W. Rep. 77, 670, also 40 N. W. Rep. 924).

I am unable to find any errors in the proceedings in the court below. The judgment should be and is affirmed, with costs.

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

SHERWOOD, C. J., *(dissenting).* This is an action of *assumpsit* to recover the amount due upon a promissory note made by the defendants, and reading as follows:

"$1,000. ITHACA, MICH., July 10, 1883.

"One year after date, for value received, I promise to pay to the order of R. A. Peet one thousand dollars, at the banking office of Steel, Turck & Co., Ithaca, Mich., with interest at 8 per cent.

"K. P. PEET.
"D. C. JOHNSON."

Indorsed on back:

"R. A. PEET."

The declaration is upon the common counts, with notice that the note would be given in evidence under the same. Plea was the general issue.

The facts, as narrated in the brief of counsel for plaintiff, with a few exceptions, are substantially correct, and are sufficient for the review asked for in this Court. They are as follows:

"In April, 1882, the plaintiff in error and defendant Kosciusko P. Peet, with one or two others, organized under the laws of this State a co-operative or mutual life insurance company, doing business at Ithaca, Mich., under the name and style of 'The Michigan State Mutual Relief Association.'

"That Kosciusko P. Peet was its president, R. A. Peet its treasurer, and said Theodore S. Barnes its secretary and general manager, having the custody and control of the funds of said company; and that said company ceased

to do business in October, 1883; that, as its general manager and secretary, the said plaintiff conducted the business of the company, established agencies, collected assessments, and paid out the same, including the expenses of the company, and had the control and management of said company, and all this with the consent and occasional assistance of defendant Kosciusko P. Peet, though said Peet gave but little, if any personal assistance, other than to sign policies and pay the expense of recording the articles of association at Lansing.

"That not only did plaintiff act as secretary and general manager, but that he also performed the duties of the treasurer of said company, with the knowledge and concurrence of said treasurer and the company; the said treasurer-elect, R. A. Peet, being unable to act at all times as such, by reason of his residing upon his farm in Lafayette township, some eight miles from Ithaca, and had never acted as treasurer. No question is made but that all the business of the company was faithfully and honestly conducted by the plaintiff in every particular; that nothing appears upon the record to the contrary.

"That some time in July, 1883, the defendants applied to the plaintiff for a loan of $1,000, to use in the building of a livery barn at Ithaca; that said amount was actually paid by the plaintiff to the defendants, and the note in question was executed by the defendants and delivered to the payee, R. A. Peet, and by him indorsed with his signature in blank, and delivered to the plaintiff, who has been the holder of the note ever since."

There is some evidence in the record tending to show that Mr. Barnes used the company's money, or some part of it, to make the loan; that he had not sufficient means of his own to make the loan; that he stated at the time that he was going to use the company's money. This, however, is all denied by plaintiff, and the evidence on his part tended to show that he did have means of his own, and sufficient to make the loan; that he used his own individual funds to make the same; that at all events, if he used any of the company's money, it was along with his own means, and his own means at least was used in part. The evidence also tended to show, and it was

undisputed, that the company did not and could not have had $1,000 at the date of the note. The record further shows that said company, soon after the date of the note, ceased to do business, and went out of existence; that in October, 1883, another association was organized, with the same officers of the former company, and known as the "Peninsular State Mutual Benefit Association," and being the same referred to above.

Under the issue as the cause was finally submitted to the jury under the charge of the court, but a single question was left for them to pass upon, which was, whether the insurance company or the plaintiff was the owner of the note when this suit was brought. The jury found for the defendants, and plaintiff appeals.

The first five assignments of error relate to the testimony offered tending to prove the ownership of the note, and we think none of the exceptions are well taken upon this subject. The court charged the jury, in substance, that if the jury found that, at the time of the commencement of the suit, the note in question belonged to the insurance company, plaintiff could not recover. We see no fault in this charge. It was not pretended upon the trial by the plaintiff that he held the note in any other capacity than owner, and as such owner he brought suit to recover the amount due thereon.

The court allowed five assignments of error to the charge, and in omitting to charge, to be filed in addition to those orignally made. They are as follows:

"1. The court erred in instructing the jury that there was but a single question in the case, viz: whether the note in question, at the commencement of suit, belonged to the plaintiff or to the insurance company. The court erred in instructing the jury that the only question for them was whether the plaintiff or the insurance company owned the note at the time of the commencement of suit, without also instructing them in relation to the

rules of law by which such ownership could be determined by them upon the evidence before them.

"2. The court erred in leaving the jury to pass upon the question of ownership of the note in question, unaided by any legal instructions by which such question could be properly determined.

"3. The court erred in instructing the jury that, in passing upon the question of the ownership of the note, the burden of proof was upon the plaintiff.

"4. The court erred in submitting to the jury the question of ownership at all, as upon the undisputed evidence the legal title to the note was shown to be in the plaintiff.

"5. The court erred in submitting to the jury the question of ownership at all, as the undisputed evidence showed the legal title of the note did not and could not have belonged to the insurance company at the commencement of suit."

The case is not changed by filing these additional assignments, and the parties cannot be prejudiced by them.

The two defenses set up under the theory of the defendants were—

1. That the note belonged to the insurance company, and therefore the plaintiff could not recover; and,—

2. That if the suit is well brought in the name of the plaintiff, no recovery can be had because the note has been paid in services, and which were accepted and acquiesced in as payment by the president of the insurance company and its secretary.

The court charged that there was not sufficient evidence of payment, and the case was submitted upon the question of ownership alone. The court held that it required some action to be taken upon the defendant Peet's account by the board of directors of the insurance company before the account could be regarded as settled and received as payment. In this we think the court was correct; but what is complained of most seriously by the plaintiff is that the court did not give the jury such instructions as to the ownership, and what was necessary

to establish it, or what they might take into consideration in passing upon the question, as the circumstances of the case required, and such as was essential to protect plaintiff's rights; that the court told the jury the plaintiff took upon himself the burden of proof in the case, and that he would have to establish his case by a preponderance of the evidence, without stating in what that evidence might consist. For instance, nowhere in the charge is anything said as to what were the legal presumptions arising from plaintiff's legal possession of the note, nor as to what would constitute *prima facie* evidence of ownership in the plaintiff of the note. We think that as much as this should have been done by the court in aiding the jury in the discharge of their duty under the issue; that so much, at least, was necessary for the court to have said to the jury in giving them the law applicable to the facts in the case as they appeared in the testimony; and its omission cannot be excused from the fact that plaintiff's counsel did not call special attention of the court to the subject at the time.

Counsel and parties have the right to rely upon the court for the discharge of such elementary duty in charging the jury, without any such special request; and when the court omits to do this, and a party's rights have been prejudiced by the omission, or it cannot be certainly determined that they have not been so prejudiced, it must be regarded as error; and we think that was precisely this case, and that the verdict must be set aside for that reason, and a new trial granted.

CAMPBELL, J. I concur in reversal, because I think that there is nothing to indicate that it was supposed any one but Barnes loaned the money on the note, and if it was delivered to him, as I think it clearly was, as indorsee, his liability to any one else for money due

could not change such person or corporation into a contracting party, or make any but himself the holder. The persons liable on the note could only be reached by any creditor of Barnes by garnishee process or some similar means. But such creditor, who never held the paper, and for whom there was no understanding it should be held, could not become in law entitled to be regarded as holder by any such legal fiction as was allowed in this case.

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NICHOLS, SHEPARD & CO. (A CORPORATION) v. GEORGE B. CRANDALL AND THOMAS J. CRANDALL.

Written contract—Contemporaneous parol agreement not admissible to vary—Breach of warranty—Recoupment.

The general rule is that parol contemporaneous agreements cannot be admitted to contradict or to vary the terms of a written instrument.

So *held*, where, on the purchase of a steam threshing-machine and engine, a written warranty was given by the vendor, and, in a suit to recover the purchase price, the vendee was allowed to prove a prior *verbal* warranty as to the power of the engine to run a specified separator which was not contained in the written warranty; the admission of which evidence is held erroneous.

Error to Cass. (Smith, J.) Argued January 31 and February 1, 1889. Decided November 8, 1889.

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

Howell & Carr, for appellant, contended for the doctrine stated in the opinion.

Spafford Tryon, for defendants, contended:

1. Defendants were entitled to show the parol undertaking, or warranty of the capacity of the engine, which induced them to make the purchase; citing *Chapin v. Dobson*, 78 N. Y. 74; *Unger v. Jacobs*, 7 Hun, 221; *Schenectady v. McQueen*, 15 Id. 551, 555; *Juilliard v. Chaffee*, 92 N. Y. 529; *Grierson v. Mason*, 60 Id. 394; *Lamb v. Story*, 45 Mich. 488; *Trevidick v Mumford*, 31 Id. 467; *Kostenbader v. Peters*, 80 Penn. St. 438.

2. The writing, not being signed by the plaintiff, is not the sole or conclusive evidence of the contract, and, so far as the plaintiff's undertaking goes, such writing has no greater force than the oral evidence of witnesses, and will not exclude such testimony; citing *Gage v. Jaqueth*, 1 Lans. 207–213; *Unger v. Jacobs*, 7 Hun, 220. Nor is a party liable upon a written contract who has not signed it, and, until signed, it is not the best or sole evidence of the agreement between the parties; citing *Townsend v. Corning*, 23 Wend. 435; *Osborn v. Rawson*, 47 Mich. 206; *Sovereign v. Ortmann*, 47 Id. 182; *Dillon v. Anderson*, 43 N. Y. 231.

3. Where the original contract was verbal, the law does not exclude parol evidence to show a further or a collateral agreement of one party because part of the contract was reduced to writing, and especially where it was not signed by the other party. In such a case oral testimony when received does not contradict or vary the writing, and violates no rule of evidence; citing 3 Phil. Ev. (2d ed.) 1473; *Potter v. Hopkins*, 25 Wend. 417; *Chapin v. Dobson*, 78 N. Y. 74; *Unger v. Jacobs*, 7 Hun, 220.

LONG, J. Defendants bought of Nichols, Shepard & Co., a corporation doing business at Battle Creek, a threshing outfit, in the fall of 1884. On the purchase six notes were given by defendants, amounting to the sum of $1,723. There remained unpaid on these notes at the time of the trial in the court below the sum of $1,045.80, according to the terms of the notes.

Defendants claimed a breach of warranty on the sale of the engine, and on the trial plaintiff had judgment for $77. Plaintiff brings error.

Defendants gave a written order for the outfit, which contained the following warranty:

"This machine is ordered, purchased, and sold subject to the following express warranty and agreement, to wit: That with good management the separator is capable of doing a good business in threshing and cleaning grain; * * * also that the said engine is well made, and of good material, and, if properly run and rightly managed, is capable of driving said separator to do good business in threshing; conditioned, that upon starting the machinery the undersigned purchasers shall intelligently follow the printed hints, rules, and directions of the manufacturers; and if by so doing they are unable to make it operate well, written notice, stating wherein it fails to satisfy the warranty, is to be immediately given by the undersigned purchasers to Nichols, Shepard & Co. at Battle Creek, Michigan, and also to the dealer through whom purchased, and reasonable time allowed to get to it, and remedy the defect, if any, unless it is of such a nature that they can advise by letter. If they are not able to make it operate well,—the purchasers rendering necessary and friendly assistance,—and the fault is in the machinery, it is to be taken back, and the payments refunded, or the defective part remedied, and made the same as in their other machines which do perform satisfactorily.

"But if the purchasers fail to make it perform through improper management, or lack of proper appliances, or neglect to observe the printed or written directions, then the said purchasers are to pay all the necessary expenses incurred. Deficiencies in general adaptation for threshing, separating, and cleaning, which alone involves damage or the return of the machinery, are expressly agreed by the undersigned to be reported in writing, as above stated, within five days after starting it, and not after continued use or injury to the machinery; and use without such written notice is conclusive evidence of satisfaction and fulfillment of warranty.

"It is expressly understood and agreed that all warranty on this machinery terminates and expires, and all liability of Nichols, Shepard & Co. for breach of warranty, damage, or otherwise, ceases entirely, at the close of this year. Also, that if any part of said machinery, except the belting, fails during this year in consequence of any defect in material of said part, Nichols, Shepard & Co. are to furnish a duplicate of said part, free of charge, except freight, after the presentation of the defective

piece, clearly showing a flaw in the material, at the factory, or to a dealer through whom said material was bought, at any time within this year; but deficiencies in any pieces do not condemn other parts."

Plaintiff's declaration was on the common counts in *assumpsit*.

The defendants gave notice under their plea of general issue that they would show on the trial that on or about August 15, 1884, they were desirous of going to the territory of Dakota to engage in the business of threshing wheat on an extensive scale, and were desirous of purchasing a threshing-machine of large size, with a steam-engine of sufficient ability and power to drive and operate the same without straining, forcing, or overworking any parts of the same; and the said plaintiff, well knowing that these defendants wanted to purchase a machine and engine with the design and with the purpose of using and operating the same in the territory of Dakota, and well knowing that said machine and engine would be practically worthless in such business unless it possessed the ability and power to work easily and well in such work without forcing or overworking such machine and engine, or any parts thereof, offered to sell, and these defendants, on August 15, 1884, offered to purchase of said plaintiff, one of its vibrating separators, and one of its self-guiding traction engines.

That the said plaintiff represented the same, manufactured by the plaintiff, was made of the best material, perfect and complete in all of its parts, and was fit and proper, and was capable of doing the work and business contemplated, without any strain or overwork in any part thereof, as aforesaid; and thereupon the plaintiff, in consideration that these defendants would buy of it, at plaintiff's request, one of said separators, called "Vibrator No. 4," and a self-guiding traction engine, No. 10, man-

ufactured by plaintiff at Battle Creek, its place of business, for a certain price, to wit, $2,000, undertook and promised the defendants that the said machine and engine were made of the best materials, and that both were perfect in structure and manufacture, in all respects, with perfect castings, and furnished perfect and complete in all its parts, from the choicest materials, with the best possible workmanship and finish, and was pre-eminently fitted and proper for extensive business, and that engine No. 10 was of ample power and ability to operate said separator, and would furnish more power than these defendants would need in their business of threshing.

That said engine did not possess sufficient capacity to drive or operate said vibrator No. 4 steam separator, and by reason thereof the said engine could not and did not do the work it was calculated and designed to do, and which it was warranted to perform by plaintiff; and, in consequence of such want of power and ability to do the work required, these defendants were obliged to and did allow the said threshing-machine and men in their employ to lie idle for a long space of time while said engine was being repaired, and also defendants lost the use of said threshing-machine by reason of such want of power to drive said separator to its full capacity, and lost a large number of threshing jobs and the gains and profits resulting therefrom, and the defendants, as well as their men and teams in their employ and use, were idle for a long period of time, etc. Notice is also given of defects in the machinery of the engine, and damages claimed therefor.

On the trial, Thomas J. Crandall, one of the defendants, was called as a witness, and testified substantially that he met plaintiff's agent, John Root, in the summer of 1884, at Dowagiac, who spoke to him about buying an engine and separator, and induced the defendant to go

to Battle Creek and look at the machines of the plaintiff.

"Arriving at Battle Creek," the witness says, "I told Fred Shepard, one of the firm, that I wanted a large-sized separator, a 36-inch cylinder, and a 13-horse-power engine to drive it. He said he didn't know what in the world I wanted such a power as that for. I told him I was going to take it to Dakota, and I wanted power to drive it for all it was worth,—for all I could put through it. I told them that I was told it required more power there than it did here; that they fed from both sides; and he went on and guaranteed his 10-horse-power to give us all the power we needed, and power to spare in any emergency. He said they did not have a 13-horse-power."

Hereupon the written warranty in the order was produced, and plaintiff's counsel moved to strike out this testimony, as the warranty of the engine was in the writing. Defendants' counsel then stated:

"There seems to be in this paper a printed warranty, but it refers to the machine generally, and not to the capacity and power of the engine to operate the separator. The defendants claim on a special warranty that the engine in question possesses ample power to run the separator, and would run it as well as a 13-horse-power engine, and would guarantee that it had sufficient power to operate successfully in Dakota."

The court overruled plaintiff's motion, and refused to strike out the testimony.

The witness then testified substantially that they relied upon the recommend and warranty of the plaintiff, and that he never saw the written warranty till the contract was made; that he had never run a 10-horse-power engine, and so informed Mr. Shepard; that they shipped the engine and separator to Dakota, and began threshing about August 20, 1884; that the engine lacked power, and they had to fire beyond what they should have done, using from 1,700 to 1,800 pounds of coal, when a half ton

should have been sufficient, and that coal was worth $7.50, and 75 cents to haul; that they threshed about 40 days in the fall of 1884, and averaged about 800 bushels of wheat per day.

Defendants' counsel then asked the witness:

"What sized engine was in use then in Dakota in operating separators?"

Witness answered, under plaintiff's objection, that they used from 12 to 15 horse-power engines there. Witness then testified that in consequence of heavy firing the flues leaked, and they were compelled to send 42 miles to Fargo to get a man to fix them; that they were delayed three days, and paid the man $10, and after the engine was repaired it stood only three days, and then leaked so badly they were compelled to get it fixed again, and were idle two days; that on each of these occasions four men besides himself were idle; and that they were paying the men from $2 to $4 per day and board; that after being fixed the second time it ran four or five days, and then began leaking so badly they could not use it, and quit in the middle of a job, and he came home.

Witness was then asked by his counsel:

"What amount of work had you engaged?"

Under objection of plaintiff's counsel the witness was permitted to answer this question, and testified:

"I had 1,200 acres engaged. About three-fourths of it was wheat, and the balance oats. The wheat would average about 18 bushels per acre, and the oats 50 or 60. The price of threshing was 5 cents for wheat and 3 cents for oats. The only reason why I did not do these jobs was that the engine gave out. We could thresh from 50 to 60 acres per day. Our total money expenses was $19.25 per day. I began threshing the second season on August 20. The total amount we threshed in 1884 was 14,650 bushels of wheat and 4,932 bushels of oats, and it took 19 or 20 days. I was there 23 days. The second

year I averaged 700 to 800 bushels of wheat, or 1,200 bushels of oats. The separator was capable of threshing 1,200 to 1,400 bushels of wheat, and 1,800 bushels of oats, if it had been run with sufficient power."

The defendants then called Fred East, who testified that he had 30 years' experience in threshing, and that he was in Dakota in the fall of 1884, and was using a Minnesota Chief, 36-inch cylinder, and 12-horse-power engine, for 60 days. He saw defendant there. Witness was then asked by defendants' counsel:

"What did you average per day with that machine?"

Witness was permitted to answer, under objection of plaintiff's counsel, and said 1,300 bushels of wheat and from 2,000 to 2,500 bushels of oats, if all at one place. Witness saw the machine in question that fall, and fed the separator for a while, and stated that he considered the engine rather weak. He was then asked:

"How did it correspond with the engine you were running as to power?"

And answered, under objection, that it was a weaker power; that it did not have power to run the separator to its full capacity; that the engines used in Dakota were from 12 to 15 horse-power. Witness was then asked by counsel for defendants:

"What was the value of the engine in suit for the purpose of running and operating a 36-inch-cylinder separator, like the one in suit, in Dakota in the fall of 1884?"

Witness, under objection, answered that in his judgment it was not worth anything. On his cross-examination the witness testified that all the engines he saw in Dakota were straw-burners, except defendants; that straw-burners cost less fuel; that the engine seemed to be all right, only it lacked power, and had to labor too hard;

that the difference between the cost of a 10-horse power engine and a 13 is about $300.

Mr. Eaton was called as a witness by the defendants, and testified that he was agent for C. Aultman & Co., manufacturers of engines. He was then asked what sized engine would be required to furnish sufficient power to run and operate successfully a 36-inch-cylinder separator. Under objection the witness answered,—

"A 12-horse-power engine is preferable anywhere for that size separator."

Thomas J. Crandall was then recalled, and testified that the engine would have been worth, freight and all, about $1,600 if it had sufficient power to run the separator as represented, but, as it in fact was, it was not worth over two or three hundred dollars. Upon his cross-examination he was asked by counsel for plaintiff:

"Was it not worth as much as any 10-horse-power engine?"

This was objected to by counsel for defendants as incompetent, and the objection sustained, the court saying:

"I think the question is what it was worth in the market for that purpose. If he buys one to thresh with, he is not obliged to run around to sell it to make wooden bowls with. If he bought it for the purpose of threshing out there with it, and it was recommended to run that particular separator, he is not bound to hunt up any other kind of business for the machine at all, or to sell it."

Question. "What was that engine worth in 1884,—not what it was worth to you, or worth for running that separator, but what was it in fact worth in the market?"

Under objection this testimony was ruled out by the court, the court saying:

"I don't think that is a proper question unless you confine it to the purpose of threshing. I don't think he

was bound to try and sell it for anything except threshing."

Mr. Hooden was called as a witness by the plaintiff, and testified that he was employed by plaintiff as collection correspondent; that he kept track of and knew where machines were located. Witness was then asked to state from the knowledge thus acquired how many 10-horse-power engines, 36-inch-cylinder separators, were being used in Dakota. Under objection the answer to this question was ruled out. Witness was then asked to state whether or not plaintiff was from the fall of 1884 to 1885 prepared to furnish a 13-horse-power engine, in all respects like the one in suit, except size. The answer to this question was also ruled out by the court.

Upon the close of the testimony the court stated to counsel, in presence of the jury, its views of the case upon the testimony, as follows:

"The defendants had a warranty outside of the written contract, and that part of the contract which requires them to give notice has reference only to such matters as were warranted in that contract, and does not apply to this special warranty that was made verbally, and was not a part of the contract at all, and therefore they were not bound to give notice at all. As far as the separator is concerned, all the warranty there was on that was that it was a good machine. They didn't warrant it for any particular place, or anything of the kind. I think the special warranty and the warranty in the written contract upon the separator is substantially the same, and that if there was any defects in the separator they would have to give notice of it, and, not giving notice, they could not recover for any defects in the separator. They would be confined to the damages, if any, upon the engine, and, as to that, it was sold for a particular purpose, and warranted to do a particular thing. It was warranted to run, to its full capacity, this 36-inch-cylinder separator.

"Upon the warrant there is no dispute in the testimony. They have not denied at all that they made such a statement to the defendants. If it would not run that

separator to its full capacity they have a right to damages. As to the difference there was in that engine, for the purpose of threshing in Dakota, the difference between what it would have been if it had been perfectly competent to run that separator to its full capacity, and what it was: Taking all the circumstances together in this testimony in relation to the loss and the amount of fields they lost, and the difference there was in threshing, is of no account, so far as it shows the value of the machine. Consequently the only question to be submitted to this jury is, what was the difference, if any, between this machine as it was in 1884 and as it was recommended in this verbal warrant? I think that is all there is of it."

"*By Plaintiff's Counsel.* I understand the ruling will be this: That the jury are to deduct from the amount due the plaintiff on the notes the difference between the actual value of the machine as it was for the purpose for which it is claimed to have been sold, and its value in fact, or its value as it would have been if as represented.

"*By the Court.* Yes, sir. If it was worth nothing, as he swears to, then they cannot recover anything, and they will take it just in proportion. If it was worth $500, they would deduct $500. If it was worth all they paid for it, they would recover the full amount."

There might not have been any error in these instructions if the warranty of the engine, as claimed on the trial, had been made a part of the writing. But the court was clearly in error in admitting any testimony of a parol agreement as to the engine.

The general rule is that parol contemporaneous agreements cannot be admitted to contradict or to vary the terms of a written instrument. This rule is based upon the reasonable presumption that where parties have reduced their engagements to writing, and they are plainly and intelligibly stated therein, it is conclusively presumed to embrace all that was intended, and to be the best possible evidence of the intent and meaning of those who are bound by it. *Sutherland v. Crane,* Walk. Ch. 523; *Martin v. Hamlin,* 18 Mich. 354; *Vanderkarr v.*

Thompson, 19 Id. 82; *Seaman v. O'Hara,* 29 Id. 66; *Blackwood v. Brown,* 34 Id. 4; *Stackpole v. Arnold,* 11 Mass. 30; *McLellan v. Bank,* 24 Me. 566.

It is laid down in the books as the principal cause of this rule that when parties, after whatever conversation or preparation, at last reduce their agreement to writing, this may be looked upon as the final consummation of their negotiation and the exact expression of their purpose; and all of their earlier agreements, though apparently made while it all lay in conversation, which is not now incorporated into their written contract, may be considered as intentionally rejected. The parties write the contract when they are ready to do so, for the very purpose of excluding everything else and making this permanent and certain. 2 Greenl. Ev. (4th ed.) 60.

This claimed parol agreement as to the warranty of the power of the engine to run a 36-inch-cylinder separator was made prior to the giving the order for the outfit, and which order contained the express warranty. This became the contract of sale and warranty of the outfit, when accepted and acted upon by the plaintiff, and it contains no warranty of power of the engine to drive such a separator.

On the trial it was not claimed that there had occurred any breach of this written warranty, or at least any such breach as would entitle the defendants to damages, without notice to the plaintiff, and giving it an opportunity to repair. In fact the defendants made no complaint, but from time to time wrote the plaintiff that they would pay the notes, asking an extension of time in which to meet them. The court was in error in permitting the defendants to go into this part of the case. It was error to allow such a parol warranty to be shown, or to permit testimony to be given showing damages thereunder. The whole defense to the notes was made to turn upon a claim

of damages under such parol warranty and breach, and defendants were allowed to recoup such damages on the trial to an amount almost equal to the sums remaining unpaid on the notes.

It is not, therefore, necessary to discuss the question raised upon the instruction of the court as to the measure of damages which defendants might recoup. They were not entitled to recoup damages at all under a breach of this claimed parol warranty. If defendants had any defense to the notes growing out of the contract of warranty it could only arise under the written contract, and, upon such a claim, it could only arise after they had given the notice provided in the contract, and after plaintiff had been given an opportunity to repair. Even upon the defendants' own theory the court was in error in permitting the defendants to show their loss upon jobs taken, and it would have had no tendency to show the value of the engine.

Neither could the damages upon such theory be shown without permitting the plaintiff to prove the market value of this engine in Dakota. It would not do to say that it was bought for a specific purpose, and its only value, therefore, would be for the purposes for which it was purchased. This question, however, does not become important, as the court was in error in permitting parol testimony to be given of the warranty.

The judgment of the court below must be reversed, and a new trial ordered, and upon which the parties must be confined to the written warranty and the breaches of that, if any have arisen after notice to repair. Plaintiff will recover costs.

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

MORSE, J., *(dissenting)*. I think that the order given

for the machine in this case did not constitute such a contract as would exclude the evidence of the parol warranty relied upon by defendants. See *Phelps v. Whitaker*, 37 Mich. 72, and cases cited.

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THE CITY OF PORT HURON v. GEORGE W. JENKINSON.

Sidewalk ordinance—Constitutional law—Void charter provision.

1. An ordinance requiring all persons owning or occupying any real estate in a city to keep and maintain good and sufficient sidewalks along all streets and avenues in front of or adjacent to such real estate, and imposing a fine or imprisonment for a failure so to do, is unconstitutional and void, as is a charter provision authorizing such an ordinance.
2. Where, by the provisions of a city charter, before a person can be required to build a sidewalk, the council must pass an ordinance prescribing the kind of walk to be built, its dimensions, and the material to be used therein, as well as the time within which it must be constructed, the enactment of such ordinance is a condition precedent to any liability for failing to build said sidewalk.

Error to St. Clair. (Canfield, J.) Argued February 14, 1889. Decided November 8, 1889.

Defendant was convicted of a violation of a sidewalk ordinance, and fined $25 and costs, and in default of payment sentenced to 30 days' imprisonment, which conviction was set aside on *certiorari* to the circuit court, which judgment is affirmed. The facts are stated in the opinion.

P. H. Phillips, for appellant, contended:

1. The extent of municipal police power over streets includes everything necessary to render them easy of access and use to the public, and to preserve their usefulness unimpaired; citing *Nelson v. Laporte*, 33 Ind. 258; *Gaslight Co. v. Middleton*, 59 N. Y. 228; *Horst v. Moses*, 48 Ala. 129; *New Orleans v. Clark*, 95 U. S. 644.
2. In order that the imposition of fines for offenses against municipalities may be made effective, it is usually provided that offenders may be imprisoned for a certain length of time, on default of payment of fine and cost of prosecution. Such imprisonment is not looked upon as a punishment for the offense, but simply a necessary means of enforcing the pecuniary penalty; citing *Sheffield v. O'Day*, 7 Ill. App. 339; *State v. Herdt*, 40 N. J. L. 264; nor does it fall within the meaning of imprisonment as used in the Constitution, and it does not entitle the offender to the protection of any of the rights or guaranties which are accorded to persons who stand accused of an offense punishable by imprisonment; citing *Inwood v. State*, 42 Ohio St. 186; *State v. Herdt*, 40 N. J. L. 264.
3. Police powers authorize all regulations tending to promote the public health, security, and comfort of the community. They have the right to regulate the use of streets, and to enact ordinances to keep them in passable condition; citing *Paxson v. Sweet*, 13 N. J. L. 196; *Palmyra v. Morton*, 25 Mo. 593; *Palmer v. Way*, 6 Col. 106; *Railway Co. v. Hoboken*, 41 N. J. 71.
4. The authority of municipal corporations to punish for failure to remove snow from sidewalks has been frequently recognized; citing *Goddard, Petitioner, etc.*, 16 Pick. 504; *Railway Co. v. Mayor*, 11 Allen, 287; *Kirby v. Market Ass'c'n*, 14 Gray, 252; *Taylor v. Railroad Co.*, 45 Mich. 74; *Woodbridge v. Detroit*, 8 Id. 274; *Bonsall v. Lebanon*, 19 Ohio, 418; *Paxson v. Sweet*, 13 N. J. 196; Dillon, Mun. Corp. § 394.

Stevens & Merriam, for defendant, stated as contended in the opinion.

SHERWOOD, C. J. This action was brought by the city of Port Huron to recover of the defendant a penalty claimed to have been incurred by him for the violation of an ordinance of said city, requiring him to keep and maintain a good and sufficient sidewalk along the street in front of the premises owned by him, and which it was his duty to construct and maintain. The ordinance of

the city, for the violation of which complaint was made, reads as follows:

Section 1. "All persons owning, or occupying, or having any real estate within the city of Port Huron shall keep and maintain good and sufficient sidewalks along all streets and avenues in front of or adjacent to such real estate. And any such person failing or refusing to build or repair any such sidewalk in front of or adjacent to real estate owned or occupied by him, or in which he is interested, for ten days after notice to him to build or repair any such sidewalk by the superintendent of public works, shall be deemed a violator of this ordinance."

Section 14 provides that—

"Violators of this ordinance shall, on conviction thereof, be punished by a fine, not to exceed one hundred dollars, or by imprisonment in the county jail not to exceed three months."

The ordinances established by the mayor and common council of said city further provide that—

"Whenever the accused shall be tried for the violation or non-observance of any ordinance, or any provision of the city charter, of the city of Port Huron, and found guilty, either by the court or by a jury, or shall be convicted of the charge made against him upon a plea of guilty, the court shall render judgment thereupon, and inflict such punishment, either by fine, penalty, forfeiture, or imprisonment, together with such costs of prosecution, as may be authorized by law and the court may order. But such punishment shall in no case exceed the limit fixed by law for the offense charged; and, in rendering such judgment and inflicting such punishment, the court may award against such offender a conditional sentence, and order him to pay a fine, with or without costs of prosecution, and, in default thereof, to suffer such imprisonment as is provided by law and awarded by the court in all cases where the offender shall be convicted of an offense punishable, at the discretion of the court, either by fine or imprisonment, or both: *Provided*, That when any person is convicted of being a disorderly person, under any provision of the charter or ordinances of the city of Port Huron, the court may, in its discretion,

require of the offender a recognizance, with sufficient sureties, for good behavior for a term of not less than 60 days, nor more than one year, thereafter; and, when such security for good behavior is required to be given, the court or magistrate may require and further order that the costs of prosecution, or any part thereof, shall be paid by such person, who shall stand committed until such costs are paid, or he is otherwise legally discharged. But such imprisonment shall not exceed ninety days."

The power of the council of the city of Port Huron to pass the ordinance in question is claimed under section 1, chap. 18, of the city charter, and is as follows:

"It will be the duty of each and every person owning, occupying, or having any interest in any real estate within the city to construct, keep, and maintain good and sufficient sidewalks along all streets and avenues in front of or adjacent to such real estate; and, upon failure so to do, such person, after due notice, shall be liable to prosecution according to such ordinances as the common council of said city may adopt." Local Acts 1885, p. 538.

It is claimed the testimony showed a violation of the ordinance; and, after the same was given, the defendant, by his counsel, moved the court (the justice before whom he had been brought by warrant) that the complaint and warrant be quashed, and the defendant be discharged, for the following reasons:

1. That the charter of the city did not authorize criminal punishment or criminal proceedings in the case for the offense charged, nor empower said city to punish criminally the person so refusing or neglecting to build a sidewalk.
2. If the charter was intended to confer such authority, the provision purporting to confer the same is unconstitutional.
3. The ordinances referred to, providing criminal punishment for the offense charged against the defendant, and under which the proceedings were had against him wherein he was convicted, were illegal and void.

The justice overruled the motion, found the defendant guilty, and gave judgment that he should pay a fine of $25, and costs of prosecution, and, in default of such payment, be confined in the county jail for 30 days. This conviction was removed to the circuit court for the county of St. Clair by *certiorari* where the case was heard before Judge Canfield, who reversed the judgment of the justice, and gave judgment against the city for the costs of the suit. The city now seeks a review of the questions raised.

But two questions were argued in this Court by counsel for the city. The *first* relates to the constitutionality of the act under which the ordinance was passed; and, *second*, does the section of the act referred to authorize the adoption of the ordinance under which the prosecution was had?

The ordinance is clearly within the provisions of the statute; but that is of no consequence in this case, as will hereafter appear.

In the affidavit upon which the writ of *certiorari* was obtained, the defendant made the following allegations of error, and which were presented for the consideration of the circuit court:

"1. The warrant issued in said cause did not authorize the apprehension or arrest of the deponent, for the reasons—

"*a*—That it was not directed to anybody, to any officer or person authorized to make arrests.

"*b*—That no criminal action was alleged therein.

"2. That the provisions of the ordinance referred to, authorizing criminal prosecutions to be instituted against persons who fail to build or repair sidewalks in the city of Port Huron, is unconstitutional, illegal, and void.

"3. The judgment of the justice aforesaid was void, as the provisions of the charter aforesaid do not authorize an alternative judgment."

By section 2, chap. 18, of the city charter, it is provided that—

"The common council shall have power to prescribe, by resolution or ordinance, the grade, width, and character of all sidewalks within said city, and the materials of which, and the time within which, the same shall be constructed or repaired; and may provide for the punishment by fine or imprisonment, or both, of any and every person who fails, neglects, or refuses to comply with the provisions and requirements of such resolution or ordinance."

It will be seen, from an examination of the two sections of the statute herein given, that, before a person owning land in the city can be required to build a sidewalk along the street upon which it abuts, the council must have passed an ordinance prescribing the kind of walk to be built, its dimensions, and the material to be used therein, as well as the time within which it must be made. In the case of that required of this defendant, the record does not show that this was ever done. The complaint and warrant are both defective in this respect, and the court was without jurisdiction in the case; and the magistrate should have yielded to the motion to dismiss the proceedings, when it was made by counsel for the defendant.

This defect would be sufficient to dispose of the case if no other infirmity appeared; but a more serious difficulty is encountered upon an examination of these two sections of the statute, and the provisions of the by-law enacted by the council thereunder. Neither of them are of any validity whatever.

No legislative or municipal body has the power to impose the duty of performing an act upon any person which it is impossible for him to perform, and then make his non-performance of such a duty a crime, for which he may be punished by both fine and imprison-

ment. It needs no argument to convince any court or citizen, where law prevails, that this cannot be done; and yet such is the effect of the provisions of the statute and by-law under consideration. It will readily be seen that a tenant occupying a house and lot in the city of Port Huron, and so poor and indigent as to receive support from his charitable neighbors, if required by the city authorities to build or repair a sidewalk along the street in front of the premises he occupies, and fails to comply with such request, such omission becomes criminal; and, upon conviction of the offiense, he may be fined and imprisoned. It is hardly necessary to say these two sections of the statute are unconstitutional and void, and that the provisions are of no force or effect. They are obnoxious to our Constitution and laws; and the two sections of the statute are a disgrace to the legislation of the State.

The judgment of the circuit court will be affirmed, with costs to be paid to the defendant by the city.

The other Justices concurred.

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NELSON MATHEWSON ET AL. v. JOHN W. HOFFMAN AND FRANKLIN DENTLER.

Waters and water-courses—Prescriptive rights—Diversion of river—Statute of limitations—Bars right to restore to original channel.

1. The exclusive enjoyment of water in a particular way for 20 years, without interruption, becomes an adverse enjoyment sufficient to raise a presumption of title against a right in any other person which might have been, but was not, asserted.

2. One who has taken the water from the original channel, and has continued to divert and enjoy it for a period beyond the statute of limitation as to real actions, cannot afterwards be permitted to restore it to its original state when it will have the effect to destroy or materially injure the property of those through or by which it formerly flowed. *Belknap v. Trimble*, 3 Paige, 603.

3. An inchoate right of protection from the overflow of lands by water passes by a sale, and the successive owners are in privity with each other. *Leonard v. Leonard*, 7 Allen, 377.

4. While rights in a stream of water may not be lost by mere non-user, they may be by long-continued adverse enjoyment by others. Gould, Waters, § 329.

Appeal from St. Joseph. (Loveridge, J.) Argued June 6, 1889. Decided November 8, 1889.

Bill to enjoin the diversion of a water-course. Defendants appeal. Affirmed. The facts are stated in the opinion.

H. P. Stewart and *Dallas Boudeman*, for complainants, contended:

1. The continued diversion of a stream of water for 20 years, or the use of the water in any particular manner for that period, gives the diverter or user an absolute right by prescription to continue such use, the period in which such rights will become absolute being fixed by that allowed for bringing actions to recover real estate; citing Angell, Wat. § 200 *et seq.*; Washb. Eas. §§ 383, 354 *et seq.*, 387 *et seq.*; High, Injunc. (1st ed.) § 507; *Pillsbury v. Moore*, 44 Me. 154; *White v. Chapin*, 12 Allen, 516; *Townsend v. McDonald*, 12 N. Y. 381; *Law v. McDonald*, 9 Hun, 23; *Conklin v. Boyd*,, 46 Mich. 56; *Bunce v. Bidwell*, 43 Id. 542.

2. In such a case the rights must be mutual, and land-owners to whose lands the water had been a detriment gain a corresponding right to have it remain off their land, and to continue to run through the new channel which becomes, as to all persons interested, after said limitation period, the legal channel for the water; citing *Delaney v. Boston*, 2 Har. (Del.) 489; *Middleton v. Gregorie*, 2 Richardson Law (S. C.), 638; *Woodbury v. Short*, 17 Vt. 387; *Belknap v. Trimble*, 3 Paige, 605; *Shepardson v. Perkins*, 58 N. H. 354; *Ford v. Whitlock*, 27 Vt. 265; *Shields*

v. Arndt, 4 Green (4 N. S. Eq.), 234; *Norton v. Volentine*, 14 Vt. 239; Gould, Waters, § 340; *Smith v. Adams*, 6 Paige, 441.

3. When a person uses the water of a stream in a particular way, whether by diverting it or fouling it, uninterruptedly for the statutory period, it will be presumed to be under a claim of right and to be adverse, and sufficient to establish a title by prescription, and it is incumbent on the owner of the servient tenement to show that the use was under some license; citing Gould, Waters, § 341; *Hammond v. Zehner*, 21 N. Y. 118; *Law v. McDonald*, 9 Hun, 23; *Melvin v. Prop'rs of Locks, etc.*, 16 Pick. 137; *White v. Loring*, 24 Id. 319; *Hart v. Vose*, 19 Wend. 365; *White v. Chapin*, 12 Allen, 520; *Perrin v. Garfield*, 37 Vt. 310; *Garrett v. Jackson*, 20 Penn. St. 331; *Steffy v. Carpenter*, 37 Id. 41.

4. The right to divert a natural stream may rest upon estoppel, without requiring the length of time to acquire the right by prescription; citing *Jacox v. Clark*, Walk. Ch. 249; *Payne v. Paddock*, Id. 487; Gould, Waters, § 349; and easements of a similar character are recognized by this Court; citing *Conklin v. Boyd*, 46 Mich. 56.

Howell, Carr & Barnard, for defendants, contended:

1. The stream and the rights in it being appurtenant to land, can pass only by deed; citing Gould, Waters, § 300; and cannot be lost by abandonment; citing 3 Washb. Real Prop. 61, 66; *Arnold v. Stevens*, 24 Pick. 106, 113, 114; *Townsend v. McDonald*, 12 N. Y. 381; *Day v. Walden*, 46 Mich. 575, 583; Gould, Waters, § 204; Angell, Wat. §§ 243, 249, 252 (note).

2. The statute of limitations does not apply to the case; possibly, it fixes a time within which a grant can be presumed; citing *Parker v. Foote*, 19 Wend. 309; *Colvin v. Burnet*, 17 Id. 567; but if the circumstances are inconsistent with the presumption of a grant the court will not presume it; citing *Thorpe v. Corwin*, 20 N. J. L. 312, 316; *Cobb v. Davenport*, 32 Id. 369; *Powell v. Bagg*, 8 Gray, 441; *Tinicum Co. v. Carter*, 100 Am. Dec. 606, 607; *Rhodes v. Whitehead*, 84 Id. 631; Angell, Wat. § 211 (note); 2 Best, Ev. §§ 378–380.

3. As the right claimed depends upon the fiction of a grant, the subject matter must be capable of being conveyed by grant, and if not, or if a grant would be contrary to public policy, the fiction cannot find place; citing Angell, Wat. § 201; Gould, Waters, § 331; *Edson v. Munsell*, 10 Allen, 567; *Burbank v. Fay*, 65 N. Y. 66; *Railway Co. v. Hoag*, 90 Ill. 340; *Rhodes v. Whitehead*, 84 Am. Dec. 631.

4. The right to the natural flow of a stream is a natural right and does not depend upon grant, prescription, or user; citing Gould, Waters, § 204; and although the right to use may be enlarged, modified, or even acquired by prescription, the right to a natural flow is not the subject of grant; citing Gould, Waters, § 205; *Roberts v. Richards*, 50 L. J. Ch. 297; and the land-owner has no property in the water but has only a right to it as it flows; citing Gould, Waters, § 204; *Stein v. Burden*, 65 Am. Dec. 394.

5. The rule is that a prescription can only operate against one who is capable of making a grant; citing Wood, Lim. 379; and the relief of land from the flow of a stream is not subject to grant, and cannot be acquired by prescription; citing *Felton v. Simpson*, 11 Ired. 84; and it has been held that a right by prescription cannot be gained in the flow of surface water unless artificial ditches are constructed; citing Gould, Waters, § 279; *Boyd v. Conklin*, 54 Mich. 583.

6. Assuming, however, that there is nothing in the way of the doctrine of prescription, there must have been an adverse user for the requisite time, and it must have been other than permissive; citing 2 Wash. Real Prop. (5th ed.) 341; Gould, Waters, § 334; *Cobb v. Davenport*, 32 N. J. L. 387; *Yelverton v. Steele*, 40 Mich. 539; *Flora v. Carbean*, 38 N. Y. 111; *Wiseman v. Lucksinger*, 84 Id. 43; and the proof of it must be clear and cogent; citing *Yelverton v. Steele*, 40 Mich. 538; *Marble v. Price*, 54 Id. 466; and the holder must have believed in his title; citing *Campau v. Lafferty*, 43 Mich. 429; and the occupancy must have been such that it is difficult or impossible to account for it except upon the presumption of a grant; citing *Brace v. Yale*, 10 Allen, 441; *Vliet v. Sherwood*, 35 Wis. 229; *Water Co. v. Water Co.*, 64 Cal. 185; and it must have been constant as to extent, manner, and quantity; citing 2 Washb. Real Prop. (5th ed.) 343; Gould, Waters, §§ 342, 343; and it must have been peaceable; citing *Sargent v. Ballard*, 9 Pick. 251; *Arnold v. Stevens*, 24 Id. 110; *Ward v. Warren*, 82 N. Y. 256; *Colvin v. Burnet*, 17 Wend. 568.

LONG, J. The bill in this cause is filed by ten complainants against defendants, Dentler and Hoffman, to perpetually enjoin them from removing a certain dam, and thus cause the waters held back by the dam to flow across the farming lands of complainants.

The bill alleges, substantially, that the complainants

are severally the owners of certain parcels of real estate particularly described in the bill of complaint, and situated in the township of Mendon, St. Joseph county, and State of Michigan, and at the time of commencement of this suit were occupying, respectively, the premises so owned by them.

That prior to the year 1844 a natural and perpetual stream of water, called the "Little Portage River," crossed from an easterly direction over the parcels of land owned by them, and emptied into the "Big Portage River," so called, on section 24, in Park township, which was a point westerly of the lands owned by the complainants; that on the margin of said stream, and across the several parcels of land now owned by the complainants, was a large amount of bottom-land, which, while the stream ran through it, was wet and cold by reason of the waters of the streams flowing over and percolating through such bottom-lands, and thereby said bottom-lands were made worthless, and could not be made valuable for farming or any other purpose, and that no crops could be raised thereon by reason of the waters so percolating through and flowing on said lands; and, by reason of said wet lowlands along said stream, the public health, and especially the health of the persons living near the same, was detrimentally affected.

That about 1844 one Elisha Doane caused to be dug a race from the Little Portage river to the St. Joseph river,—the St. Joseph river lying one mile south of where the race intersected the Little Portage river,—and this point of intersection was east and up the stream from the lands now owned by the complainants; that after Doane had dug the race he constructed a dam across the Little Portage river at a point where the race intersected it, and stopped the flow of the water of the Little Portage river in its original channel, and diverted the waters of the stream

into the artificial channel dug by him; that this diversion of the waters of the Little Portage river was made by Doane for the purpose of creating a water-power at the village of Mendon, through which it passed; that after the diversion Doane constructed a dam near the St. Joseph river, and took the waters of the Little Portage river through the race, as above stated, and made a water-power at this point, and on the water-power mills were built, amongst others, a flouring-mill, and this, with other machinery, was operated uninterruptedly from 1844 to 1882, when the dam broke away, and has not since been rebuilt; but that the water continued to be diverted from the Little Portage river down through the old race and through the old mill-pond ever since 1844, and still continues.

That Doane, and those claiming under him, continued, from a period since 1844 to the present time, to occupy, use, and divert the water from the Little Portage river, and have continually diverted it through said race, and thereby removed it from flowing across said lands owned by the complainants, and it has not flowed across the same for a period of about 43 years prior to the time of filing the bill of complaint; that the diversion of the water of the Little Portage river by said Doane, and those claiming under him, continued peaceably and uninterruptedly, and by the tacit consent of all the parties interested, for more than 40 years last passed; and that, by the long, peaceable, and uninterrupted diversion of said stream of water from flowing across the lands owned by the complainants, their lands have become, and are now, freed, relieved, and unincumbered in law from the flowing of the waters of said stream across said lands; and any and all rights of any other persons, which might otherwise have existed, to have the stream of water flow across said lands have become barred, concluded, and

estopped by reason of the great length of time during which said diversion has continued.

That complainants became the owners of their several parcels of land since the diversion of the water of the Little Portage river, and they purchased their lands knowing that no stream of water incumbered them, and believing that said stream of water would remain diverted in the same manner that it has been so long diverted; that by reason of the diversion of said stream of water from their said lands the low bottom-lands adjoining the original bed of the stream have become dry, and in a good condition for cultivation; that complainants have been to a considerable labor and expense in preparing and fitting said lowlands upon said respective premises for cultivation, and that they are now, and for years have been, cultivating a considerable portion of the same, raising crops thereon, and such lands have now become the most valued portion of their farming lands; and that while, with the water on, they were worthless, they are now worth $50 per acre and upwards, and the amount of such lands aggregate about 380 to 400 acres; that all of their said lands are similarly located to the old channel of the Little Portage river, and would be similarly affected by the return of the water of the stream to the old channel; that they, and those under whom they claim, have uninterruptedly, and for more than forty years last past, enjoyed and occupied their respective parcels of land freed and unincumbered of the waters of said river

That since the diversion of the waters of the Little Portage river, at a point known as "Parkville," about one mile below the point where the Little Portage river originally emptied into the Big Portage, a dam and water-power has been erected, and on this water-power several years ago was erected a flouring-mill, and which

since has been operated, and the same is now being operated, by Franklin Dentler, one of the defendants. That since the diversion of said Little Portage a dam and water-power were erected across the Big Portage river about eight miles below the Parkville water-power, and a flouring-mill was erected on that, and the same is being used by the defendant John W. Hoffman.

That said Dentler and Hoffman, defendants, have recently conceived a scheme of diverting the water of the Little Portage river from and out of the channel through which it has so long flowed, as above stated, and to turn back the stream of water again into the old abandoned channel, upon and across the lands of complainants; that defendants, just before the filing of the bill of complaint in this cause, had notified complainants that they proposed to turn the waters back into the old channel, as above stated; that the defendants insisted that they had the right to turn the same back, and to use the water for their water-powers, and they threatened to do so, and would do so, unless they were restrained by injunction.

Complainants further state that the turning of the waters of said stream into the original channel is threatened by defendants, and if done that it will result in irreparable injury to them; that if the waters are so caused to flow in the old channel, across said lands, the same would cause the bottom-lands belonging to complainants to become wet and cold, and render them worthless for farming purposes, and they would be valueless for any purpose; that the crops growing upon said lands would be destroyed, and complainants would be deprived of the use and value of said bottom-lands, and each would be damaged more than $100; that the lands adjoining are low, and the flow of water is but slight, and as a result the lands would be wet and overflowed by the precolation

of the water; that, during the time the old channel has not been used, vegetable matter has accumulated and grown up thereon, and to return the water into the old channel again would result detrimentally to the public health, and especially to the health of the complainants, who reside near the old channel; that the air would thereby be filled with malaria and poisonous gases and foul odors, and complainants' health and comfort thereby detrimentally affected, and that this would continue from year to year, while said waters were so allowed to flow.

The bill alleges that the acts threatened by the defendants are unlawful, and against the complainants' rights, and detrimental to the public health generally, and especially to the health of complainants, who live so near the lands thus to be affected.

The prayer of the bill is that the defendants be required to answer the bill, but not under oath, and that it be decreed that the complainants' lands above described be freed and unincumbered of and from the waters of the Little Portage river, and that the same cannot be caused to flow in said old channel, across complainants' lands, by the defendants, and that the complainants' lands are freed from any servitude of the waters of said Little Portage river that now flow in the above-mentioned race; that the defendants be perpetually enjoined and restrained from diverting the flow of the water from the Little Portage river, now flowing through the artificial channel, and from causing the same to flow across complainants' lands through the original bed of the stream, and from causing any of the waters whatsoever to flow on and across the lands of the complainants; and they also pray for general relief in the usual form.

On filing the bill a temporary injunction was issued December 30, 1887.

The answer leaves the complainants to prove the title

of the lands claimed by them, and the character and quality of the bottom-lands; admits the existence of the Little Portage river; does not deny the diversion of the stream, but says, if the race was dug, it did not obstruct the further flow of the water; and denies that all the water was so diverted; and denies that the diversion was continuous. Defendants also deny that the complainants' lands are freed from the incumbrance, admit the erection of the defendants' mills, and that they have always claimed the water. The answer also admits that they purpose closing up the race and restoring the water to the old channel, but denies that it will injure complainants' lands or the public health.

By the answer, more fully stated, it is claimed by defendant Franklin Dentler that the flouring-mill at Parkville has been operated by him for several years; that it is erected along what is called the "Big Portage," below the point where the Little Portage enters it, and he claims, and always has claimed, that he is legally entitled to the flow of the water of the Little Portage river, in place of a portion of it which is diverted and cut off by the said race.

Defendant Hoffman, for himself, says that a flouring-mill has for several years last past been operated by him on the Big Portage river, several miles below Parkville, and he claims, and always has claimed, the flow of the water for said mill, instead of a portion of it so originally cut off by the digging of said race.

And the defendants, further answering, say that, being the owners by purchase of Adams Wakeman of the waters of the Little Portage river at Mendon, and of the lands through which said race is cut, and all franchises and riparian rights of said Wakeman, who was the sole owner of the same at the time of such purchase, they have conceived the idea that they have the right, and propose, to

return so much of the waters of the Little Portage river back into the original channel which were so wrongfully, unjustly, and injuriously taken from them to the mill owners who own any part of the waters of the Little Portage river; which purchase from Adams Wakeman was made a short time ago, and for the purpose of preventing further litigation. And they further say that, by the purchase of said lands, franchises, and riparian rights of Adams Wakeman, they are entitled to the use of the water so wrongfully diverted, as they claim, and to return said waters to the original channel, whatever its effect may be upon the lands of complainants; and that complainants knew that these lands were subject to the rights and flow of said waters.

On the hearing in the court below, a decree was entered granting a perpetual injunction, according to the prayer of the bill. Defendants appeal.

It is claimed on the part of the complainants that the evidence on their part establishes beyond all controversy the following propositions:

1. The ownership of the lands described in the bill by the respective parties, and that they have owned and occupied them for many years; that the homes of all of them are situated near the bottom-lands involved in the case; and that the complainants, and those under whom they claim, have owned and occupied these lands in the neighborhood of 40 years, continuously.

2. It is shown beyond all question that prior to 1844, while the water was flowing through the lowlands adjoining the stream of the Little Portage, all the lands adjoining such stream were impregnated and soaked with water to such an extent that they were substantially valueless; that nothing could be raised upon them; that the soil was of such a nature that water passed easily and freely through it; that a goodly portion of the land was covered with wild flags; and that the only thing ever obtained from it while the stream flowed through it was the ordinary wild or marsh grass, of very little value for any purpose, and often it became necessary to carry this off,

because the water prevented driving teams upon the land to get it. The land, in its original state, was substantially a waste.

3. The fact is also proven, without contradiction, that about 1844 the water of the Little Portage was turned at a point north of Mendon village, and caused to run through an artificial channel dug by Mr. Elisha Doane, and, after being so turned, it was dammed up before it reached the St. Joseph river, thus forming a water-power, on which were located, and for many years were operated, mills of various kinds, such as carding-mills, turning lathes, saw-mills, planing-mills, chair factories, and grist-mills.

4. It is shown by a great amount of testimony that after this diversion the flow of the stream at an ordinary stage of water was substantially all through the artificial channel. During times of freshets, and when more than the ordinary water was coming down the stream, the water would overflow all the lowlands, including those of complainants, but these freshets were of short duration, and usually in the spring and fall, and these still continue in the same manner as formerly; but this did not and does not interfere with the complainants in the cultivation of their lands.

5. The diversion of the water from these lands had a very beneficial effect upon them. The creek bottom was composed of the decayed vegetable matter usual along the streams of this State. Water passed quickly through it, and so long as the stream had passed through the channel the soil remained saturated with water to such an extent that nothing of value could be grown upon it. When the water was removed all of this was changed. The lands soon became dry. The owners of it, at considerable expense to themselves, cleared it up of such underbrush and obstructions as were on it, and the result was that it became not only good farming lands, but in fact the best in that portion of the country. Better crops were raised upon it than upon any of the upland; and this, in a section of the country that cannot be excelled in the State in fertility of its soil.

We think these propositions are fully established by the evidence. Under the facts so established, the claim of the complainants is that they are entitled to the use

of their lands, freed from this incumbrance, on either one of three theories:

1. That there has been a grant and agreement by and between the lower proprietors and the person digging the race that he should take the water off these lands and keep it off.
2. That they have gained the prescriptive right to have the water kept off their land by the undisputed and uninterrupted use of the land free from the water for the period required by law for that purpose.
3. That they have continued to occupy the lands freed from the water for such a length of time as that they are now protected in their use by the statute of limitations and adverse possession and user, and that defendants have no longer the right to dispossess them of any part of their lands for the purpose of running the water across them.

We are satisfied from the evidence that all three of these propositions are sustained, and that defendants have now no right to take down the dam, and cause the waters of the Little Portage river to flow across complainants' lands.

Prior to 1844, and perhaps for a period less than 20 years thereafter, the complainants and their grantors had the right to the flow of those waters through their natural channel, which was across their lands, and making their way into the Big Portage. During that year this dam was erected, and has been kept and maintained ever since, causing all these waters, except during the spring and fall freshets, to flow through an artificial channel, then cut from the stream above complainants' lands, to and through the village of Mendon, and the waters flowing thence into the St. Joseph river. These waters, so diverted from the natural bed of the stream, have been used by the defendants and their grantors from that time until the present, and the diversion has been continuous, exclusive, and adverse to the complainants, and all the

land-owners below where the dam was erected to the Big Portage.

Defendants make some claim that the proofs show an interruption of the use of the waters during some period of this time, that the dam was not constantly maintained, and that a portion of the waters were thus permitted to flow down the channel of the old stream. We find no evidence in the record that would warrant the assumption that the dam was out for any length of time, or that the parties using the waters for mill purposes at the village of Mendon ever abandoned its use, or assented to have it carried back into the old channel. This use has been continuous, open, and notorious, and the defendants and their grantors have had the exclusive use and enjoyment of these waters ever since the erection of this dam, so far as the complainants are concerned, and such use has been adverse to the complainants. During all this time the complainants, as well as all others who might have an interest in the use of these waters below the dam, have acquiesced, so far as shown by this record, in the use made by the parties diverting and using it. Nothing more is requisite to establish the right, at least, of the parties who have so long continued its use.

If complainants had filed their bill to remove the dam, and claimed the right to have the waters flow again through the old channel, under the facts proven in this case, such claim must have been denied, for the facts show a prescriptive right in the defendants to have the waters continue to flow through the channel made in 1844. The rights of the complainants and their grantors in these waters were cut off when the dam was first constructed, and the computation of time begins when the injury or invasion of the owner's rights begins. The use by the defendants and their grantors being continuous,

exclusive, and adverse, and the complainants having acquiesced, such use and enjoyment would ripen into a right after the lapse of 20 years. It follows that these rights and duties must be reciprocal. If complainants could not compel the return of the waters into the old channel, and defendants' use had ripened into a right to have the waters carried through the artificial channel made in 1884, by what reasoning can it be claimed that the defendants may, as a matter of right, compel the complainants to again receive the waters through its original channel, and permit it to flow across their farms? The defendants must stand in the shoes of their grantors, having no other or greater rights, so far as the property through which the waters now flow is concerned; and their right to have the water carried again into the Big Portage, to be used by them for milling purposes, is no greater than their grantors' to that property, all of whom have acquiesced in the use made of the water at Mendon.

The complainants also have the same right of protection from the overflow of their lands by this water as their grantors. Such inchoate right passes by a sale, and the successive owners are in privity with each other. *Leonard v. Leonard,* 7 Allen, 277.

The complainants and their grantors, for more than 45 years, have enjoyed their estates freed from these waters, and they cannot now be compelled to receive them. The defendants have no more right, under the circumstances, to change the water from the artificial channel back into the original channel than they would to turn it into any other channel, or across the land of any other person. The new channel has become the channel of the stream.

The exclusive enjoyment of water in a particular way for 20 years, without interruption, becomes an adverse

enjoyment sufficient to raise presumption of title against a right in any other person which might have been, but was not, asserted. This rule must be reciprocal, and one who has taken the water from the original channel, and has continued to divert and enjoy it for a period beyond the statute of limitation as to real actions cannot afterwards be permitted to restore it to its original state when it will have the effect to destroy or materially injure the property of those through or by which it formerly flowed. *Belknap v. Trimble*, 3 Paige, 605.

Defendants' counsel contend that rights in a stream of water cannot be lost by mere abandonment. It is true that rights may not be lost by mere non-user, but such rights may be lost by long-continued adverse enjoyment by others. Gould, Waters, § 329.

Defendants' counsel also contend that this is a navigable stream, within the ruling of this Court in *Moore v. Sanborne*, 2 Mich. 519; *Rice v. Ruddiman*, 10 Id. 140; *Thunder Bay River Booming Co. v. Speechly*, 31 Id. 336,—and that the public have rights therein, and therefore the doctrine of prescription is not applicable. The stream itself does not bear evidences of navigability, within the ruling of these cases, and the defense, under the pleadings and proofs taken in the case, is not rested upon any such claim.

The defendants claim the right to turn the stream back into the old channel for their own private use, and because they have acquired all the rights of Adams Wakeman at Mendon. The case need not be discussed at greater length, as we are satisfied, from the whole record, that the complainants are entitled to the relief prayed.

The decree of the court below was in accordance with the prayer of the bill, and must be affirmed, with costs.

The other Justices concurred.

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MARSHALL B. SHAW v. NEHEMIA CHASE ET AL.

Equity—Accounting—General and special demurrer.

1. On appeal from an order overruling a general and special demurrer, *held* that the statute authorizing such appeal only allows a consideration of the questions raised by the *general* demurrer. Act No. 58, Laws of 1883; *Babcock v. McJury*, 76 Mich. 316.
2. A general demurrer cannot be sustained if the bill makes out any cause whatever for equitable relief.
3. A bill by one partner setting out a substantial fraud practiced on him by his copartners in the purchase of his interest in the firm assets and business, and a right to an accounting for a fund reserved by them to abide the result of threatened litigation, states recognized grounds of equitable jurisdiction, and a general demurrer is properly overruled.

Appeal from Kalamazoo. (Buck, J.) Argued June 18, 1889. Decided November 8, 1889

Bill to set aside a partnership settlement, and for an accounting. Defendants appeal from order overruling demurrer. Affirmed. The facts are stated in the opinion.

O. T. Tuthill and *Howard & Roos*, for complainant, contended:

1. One who complains of fraud need only set forth in his bill the substance of the transaction, and the result. Evidence that the mode of consummating the fraud varies in some respects in the manner charged is no reason for denying relief; citing *Turck v. Soule*, 55 Mich. 128; *Merrill v. Allen*, 38 Id. 487; *Wells v. Hydraulic Co.*, 30 Conn. 316; Story, Eq. Pl. §§ 28, 252, and cases cited.

Edwards & Stewart (*Osborn & Mills*, of counsel), for defendants, contended:

1. A bill for relief, on the ground of fraud, should point out the particular acts of fraud; and a bill to open a settled account

should point out the specific errors complained of; citing Story, Eq. Pl. § 251; *Munday v. Knight*, 3 Hare, 497; *Gage v. Parmelee*, 87 Ill. 329; *Tong v. Marvin*, 15 Mich. 60.

CAMPBELL, J. This case was decided below on demurrer to the bill, which was overruled, and defendants appealed. Although other grounds were taken, the statute only allows us to consider, in such a case, the general demurrer; and according to the rules of practice a general demurrer cannot be sustained if the bill makes out any cause whatever for equitable relief.

This bill sets out, among other things, that complainant was formerly partner with defendants in the business of dealing in certain kinds of agricultural implements, and in the fall of 1887 sold out to them his interest in all but $24,000, which was laid aside to abide the result of some existing or threatened litigation; that he was not personally familiar with the condition of the business, and accepted the $16,000 as the amount represented to him by his associates as the sum to which his interest amounted.

The bill sets up that he was in this deceived and defrauded, and that his interest was really a very large sum beyond what they represented. He also alleges and claims that the $24,000 is not required to meet the purposes for which it was set aside, and that he should have his one-fourth of that sum, or so much as remains of it, restored to him.

This bill sets out a substantial fraud in the sale, and a right to an accounting for the fund reserved. Both of these are recognized grounds of equitable jurisdiction, and they involve here the additional element of a fiduciary relation, which is also proper for equitable treatment.

This being so, it is not material, on this appeal, to look into any of the other special grounds of demurrer.

The court below has decided them against defendants, and ordered them to answer, and that order we cannot, at this stage, interfere with.

The order overruling the demurrer must be affirmed, and the time to answer enlarged to 60 days from this decree of affirmance.

CHAMPLIN, MORSE, and LONG, JJ., concurred.

SHERWOOD, C. J., *(dissenting)*. This case is before us on bill and demurrer, both general and special. The demurrer was overruled by the circuit judge, and defendants took the appeal, which is under the provisions of Act No. 58, Laws of 1883, p. 47. This act provides that—

"Any complainant or defendant who may think himself aggrieved by the order overruling a general demurrer * * * may appeal therefrom to the Supreme Court."

The case was heard before Hon. George M. Buck, circuit judge, at the Kalamazoo circuit, and the order entered overruling the demurrer is in the following language:

"The demurrer of said defendants to the bill of complaint of said complainant having been brought on for argument before said court, and after hearing Messrs. O. T. Tuthill and Howard & Roos, solictors for complainant, in opposition thereto, and Messrs. Edwards & Stewart, solicitors for defendants, and Messrs. Osborn & Mills, of counsel for defendants, in support of said demurrer, and after due consideration of the same, it is ordered by the court that the same be and is hereby overruled, with costs to be taxed."

The point is made by counsel for the appellee that, the demurrer being both general and special, the order overruling it was not appealable under the statute, and this raises the first question presented for our consideration. The counsel for appellee rely upon *Turck v. Soule*, 55 Mich. 128 (20 N. W. Rep. 822), as decisive of the ques-

tion in their favor. It is true, in that case the demurrer was both general and special, but there are points made in this case, and urged with much force, which were not presented on the hearing in *Turck v. Soule.* The form of the order overruling the demurrer is the same in both cases, but our attention in that case was not then particularly called to that subject. Indeed, nothing was said challenging its consideration. In this case it is claimed to be of vital importance in determining the point now being considered.

A general demurrer is one going to the merits of the case intended to be made by the bill, and when no particular cause is assigned except the formulary required by the practice or rules of the court that there is no equity in the bill, and is always proper where the bill is defective in substance. Story, Eq. Pl. § 455. And if such demurrer is overruled, the order entered is a simple one stating briefly the fact, and is substantially in the form used in the present case, and it excludes any presumption that the court passed upon the special formal defects raised, irrespective of the equity contained in the bill.

A special demurrer is usually interposed to test the sufficiency of the bill in point of form, in which case it is indispensable that the particular objection to the bill, and the defects therein, shall be pointed out in the demurrer; and when the demurrer interposed is only special, the same order may be made in overruling it as if the demurrer was general. But where the demurrer is both general and special, the order made, it is insisted by counsel for defendants, should be different. It is insisted it should show to what extent the demurrer has been passed upon by the court, because if the action of the court only related to the general demurrer, either party would have the right, under the statute, to appeal therefrom, but if it extended to both then no appeal can be taken.

And it is further insisted by the defendants' counsel in this case that, the order entered being the proper one in overruling the general demurrer, and no notice having been taken therein of the points made upon the special demurrer, and it nowhere else in the record appearing that they were passed upon by the court, it should be held that the decision was upon the general demurrer only, and that, the defendants' right to appeal depending upon the action of the court, and not upon its omission to act, the right to appeal remains; that no other ruling upon the point raised can be made and the rights of the parties be preserved.

I think the views of counsel are correct. There can be no question, I apprehend, but that the demurrer in this case is both general and special, and I can see no valid objection to the demurrer being made in this form if the bill shall be deemed objectionable in both forms. If the general demurrer for want of equity includes all the causes especially assigned, the overruling of such demurrer would be still appealable, because the chief and primary objection is, in all such cases, that the bill is without equity, and the statute will apply. It still remains to be seen whether the bill can be sustained under the general demurrer pleaded. In it, under the order made, the assignment of special causes can have no effect except to limit the field of investigation, as when such assignment is made it is but fair to presume no other causes exist than those stated and relied upon.

The bill in this case is filed to obtain a dissolution of a copartnership. It alleges fraud practiced upon him by defendants, who were his copartners, in a settlement he made with them, upon which he sold to them his interest in the firm and its business, and prays that such settlement and sale, because of such fraud, may be set aside, and that an accounting may be had, and that what-

ever may be found due to him on such accounting may be decreed to be paid to him by his copartners, the defendants, and for an injunction.

It states in substance that in January, 1881, he became a member of the firm of Chase, Taylor & Co., which was composed of Chase, Taylor, Babcock, and Gilkey, by buying out Babcock's interest therein; that on March 11, 1882, the firm was dissolved, and was reorganized, and Frank J. Henry was taken in in the place of Gilkey, and the firm continued together until late in the year 1887, having its office in Kalamazoo; that the business carried on by the firm was manufacturing and selling spring-tooth harrows and cultivators and such other articles as might be subsequently agreed upon to manufacture and sell; that during this same period this company organized another firm, under the name of Chase, Henry & Co., which was auxiliary to the other, in conducting its varied business, and that after complainant retired from said firms of Chase, Taylor & Co. and Chase, Henry & Co. the remaining members formed a new firm, under the name of F. J. Henry & Co., and being really the same as Chase, Henry & Co.; that at the time the first of said firms was formed complainant was in company with Chase, making and selling fanning-mills, and during the continuance of the firm of Chase, Taylor & Co. complainant was out of the State most of the time, engaged in said fanning-mill business in California; that the firm of Chase, Taylor & Co. carried on its business largely, and sold its goods in different states, and accumulated money, and notes and obligations due it, as the complainant was informed by his partners.

That, upon complainant's returning to Kalamazoo in 1887, Chase offered to sell his interest in the firms in which complainant was a member, and complainant was willing to buy if the other members would do so; but

they were unwilling to purchase; that complainant then proposed to sell his interest in the firm to the other members, and his proposition was accepted, and the sale was made for the sum of about $16,000, upon the representation of the other members as to its condition, and upon which he relied, and upon their dealing fairly and justly with him; and that thereupon he retired from the firms and their business, but no actual dissolution was ever made of either of the firms, nor has any full statement of their affairs and business ever been made to the complainant; that the acceptance and payment of the $16,000 was on an estimate made by the other members; that the partnership books and accounts are still in existence and in possession of the other members, and now, as complainant believes, in the possession of Chase, Henry & Co.; that the partnership business of the firms, so far as complainant is concerned, and the assets of the several firms of which he was a member, are held by the other members of said firms, and that complainant is anxious to close up and have adjusted the copartnership business; and that he has requested of Chase, who has the control and management of said firms, a final settlement, but he has refused to accede to the request

The bill further states that said firms of Chase, Taylor & Co. and Chase, Henry & Co. are largely indebted to complainant in assets, profits, and business, accruing while he was a partner, amounting to the sum of $150,000, and that they ought to come to a fair and honest settlement with him, and pay him what is honestly due him; that said firms, as complainant is informed and believes, well knew that a larger sum was due him than $16,000; that Chase is involved in other large litigations, one with complainant; that he has been sued by one Cooney for $25,000, and who is waiting to bring other suits against him for large amounts, with fair prospects of success, as

complainant believes (and complainant may also cause suits for personal damages to be brought against him for $50,000), and that he is also indebted in large amounts of money, as complainant believes, and that complainant hears and believes that notes for large amounts will be made in the name of said firms unless the defendants are all enjoined from so doing, and from what he knows of Chase he believes he will incumber his individual property, to complainant's great injury, that at the time he received the $16,000 there was about $24,000 of the firm assets deposited in the bank to the credit of Chase, as an indemnity to him against possible loss in consequence of the Reed harrow suits, so called, which had long been in progress in the court, and which sum said Chase insisted should be set apart for that purpose; and that complainant's interest therein is about $6,000, which Chase withholds contrary to his rights, and which he is entitled to have.

The fraud charged is either upon information and belief, or upon belief alone, and is in substance as follows:

1. The design of Chase in offering to sell his interest in said firm was a feint to induce complainant to sell and thus get him out of the firms. This is stated upon belief alone, and no facts are stated upon which the charge can be inferred.

2. Upon information and belief it is charged that defendants knew complainant's interest, when he sold out, was more than $16,000, and that they fraudulently concealed and deceitfully misrepresented the true state of the affairs of the firm for the purpose of getting him out of it, and cheating him out of a large part of his interest.

3. Upon information and belief the bill charges that manipulation of the keeping of the books and accounts of the firm was had which made it appear that some years the firm made less than they actually did, of which complainant knew nothing

4. When he retired from the firm he supposed the books had been honestly kept, and he relied upon them, but he is informed and believes they were not honestly

kept, and he believes the true account of profit can be proved by evidence since come to light which will show the firm largely indebted to him over the $16,000, to the amount of $50,000, and but for the fraud and deception practiced upon him he would not have taken the $16,000.

5. Complainant and the other members of the firm sustained damage to the amount of $150,000, because of Chase's obstinacy in refusing to settle patent suits, and compromise other claims, as will be made to appear by the proofs, as complainant believes.

The foregoing is a sufficient statement to show the character of the bill. It is very evident that the fraud alleged against the complainant's partners constitutes, and was intended to constitute, the grievances of the bill. Without these allegations it is not pretended the bill could for a moment be sustained. It is one for relief, on the ground of fraud, and in such case it is not sufficient to charge the fraud in general terms, but it should state the particular acts of fraud, and the facts from which it is inferred. And the same is true of a bill to open or set aside a settlement of an account. It is not sufficient to allege generally that it is erroneous, but the specific errors wherein it is alleged to be incorrect should be pointed out. Story, Eq. Pl. § 251; *Palmer v. Mure,* 2 Dick. 489; *Munday v. Knight,* 3 Hare, 497; *Knight v. Bampfeild,* 1 Vern. 180; *Hunter v. Daniel,* 4 Hare, 432; *Johnson v. Curtis,* 3 Brown, Ch. 266; *Taylor v. Haylin,* 2 Id. 310; *Gage v. Parmelee,* 87 Ill. 329.

It is true, one who complains of fraud need only set forth in his bill "the substance of the transaction and the result," and evidence that the mode of consummating the fraud varies in some respects from the manner charged is no reason for denying the relief, because in this respect the bill may be amended at the hearing. The substance of the transaction, however, must always be stated, and which are the acts constituting the fraud,

and the facts from which the court is asked to infer it. The evidence of these facts need not be stated, but the facts themselves are essential, and especially is this the case when the fraud charged is upon information and belief of the party alleging it.

The facts only which are relevant and well pleaded are admitted by a demurrer. It does not admit conclusions of law, when stated, nor inferences drawn by the pleader from the facts stated. Story, Eq. Pl. §§ 452, 453; Coop. Eq. Pl. 111; Mitf. Eq. Pl. 211, 212. And we may say, further, a demurrer only admits matters positively alleged in the bill, and "not every fanciful pretense suggested," nor loose and vague statements. Story, Eq. Pl. § 250; *Frietas v. Dos Santos*, 1 Younge & J. 574.

The grounds of demurrer stated specially are those relied upon as supporting the general demurrer. With these general rules in view these several grounds of demurrer will now be considered. They are:

"1. That complainant, in and by his said bill, alleges no facts which in law constitute misrepresentation or fraud, or from which any legal inference thereof can be drawn, on the part of defendants towards him, entitling him to the relief prayed in and by said bill.

"2. The complainant, in and by his said bill, only imputes fraud in loose and indefinite terms, and does not charge it specifically.

"3. The complainant, in and by his said bill, in its allegations of fraud and deception by defendants in the keeping of the books of account of the partnership business, does not allege what the items or entries of the accounts are, alleged as fraudulent, or in what respect they are fraudulent.

"4. The complainant, in and by his said bill of complaint, alleging fraudulent misstatements and concealments by defendants regarding the copartnership business and accounts, does not state what were such misstatements and concealments, *i. e.*, what was and wherein misstated, and what was concealed.

"5. The complainant, in and by his said bill of com-

plaint, does not allege specific acts of defendants as fraudulent, and he states no specific facts from which this imputed fraud of defendants is a legal inference.

"6. The complainant, in and by his said bill of complaint, wherein he claims that the settlement and sale of his interest in the firms of Chase, Taylor & Co. and Chase, Henry & Co. to defendants should be avoided on the ground of the fraud of the defendants, does not allege that he has rescinded, or offered to rescind, such settlement and sale, nor allege that he is ready and willing to put defendants *in statu quo*.

"7. That it appears by and from said bill of complaint that the alleged $24,000 of assets of the firm of Chase, Taylor & Co., deposited in bank as an indemnity to defendant Chase, for which complainant prays an account, was a trust fund set aside to meet and pay liabilities that might be adjudged and decreed against said firm, and litigating expenses in suits pending and to be commenced against said firm; and that complainant's interest in said fund is contingent upon the suits pending and prospective being at an end, and the trust executed, and a residue remaining; and complainant, in and by his said bill, does not allege that said suits were ended, the trust executed, leaving a residue of such fund, etc., remaining.

"8. That the material matters stated and charged in said complainant's bill are not stated as facts upon his knowledge, but upon his information and belief, and are so stated in a loose, indefinite, and uncertain manner, and do not state the sources of his information and belief, nor the facts upon which his information and belief are founded."

A careful reading of complainant's bill, I think, fully sustains each of these eight grounds of objections thereto. Several paragraphs of the bill are ingeniously drawn, as if the pleader desired to obscure the facts which ought to exist, if the conclusions or inferences stated in place thereof are correct. Such pleading clearly falls within the mischief contemplated by the rules above stated, and which they were intended to obviate. Other statements of fraud are loosely made and vaguely charged, also, in violation of such rules upon that subject.

Defendants' ninth ground of demurrer is as follows:

"That said bill of complaint is multifarious, in that it is exhibited against the firms of Chase, Taylor & Co. and Chase, Henry & Co. and F. J. Henry & Co., defendants, and Frederick A. Taylor, Frank J. Henry, and Nehemiah Chase, as defendants, the said bill being exhibited against the said Nehemiah Chase, individually, as defendant, for the accounting for a trust fund of which he is trustee, and which is for a distinct matter and cause from the matters for which said other defendants are asked to account, and in which the other defendants are not in any manner interested."

I have no doubt, upon the position taken by the counsel for defendants, upon the ninth ground of demurrer being correct, although it must be conceded that there is no positive, inflexible rule as to what in a court of equity constitutes multifariousness which is fatal to the suit. And courts have always felt it their duty to exercise a sound discretion in determining whether the subject-matters of a suit are properly joined or not, and—

"All that can be done in each particular case as it arises is to consider whether it comes nearer to the class of decisions, where the objection is held to be fatal, or to the other class, where it is held not to be fatal." Story, Eq. Pl. § 539; *Campbell v. Mackay*, 1 Mylne & C. 621; *Oliver v. Piatt*, 3 How. 412.

There are cases, however, in which, all the authorities agree, the objection, when properly taken, should prevail, and the case not be allowed to go further in its present condition, and it is equally well settled that demurrer, which is always special in such cases, is the proper mode of procedure to obtain relief; but courts will not be technical to favor this defense when equity between the parties can be attained, and a joinder of parties or of subject-matters, or misjoinder of the same, will be overlooked where neither can do harm. Jen. Ch. Pr. 26; *Hammond v. Bank*, Walk. Ch. 214; *Wales v. Newbould*, 9

Mich. 81; *Reed v. Wessel*, 7 Id. 139; *Payne v. Avery*, 21 Id. 524.

This point, however, need not be further considered, as under the views above expressed, upon the nature and scope of the order appealed from, it must be held the circuit judge did not pass upon anything necessarily included under the special demurrer, and it is his action alone that is under review.

I think the order of the circuit judge should be reversed.

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NEAL MALLOY, ADMINISTRATOR, ETC., v. THE TOWNSHIP OF WALKER.

Highways—Embankment—Negligence—Failure to erect barriers—Liability of township.

1. Where a roadway is built at such a height between hills, and so narrow, as to require barriers or railings to make it reasonably safe and fit for public travel, it becomes the duty of the proper township to erect them, and failing so to do it must be held liable for injuries resulting from a neglect of such duty. *Carver v. Plank Road Co.*, 61 Mich. 584, 585.
2. It is a question for the jury to determine whether, under the circumstances of a given case, a highway is reasonably safe and fit for public travel, and whether a particular vehicle was unsuitable, and not road-worthy, as being unwieldy and unmanageable.
3. Where by reason of the failure of a township to keep a highway in repair travelers upon it are placed in a perilous position, no negligence can be imputed to a party in charge, if, acting upon the occasion, as it appeared to him to be, for the safety of himself and those in his charge, he did not take the precaution which upon consideration a more prudent man might have taken.

4. The statute itself imposes upon a township the duty of keeping its highways in repair, and it cannot be heard to say that because some other municipality has failed in a corresponding duty it can be excused from liability arising from its own neglect.
5. The statute requiring townships to keep their highways in repair cannot be so construed as to relieve from liability by saying that the township had adopted a method of construction, and had built according to the plan.
6. A municipality cannot construct a dangerous and unsafe road, —one not safe and convenient for public travel,—and shield itself behind its legislative power to adopt a plan and method of building and constructing in accordance therewith.

Error to Kent. (Grove, J.) Argued June 27, 1889. Decided November 8, 1889.

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

J. C. Fitz Gerald (*Francis A. Stace,* of counsel), for appellant, contended:

1. A municipal corporation cannot be held liable in damages on account of the plan or scheme of the construction of a road, either as to height of embankment, precipitous sides, width of road-bed, or want of railing or barrier; citing *Detroit v. Beckman*, 34 Mich. 125; *Lansing v. Toolan*, 37 Id. 152; *Toolan v. Lansing*, 38 Id. 315; *Dermont v. Detroit*, 4 Id. 435; *Davis v. Jackson*, 61 Id. 530; *Woodbury v. Owosso*, 64 Id. 239.
2. Municipal corporations and their officers are entitled to use their own judgment as to the manner of constructing highways; citing *Shippy v. Au Sable*, 65 Mich. 494; *Williams v Grand Rapids*, 59 Id. 51; *Irving v. Ford*, 65 Id. 241; *Marquette v. Cleary*, 37 Id. 296.
3. In this State the statutory liability has repeatedly been held to be limited to the highway, as constructed, being out of repair, and not to require any additional or new erection; citing *McKellar v. Detroit*, 57 Mich. 158; *Agnew v. Corunna*, 55 Id. 428; *McArthur v. Saginaw*, 58 Id. 357; *Engine Works v. Kimball*, 52 Id. 146; *Woodbury v. Owosso*, 64 Id. 239.
4. The question as to whether or not a jury was the proper tribunal to determine the necessity for a railing at any particular

locality on a highway did not come before the Court in *Sharp v. Township of Evergreen*, 67 Mich. 443, and was not considered in any manner.

5. How Stat. § 1366, has provided for the erection of railings where a highway along the bank of a lake, etc., has been narrowed by washing away, and no provision is made for putting up such safeguards in any other places, thus leaving it to the judgment of the proper officers to decide where such railings are or are not necessary. See *Carver v. Plank Road Co.*, 61 Mich. 584, 585.

6. Evidence of the custom and usage, generally, as to placing *barriers* or railings on the sides of similar embankments on highways was admissible; citing *McKellar v. Detroit*, 57 Mich. 158; Story, Bailments, § 11; *Raymond v. Lowell*, 6 Cush. 524; *O'Linda v. Lothrop*, 21 Pick. 292; *Underwood v. Carney*, 1 Cush. 285; *Gerrard v. Cooke*, 2 Bos. & P. N. R. 108; *Monongahela City v. Fischer*, 111 Penn. St. 9; *Richardson v. Turnpike Co.*, 6 Vt. 496; *Steiner v. Coxe*, 4 Penn. St. 13; *Woods v. Galbreath*, 2 Yeates, 306; *Dumont v. Kellogg*, 29 Mich. 420; *Gould v. Boston Duck Co.*, 13 Gray, 442.

Blair, Kingsley & Keinhans (*Thompson & Temple*, of counsel), for plaintiff, contended:

1. Want of railings necessary to the security of travelers is a defect in a way within the meaning of the statute making townships answerable for damages sustained by reason of any defect in a way; citing *Hayden v. Attleborough*, 7 Gray, 338; see, also, *Norris v. Litchfield*, 35 N. H. 271; *Hyatt v. Rondout*, 44 Barb. 391; *Plymouth v. Graver*, 125 Penn. St. 24; and it seems to be uniformly held that the absence of railings or barriers at dangerous places is a defect for which the town is liable; citing *Adams v. Natick*, 13 Allen, 429; *Alger v. Lowell*, 3 Id. 402; *Woodman v. Nottingham*, 49 N. H. 387; *Joliet v. Verley*, 35 Ill. 58.

2. Evidence of the custom in Kent county not to have barriers on highway embankments was properly excluded; citing *Champaign v. Patterson*, 50 Ill. 65; *Hinckley v. Barnstable*, 109 Mass. 126; *Kenworthy v. Ironton*, 41 Wis. 647; *Perkins v. Fon du Lac*, 34 Id. 435; *Hubbard v. Concord*, 35 N. H. 60; *Littleton v. Richardson*, 32 Id. 59; *Hyatt v. Rondout*, 44 Barb. 385; *Tripp v. Lyman*, 34 Me. 250.

LONG, J. This action is brought by the plaintiff as administrator of the estate of Walter S. Gee, deceased,

against defendant township, to recover damages on account of the death of Walter S. Gee, which the plaintiff alleges was caused by the wrongful negligence of the defendant to keep in good repair, and in a condition reasonably safe and fit for travel, a certain highway in that township. Plaintiff on the trial in the court below, before a jury, had a verdict and judgment for $2,500. Defendant brings error.

Forty-nine errors are assigned. Ten of the assignments of error are based upon the ruling of the court in the admission and rejection of evidence during the trial. Twenty-one of such assignments of error are based upon the refusal of the court to give defendant's written requests to charge, and the balance of such assignments are based upon certain portions of the charge as given.

The circumstances under which Mr. Gee received his injuries are not much in dispute, and are stated very fully in the brief of counsel for defendant.

It appears that a party of ladies and gentlemen, including plaintiff's intestate and the plaintiff, all residents of the city of Grand Rapids, had arranged to make a visit and spend the evening at the residence of Mr. A. J. Gill, which is situate in the township of Walker, about two and a half miles west of the city of Grand Rapids, on the south side of the highway called "Bridge Street Road," running from the city westward to the Grand river, a distance of about ten miles. Plaintiff's intestate, who was part owner of a livery stable, furnished the conveyance, team, and driver, for which he was paid by the party. The conveyance provided was a long carry-all on wheels, of peculiar and unusual build, being more than twenty feet long, made without any reach, with a "goose-neck" forward supporting the driver's seat, and under which the fore-wheels turned. The seating room for

passengers extended from behind the goose-neck backward several feet beyond the hind axle, and it was entered from behind by a step; the seats running lengthwise, and being over fifteen feet long. The vehicle was so constructed that when loaded the weight of the passengers rested almost entirely on the hind axle. The tread of the wagon was wider than usual, the wheels being nearly a foot further apart than in ordinary wagons. It was drawn by four horses, the pole being attached to the collars of the wheel-horses by pole-straps, no neck-yoke being used.

The party arrived at Mr. Gill's house between 8 and 9 o'clock in the evening, and remained till about one o'clock in the morning of February 25, 1887, when they started to return in the same conveyance. There were 26 full-grown persons, including the driver, in the load, one of whom, the plaintiff, besides the driver, sat on the driver's seat. Two of these persons, plaintiff's intestate and Mr. Fred Clark, rode standing on the hind step; and the remainder, 9 gentlemen and 13 ladies, in the seating room of the carry-all, the most of the ladies being in the forward part. The road at this time was covered with snow and ice. There had been several sunny days, and the snow had somewhat thawed in the day-time, but had frozen again at night. The conveyance was on wheels, though for some part of the way on this highway the sleighing was good, and sleighs were being generally used.

A short distance from Mr. Gill's, on this road towards the city, over which the party started to return, was a valley between two hills. The road began to descend towards the east shortly after leaving Mr. Gill's gate, and continued to descend for about 12 to 15 rods, until it reached an embankment constructed across the valley from hill to hill, a distance of about 18 rods. This embankment was from 12 to 16 feet wide at the top, with sides

sloping at a grade of about one foot perpendicularly to one and one-half feet horizontally, being at the point where the accident occurred from 9 to 10 feet high above the natural surface, and some 17 feet on the grade to the bottom of the embankment. It had no railings or barriers at the sides. The traveled track of the highway passed over this embankment, and there was a well-defined traveled track, with tracks of teams and vehicles worn down into the snow and ice forming two parallel troughs, from 2 to 4 inches deep, with a cone or raised ridge between them, along about the middle of the embankment; the track on the hill approaching it not being so well defined, as teams in descending the hill had not followed any particular track until they came to the embankment.

Near the top of the hill, near Mr. Gill's, there was a hollow place, which had been washed out by a thaw in the early part of the winter. This place had been marked by a stake, and Mr. Gill accompanied the party with a lantern to guide them by this hollow, which he did, the team keeping to the south side of the road as they went down the hill. The night was cold and frosty, and the road on the hill-side and across the embankment was icy and slippery. There was no moon, but it was not a dark night, being light enough for the driver to see the traveled track 10 or 15 rods ahead of his team. After the team passed the hollow place, Mr. Gill left them, and returned home, and the vehicle proceeded down the hill, the horses going at a pace between a trot and a walk, keeping to the south side of the road-way until they approached the bottom of the cutting, and the beginning of the embankment. At this point there was a water-break, being a slight elevation crossing the road to turn the water which might flow down through the cutting to the sides of the embankment. On approach-

ing this, the team and vehicle being on the south side of the road, the driver undertook to bring them into the traveled track, so that both off wheels should be on the south side of the ridge or cone, above mentioned, and both near wheels should be on the north side of it, and for that purpose drove his team somewhat to the north, and then along the center of the traveled track.

It appears that the fore wheels, in coming on to the embankment, took the traveled track as intended, but the hind wheels did not follow them, and, going too far to the north, both of them got wholly on the north side of the cone, and thus failed to track with or follow the fore wheels. The wagon proceeded along, the team and fore wheels keeping the track, and the hind wheels keeping out of it, and getting further and further out towards the north edge of the bank. The driver, giving his attention to his horses, did not notice the hind part of the wagon. Mr. Gee, the deceased, and Mr. Fred Clark, standing on the hind steps, did not notice this condition until the wagon had passed some 12 rods from this water-break, when the hind part of the wagon had worked quite over to the north edge of the bank, the fore wheels remaining in the traveled track. Then a slight jolting was noticed, and deceased and Clark jumped to the ground, deceased putting his shoulder to the north side of the wagon, apparently endeavoring to push it back onto the roadway by his own strength. About this time the hind axle broke close to the off (or south) hind wheel, and the hind part of the wagon immediately slid sideways down the embankment, and the horses being still in motion, and the driver knowing nothing of anything being wrong until the hind end of the wagon began to go down. The entire conveyance moved forward, from the place where the axle broke, about 40 feet, before stopping. The fore wheels and fore part of the wagon remained on the roadway, and the hind

part slid around so that the rear was at the foot of the bank, some 17 feet from the top of the bank, the driver remaining on his seat until the horses were unhitched. None of the persons remaining in the wagon were injured.

Mr. Gee, the deceased, being on the north side of the rear end of the wagon when it went over the edge, was thrown some distance down the bank, and in some manner received a blow on the head. At first he did not appear seriously hurt, and took an active part in unhitching the horses, and went back with a greater part of the party to Mr. Gill's house to obtain some other conveyance. Having obtained a sleigh at Mr. Gill's, and the offer of another at Mr. Edison's, about a quarter of a mile further west, Mr. Gee started with Edison to walk there and get it, another of the party accompanying him with a pair of horses. During this walk Mr. Gee complained of a severe pain in his head, where he had received a blow, and returned to Gill's and laid down, and shortly after became unconscious, and died a few days thereafter from the effects of it.

The only ground upon which any attempt is made to hold the township liable is the alleged neglect to provide barriers or railings along the sides of the embankment in question. The court in instructing the jury stated that, to entitle the plaintiff to recover, he must prove, by a fair preponderance of evidence,—

1. That the highway at the place where Walter S. Gee received the injuries which caused his death was not in good repair, and in a condition reasonably safe and fit for travel.

2. That the defendant had reasonable time and opportunity after said highway became unsafe and unfit for travel to put the same in a proper condition for use, and had not used reasonable diligence therein.

3. That at the time said Gee received said injury both he and the driver were exercising proper care and cau-

tion, and that no negligence of either contributed to the injury of which complaint is made.

4. That Mr. Gee's death was caused by injuries which he then received, and that his next of kin, the persons entitled by law to distribution of his personal estate, have sustained pecuniary loss by his death.

The defendant in its first request asked the court to charge the jury that, under the pleadings and proofs, as no liability was shown, the plaintiff was not entitled to recover. This request the court refused, but charged the jury:

"You will first consider and determine the question whether this portion of the highway where the accident occurred was in a condition reasonably safe and fit for travel, and in this case that question will depend upon your solution of another question, viz., whether or not suitable railings or barriers along the sides and at the top of the embankment in question were necessary to render the highway reasonably safe and fit for travel."

The question of the negligence of the defendant under the charge as given was therefore made to depend upon the question of the duty of the defendant to erect and maintain these barriers, and, under the circumstances surrounding the case, was left as a question of fact for the determination of the jury. It is contended by defendant's counsel that this was error.

It appears that this highway had been used there for 25 years; that the town had done work on this embankment during the spring and summer prior to the accident, when it was raised about 15 inches, all the statutory labor during that year being put on this fill. There never was any railing or barrier of any kind on either side of the embankment. The actual condition of the hill and embankment was well known to the town officers, the supervisor, justice of the peace, town-clerk, and commissioner of highways having passed over it during the winter and spring before the accident, and Mr. Edison, the over-

seer of that road-district, lived on that road, within 40 rods of the place of the accident, passing over it every time he went into the city.

Plaintiff's counsel in their brief assign the following as the reason of the accident: The accident did not occur because of any slipping or sliding of the wagon. It was one that might have happened on such a road as well in July as in February. It was simply one of those affairs by which a man gets unconsciously and imperceptibly out of the beaten track, either when he is on foot or driving in the night-time, and especially after being compelled to deviate from the straight traveled way by obstructions in his pathway which he must necessarily go around. That the immediate and proximate cause of the injury in this case resulted from—

First, the narrow top or surface of the artificial embankment;—

Second, the want of any barriers or guards along the sides to prevent vehicles from going over in the night-time.

It is claimed by plaintiff's counsel that, owing to the steep embankment, and anticipating the results likely to ensue to travelers in passing over it in the night-time, it was the duty of the township at this particular place to cause barriers and guards to be erected in order to secure a reasonable degree of safety for public travel, and that the circumstances of the case bring it within the provisions of the statute requiring townships having the care and control of the highway to keep the same in good repair and in a condition reasonably safe and fit for travel. At least, the question was one for the jury to decide, under the circumstances, whether the road was in such condition, and whether it was the duty of the defendant township to erect such guards or barriers. Outside this statute there is no liability.

The defendant's counsel claim that a township cannot be held liable on account of a plan or scheme of construction of a road, either as to height, width, or want of barriers. Counsel cite the following cases as sustaining these views: In *Detroit v. Beckman*, 34 Mich. 125, the plaintiff's intestate was killed by running the wagon which he was driving off the end of a culvert, and overturning into a ditch. The negligence alleged was that the city erected too short a culvert, and left too much of the ditch open and unprotected. It was not alleged that there was any negligence whatever in the construction, except that which pertained to the plan itself. This Court laid down the rule in that case that,—

"When complaint is made that the original plan of a public work is so defective as to render the work dangerous when completed, it is apparent that the fault found is with legislative action, and a suit grounded upon it is grounded on a wrong attributable to the legislative body itself; for the determination to construct a public work, and the prescribing of the plan, are and must be matters of legislation, whether done on behalf of the State by or under the direction of its legislative body, or on behalf of a county, town, or city by or under the direction of the proper board or council. In carrying out of the plan there may be negligence attributable to ministerial officers, but negligence in the plan itself must be attributed to the body that devised, ordered, or adopted it."

The Court further said:

"In this State the question which lies at the foundation of this suit is not an open one. In *Larkin v. Saginaw Co.*, 11 Mich. 88, it was decided that no action would lie for an injury resulting from an exercise of legislative authority. In *Pontiac v. Carter*, 32 Mich. 164, which was a case of injury, by change in the grade of a street, to buildings previously erected with reference to an established grade, the point was quite fully discussed, and the liability of the city denied."

In *Lansing v. Toolan*, 37 Mich. 152, the same principle

was stated, and the case of *Detroit v. Beckman, supra,* cited and approved. In *Toolan v. Lansing,* 38 Mich. 315, the case was again before this Court, and *Detroit v. Beckman* again cited, and the doctrine there laid down approved. In *Davis v. Jackson,* 61 Mich. 530 (28 N. W. Rep. 526), where the action was brought to recover damages for injuries to the plaintiff in driving his carriage against a stone placed on the end of a culvert and being overturned, the defendant asked the court to instruct the jury:

"4. If you find that the placing of the stone in question at or near to the end of the box-drain by the defendant was a part of the plan for improving the street by putting in the drain, and protecting the end of the drain and the traveling public from injury or accident by placing the stone in the position where it was at the time of the accident, the plaintiff cannot recover."

"9. The wrong which must exist, to render the city liable, is neglect, and there can be no neglect when the work was completed as intended. Negligence cannot be predicated on a work done in accordance with its design or plan, even though it does not sufficiently protect the public."

It was held that these instructions were proper, under the circumstances, and should have been given. These cases all arose prior to the statute under which plaintiff claims to recover, except *Davis v. Jackson, supra,* which we think clearly distinguishable from the present case. The circumstances there tended to show that the city had placed some barriers at the ends of the culvert for the very purpose of preventing persons running off the end. The plaintiff ran against the barrier itself, and was injured. Since the present adoption of the present statute there has been no decision of this Court laying down the rule now contended for by defendant's counsel. The statute is imperative. Section 1445, How. Stat., provides:

"It is hereby made the duty of townships, villages,

cities, or corporations to keep in good repair, so that they shall be safe and convenient for public travel, at all times, all public highways * * * under their care and control, and which are open to public travel."

Sections 1442 and 1443 provide the penalty for such neglect, and authorize the bringing of suit by the party injured. It is, however, provided—

"That in all actions brought under this act it must be shown that such township, village, city, or corporation has had reasonable time and opportunity, after such highway * * became unsafe or unfit for travel, to put the same in the proper condition for use, and has not used reasonable diligence therein."

This act was passed in 1879. Act No. 244, Laws of 1879. The act of 1887 (Act No. 264), superseded and repealed the act of 1879, but the provisions of this act are very similar to the provisions of the act of 1879, and the same duty is laid upon townships, etc., to keep the highways in repair. Precisely the same question raised by counsel for defendant was presented to this Court in *Alexander v. Big Rapids*, 76 Mich. 282 (42 N. W. Rep. 1071), and there fully considered. In that case (at page 284), it was said:

"Nor can the city escape responsibility because the cross-walk was removed in the improvement of Rose avenue, on the principle enunciated in *Detroit v. Beckman*, 34 Mich. 125, and other cases cited. While the city of Big Rapids was improving Rose avenue, or even after the improvement had been completed, it had no right to leave Pine street, which crossed Rose avenue, open to travel, unless the crossing of those two streets was made reasonably safe and fit for travel."

In *Joslyn v. Detroit*, 74 Mich. 458 (42 N. W. Rep. 50), it was also held that this statute makes the municipality not only liable for injuries resulting from a neglect to keep the highway in repair, but also to keep the same in a condition reasonably safe for travel. Whether this

highway was in such a condition, it seems to us, was a question for the jury, under the circumstances here stated.

The negligence complained of was the want of any barriers or railings along a highway leading out from a populous city, and over which was a great amount of travel, the embankment being built up between two hills to such a height and so narrow that persons driving there might be in danger of being precipitated over the embankment, and the neglect to place some kind of barriers there would, under the circumstances here stated, become a question of fact for the determination of the jury whether the township had neglected a duty which this statute imposes, and the question was fairly submitted under the charge as given.

In *Township of Plymouth v. Graver*, 125 Penn. St. 24 (17 Atl. Rep. 249), a somewhat similar question arose under a statute of Pennsylvania. The statute provided that such roads should be kept constantly in a state of repair, and that at all seasons they should be kept clear of all impediments to easy and convenient traveling, at the expense of the township. It was held that where plaintiff's horse traveling on a highway, and parallel with and adjoining a railroad, took fright at a locomotive, ran upon the track, and was killed by the cars, it was for the jury to say whether the township supervisors were negligent in not erecting a barrier between the highway and the railroad.

In *Sharp v. Township of Evergreen*, 67 Mich. 443 (35 N. W. Rep. 67), an action was brought to recover for injuries sustained by plaintiff in being overturned upon a public highway. It appeared that plaintiff was driving with her husband along a public highway, and that in descending a sand hill, where the road had been raised to the height of fifteen feet, and left about sixteen feet

wide, unprotected on either side by any railing or other structure to prevent persons or teams from going off the bank at the sides in case of accident, the horse shied to the side of the track, and, becoming unmanageable, went off the embankment, taking the carriage with him, and seriously injuring the plaintiff. It was held by this Court that it was a question for the determination of the jury, under the circumstances, whether the road was kept in reasonable repair and safe for travel.

This statute cannot be given a construction that would relieve a township or other municipality, upon which a burden is cast to keep its highways in repair and reasonably safe for travel, from liability by saying that it had adopted a method of construction, and had built according to the plan. A municipality cannot construct a dangerous and unsafe road,—one not safe and convenient for public travel,—and shield itself behind its legislative power to adopt a plan and method of building and constructing in accordance therewith. The negligence consists, not in the plan of the work or the manner in which it was done, but in the failure to provide suitable protection against accident after the embankment had been made. The statute is imperative to make a road reasonably safe, and whether it is in that condition of safety and fit for travel must be a question for the jury, under proper circumstances.

If this road-way was built at such height between hills and so narrow that it required barriers to make it reasonably safe, it became the duty of the township to erect them, and, failing in this, the township must be held to suffer the consequences of such neglect. It seems to be uniformly held that the absence of railings or barriers at dangerous places along a public highway is a defect for which the town is liable. *Harris v. Township of Clinton*, 64 Mich. 447 (31 N. W. Rep. 425); *Adams v. Natick*, 13

Allen, 429; *Alger v. Lowell,* 3 Id. 402; *Palmer v. Andover,* 2 Cush. 600; *Woodman v. Nottingham,* 49 N. H. 387; *Joliet v. Verley,* 35 Ill. 58; Whart. Neg. § 976. In a note to 9 Amer. & Eng. Cyclop. Law, p. 381, tit. "Highways," it is laid down as a rule of law that in those cases where the erection of railings or barriers along the highway is a reasonable and necessary precaution to guard travelers against injury, the municipality is bound to provide such safeguards, and will be held liable for a failure in this regard; citing *Haskell v. New Gloucester,* 70 Me. 305; *Stack v. Portsmouth,* 52 N. H. 221; *Davis v. Hill,* 41 Id. 329; *Palmer v. Andover,* 2 Cush. 600; *Rowell v. Lowell,* 7 Gray, 100; *Babson v. Rockport,* 101 Mass. 93; *Freeport v. Isbell,* 83 Ill. 440; *Koester v. Ottumwa,* 34 Iowa, 41; *Bassett v. St. Joseph,* 53 Mo. 290; *Kennedy v. Mayor, etc.,* 73 N. Y. 365; *Atlanta v. Wilson,* 59 Ga. 544; *O'Leary v. Mankato,* 21 Minn. 65; *Pittston v. Hart,* 89 Penn. St. 389; and other cases.

If the township could not make this embankment there reasonably safe and fit for travel in adopting a plan of construction, they were not compelled to construct a highway over the place, or to maintain it, and it could have been closed to public travel until put in safe condition. But having constructed it, and invited the public to travel over it, their duty under the statute was plain. It appears that the direct and immediate cause of the injury was the unguarded condition of this high embankment. If any sort of barriers had been placed along its sides, so that the hind wheels of the vehicle could not have traveled so far over the side, no accident, apparently, would have happened.

It is true that no complaint was made to the officers of the township whose duty it was to maintain the road in a safe condition, yet, as we have stated, it did appear that they lived in close proximity to the place, and some

of them frequently passed over it, and must be held to have had such knowledge or notice of its defective condition as the statute requires to fix the liability. It is contended that the evidence shows that the occurrence was a pure accident. We do not so regard it. It was a question for the jury to find whether it would have occurred if the highway had been in proper condition, and this question was left to them under the charge of the court.

It is also claimed that a sleigh was the only proper vehicle to be used on that highway at that season of the year. The evidence, however, shows that at many places along the highway out from the city that night the snow had melted off so that the ground was bare in places, and that a vehicle on wheels was better and more easily drawn.

It is also claimed that this particular vehicle was unsuitable, and not road-worthy, being unwieldy and unmanageable. This question was left to the jury under the charge of the court, and they have determined otherwise. It was a question of fact for them.

The court, also, in a very full charge, and in which we find no error, left the question of the contributory negligence of the deceased and of the driver to the jury. We shall not, therefore, discuss the questions raised under the assignments of error relating to that branch of the case further than to say that if by the carelessness of the defendant in constructing and maintaining a dangerous highway there,—one not fit and safe for public travel,—and by reason of such defects and dangerous condition the hind wheels of the wagon slid over the embankment, and the wagon was liable to be overturned, and the parties then and there in the wagon, under the charge of the deceased, liable to meet with great bodily injuries, it was not negligence on the part of the deceased to use all due care to prevent the overturning and consequent injury to

the parties in his charge. The fact that he alighted and placed his shoulder to the vehicle to prevent the accident could not be charged as negligence. If it was the negligence of the defendant in not repairing the highway which placed the deceased and those under his charge in a perilous position, no negligence could be imputed to the deceased, if, acting upon that occasion, as it appeared to him to be, for the safety of himself and party in his charge, he did not take the precaution which upon consideration a more prudent man might have taken. At least it was a question for the jury, and fairly submitted.

Counsel for defendant has devoted great space in his brief, and urged the same in his oral argument here, that the court erred in refusing to permit defendant to give in evidence the custom and usage generally as to placing barriers or railings on the sides of similar embankments on highways; and it is contended that travelers have no right to expect more than the usual and customary safeguards, and that it would be unreasonable to expect any township to use extraordinary or unusual means to insure safety to travelers. Under the circumstances here stated, we think that there is no force in this contention. The statute itself imposes the duty, and the municipality cannot be heard to say that because some other municipality has failed in its duty it can be excused from liability arising from such neglect. Neither do we see how the action of the officers of some other locality could in any way have influenced the officers of the township in constructing this embankment. But, however that may have been, their duty was plain, and no such excuse could avail.

Complaint is also made of the charge of the court upon the measure of damages. We have read the charge, and do not think it open to criticism. We do not need

to discuss all the errors assigned, or the refusal of the court to give defendant's requests in charge to the jury. The charge as given was fair and very full, submitting all proper questions to the jury, and we find no error in the refusal to charge the requests. Many of them were covered by the general charge, and in so far as they were not so covered we do not think there was error in refusing them. Upon the whole record we may add that we think the case very fairly tried, and fully and fairly submitted, and we see no good reason for disturbing the verdict.

The judgment must be affirmed, with costs.

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

CAMPBELL, J., *(dissenting)*. I do not think that plaintiff made out a case for recovery. It is hardly necessary to enlarge on the reasons why I do not concur in the views of my Brother LONG, further than to indicate their general tenor.

This road, which is a short causeway between higher grounds on either side, appears to have an ordinary driveway, quite as wide as is usual in country roads. It differs from the common level roads only in needing and having no roadside ditches. It has existed a long time, and that is of itself one of the strongest reasons why defendant cannot be regarded as negligent in not changing what, so far as appears, has been considered a safe road. I do not understand that the laws of 1879 and 1887 purport to impose a duty on the local authorities of changing existing roads in any particular. Neither do I think courts or juries can dictate to highway authorities the use of barriers on a road bordering on no cliff or stream, which are very unusual, and which very few persons would ever think of putting up in such a place.

The accident which happened here would have happened to the wagon just as probably and just as badly on a road of the same width bordered by ditches. The deceased was perfectly familiar with the road, and knew, if any one did, in what way it was capable of causing mischief. Common highways are made for usual vehicles, and a township cannot be required to make a road-way so wide that it will furnish space for the slidings and swervings of a wagon so long that it would with its team find it impossible to turn aside, to say nothing of turning round, in twice the space required by law for any road-way. The crowning of the center of the road was not only to be expected at the season, but it was not unknown to deceased, and it was his duty, as well as that of his driver, to keep an eye upon the manner in which the wagon was moving, and see that it was properly driven. The direct cause of the movement of the wagon was beyond any doubt the failure of deceased and his driver to do this, and if they were excusable for using wheels instead of runners at such a time and place, and with such an unwieldy carriage, they were bound to look to their movements.

It is also clear that the condition of the road was not the proximate cause of the death of deceased. If he had been killed or thrown down while in the wagon, this might perhaps have been traced directly to that source. But those who stayed in the wagon came to no harm. Had he been thrown from the steps, where it was not safe to stand, he could have had no one to blame but himself. But here he came to his injury by attempting to hold or push this enormous wagon up a slope by his own strength,—a thing that was preposterous in itself, and which was certain to sweep him away with any slip. It is impossible, it seems to me, to hold that he did not

directly contribute to his injury, and he was in fact not merely aiding in it, but its primary cause.

I am not prepared to depart from what I conceive to be the settled law of this State, or to hold that the proper or best methods of building roads is among the presumable accomplishments of average jurors. The officers intrusted with that discretion are selected under the law to act on their best judgment, and I do not believe their judgment is open to revision, unless so monstrously perverted as to show they have never used their discretion at all. We have no laws that require perfect roads, or perfect safeguards. It is not negligence to do what is usually done in similar cases, until some statute intervenes to require it specifically. We have no statute that requires roads in dry places to be guarded by barriers. The law of 1877, which provided for them, was repealed in 1881, except as to roads bordering on streams. There is some reason for holding bridges to have their approaches made different from ordinary roads, partly because it is usual, and therefore expected, and practically required by statute, and partly because a road approaching is narrowed to correspond with the width of the bridge, and vehicles are more likely to miss the way, and animals are not unlikely to need looking after in driving them on it. But it is not at all usual to put up guards beside roads of even width, and with road-way as wide as our turnpikes and plank or gravel roads are required to be. And no one would think of fencing between the road-way and the ditches, which, as before suggested, would have created the same difficulty for this wagon that existed on the highway in question.

I think there should be judgment for defendant of reversal.

CHAMPLIN, J., took no part in the decision of this case

CASSIE E. FILER v. THOMAS W. FILER.

Divorce—Plea—Res judicata—Temporary alimony.

1. The dismissal of a bill for divorce on the ground of the *illegality* of the marriage sought to be dissolved cannot affect the right of the complainant to file a second bill for the dissolution of a later, *legal*, marriage.
2. Pending a decision as to the sufficiency of a plea of a prior adjudication, filed by a husband to a bill for divorce, the court has jurisdiction of the matter of the allowance of temporary alimony, and on an appeal from an order adjudging the defendant in contempt for failure to pay such alimony, the appellate court will not pass upon the issue raised by said plea, which was not replied to, but was noticed for hearing by the complainant.
3. Where a bill for divorce alleges a marriage out of the State, and acts of cruelty immediately following such marriage, without locating the place of their infliction or giving their dates, and is filed subject to the provisions of Act No. 137, Laws of 1887, which requires a residence of two years in this State where the cause for divorce occurred out of the State, and alleges but one year's residence, which bill is not demurred to but stands for hearing upon a plea of a former adjudication, the court has a right, while the case is being disposed of, upon a proper showing, to grant temporary alimony, and to enforce its order for payment of the same.

Appeal from Wayne. (Reilly, J.) Argued July 10, 1889. Decided November 8, 1889.

Bill for divorce. Defendant appeals from an order adjudging him guilty of contempt for failure to pay temporary alimony. Affirmed. The facts are stated in the opinion.

George H. Penniman, for complainant.

Alfred Russell and *Edward A. Gott,* for defendant.

MORSE, J. On April 11, 1889, the complainant filed

her bill in the Wayne circuit court in chancery, alleging her marriage with the defendant at Port Hope, Ontario, in the month of January, 1874; and that two children were born of said marriage, to wit, Claude, born June, 1875, and Adelbert, born March 5, 1879. She further alleges brutal and cruel treatment by the defendant. She also avers that shortly before the birth of her first child the defendant informed her that she was not his wife; that he had a legal wife living, to wit, one Mary A. Filer; that afterwards, on March 4, 1881, the said defendant procured a divorce from the said Mary A. Filer in the circuit court for the county of Oakland, in chancery. That in a few weeks thereafter the complainant and defendant proceeded to Waterloo, in the State of New York, and were there again married, before William H. Burton, a justice of the peace; that this marriage was followed by cohabitation as husband and wife; that said justice delivered a certificate of the marriage to said defendant, who afterwards tore up and destroyed the same.

Complainant also shows in her said bill that the defendant has for a number of years last passed been living in open and notorious adultery with a woman named Beaubien; and that she is informed that this woman claims to be married to him. She further avers that the defendant has made false charges of improper conduct against her, and induced others to do so; that for the last three years he has not supported her, or her said children. She avers that she has been a resident of this State—

"For more than one year immediately preceding the filing of this, her bill of complaint."

She prays temporary alimony, solicitor's fees, and expenses of suit, and that a decree from bed and board be granted her, with care and custody of the children,

and such other relief and remedy as may be agreeable to equity in the premises.

She also filed a petition for temporary alimony, etc. A copy of this petition, and notice of motion for an order upon said petition, to be heard April 22, 1889, was served on the defendant April 15, 1889.

On April 20, 1889, the defendant filed and served a plea in the cause. This plea sets forth a former adjudication between the parties, in substance as follows: That on August 10, 1885, the complainant filed a bill for divorce in the same court, and praying a decree from the bonds of matrimony, on the ground of extreme cruelty; that in said bill she alleged marriage with defendant at Port Hope, Ontario, on January 22, 1874, and that the parties lived and cohabited as husband and wife from that time until August 10, 1885. She made no allegation of second marriage. That the defendant answered this first bill under oath, denying the marriage at Port Hope, and averring that at the time of such alleged marriage he had a lawful wife then living; that he also denied cohabitation with complainant as her husband, as alleged in the bill, but admits that he had intercourse with complainant, who knew that he had a lawful, living wife; that complainant refused to "go through any marriage ceremony with this defendant before any minister," and after March 4, 1881, refused to permit the defendant to have any further intercourse with her, and has cohabited with other men, and is intemperate; and since said day this defendant has not had intercourse with her.

"Any children borne by the complainant, if the fruit of intercourse with this defendant, were born out of wedlock."

That he also denies all charges of cruelty, or any misbehavior charged in the bill of complaint; that the answer was not replied to; and thereafter the cause was heard on

bill and answer, and the bill dismissed; that the decree of dismissal was duly enrolled, was not appealed from, and now stands not reversed, and of record in said court. This plea was on oath.

On April 29, 1889, an order was made, on the hearing of the petition for temporary alimony, that the defendant pay to said complainant, or her solicitor, $10 per week from the date of the filing of the bill, as temporary alimony, and $50 solicitor's fees. The defendant refused to comply with this order, and such proceedings were had thereafter that an order adjudging him guilty of contempt in so refusing was made May 14, 1889. From this order defendant appeals.

The plea in the cause of former adjudication was not replied to, but was noticed for hearing by the solicitor for the complainant. It is claimed by the solicitor for the defendant that the plea must be taken as true, and that, therefore, it was a complete bar to the application for alimony; citing *Edgar v. Buck*, 65 Mich. 356 (32 N. W. Rep. 644). But the present bill is filed for a divorce, from bed and board, and not from the bonds of matrimony; and it is chiefly based upon an alleged legal marriage of a different and later date than the one alleged in first bill, which is conceded by the complainant in her second bill to have been illegal, because of the then existence of a lawful wife.

There is nothing in the plea or in the decree in the first case to indicate the grounds of dismissal of that bill; and it may have well been because of the illegality of the marriage averred therein. If so, the adjudication therein would not affect the right of complainant to file the present bill, the basis of which is another, later, and legal marriage. The matter of the sufficiency of said plea as a bar to the present suit of complainant has not yet been determined by the lower court, and we do not feel

called upon, in this appeal, to pass upon that question. The proceedings adjudging defendant in contempt seem to have been otherwise regular; and, until the court below had passed upon the plea, it certainly had jurisdiction of the matter of temporary alimony and solicitor's fees, while such plea was pending and undisposed of.

The further point is made that the court below had no jurisdiction because the bill only alleges a residence in this State of *one* year immediately preceding the filing of complainant's bill, while the statute of 1887 (Laws of 1887, p. 151) requires a residence of two years in a case where the cause for divorce occurred out of this State. It is argued, in support of this point, that the bill alleges a marriage out of the State, and then avers acts of cruelty immediately following such marriage; thereby leaving the inference that such acts occurred out of this State, as no dates are given or places named when or where said acts were committed.

As the case stands in this Court, we cannot consider this claim of defendant. The bill of complaint has not as yet been demurred to. The case stands now upon bill and plea. The court below had a right, upon a proper showing, to grant temporary alimony, and to enforce its orders granting the same. While the case is being disposed of, there can be no injustice in treating this complainant the same as other complainants in divorce cases. When the lower court determines that she had no standing in court, then she can have no claim to alimony; but, until this is decided, she is before the court, and entitled, if without means, to the usual aid afforded in such cases by a court of equity.

The order of the court below is affirmed, with costs of this appeal to complainant.

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

CAMPBELL, J., *(dissenting).* I think no temporary alimony can be granted where the marriage is in dispute. I think, further, that the former divorce proceedings are a bar to the present claim of complainant.

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EDMUND HAUG, ASSIGNEE OF GEORGE MORLEY, v. THE THIRD NATIONAL BANK OF DETROIT.

Assignment for benefit of creditors—Enrolled vessels—Prior liens on, recorded as provided by act of Congress, precede assignment—Conformity to State recording laws unnecessary.

1. A general assignment for the benefit of creditors, covering enrolled and licensed vessels belonging to the assignor, which is not recorded in the office of the collector of customs where such vessels are registered or enrolled, gives the assignee no right to the vessels as against a mortgagee whose mortgage is thus recorded.
2. The act of Congress (Rev. Stat. § 4192) in reference to the recording of mortgages upon enrolled and licensed vessels supersedes the statute of this State providing for the recording of mortgages in the office of the township or city clerk, and no presumption of fraud which would arise under the State law because of the failure to so record them can prevail against their validity.

Appeal from Wayne. (Reilly, J.) Argued October 9, 1889. Decided November 8, 1889.

Bill filed to impeach the transfer of certain property of the insolvent debtor to defendant, and for appointment of receiver. Defendant appeals from an order appointing receiver. Order vacated. The facts are stated in the opinion.

Edwin F. Conely, for complainant.

DeForest Paine (*Cutcheon, Stellwagen & Fleming*, of counsel), for defendant.

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

MORSE, J. On March 1, 1889, George Morley, of Detroit, being financially embarrassed, executed a general assignment for the benefit of his creditors, and in such instrument appointed the complainant his assignee. This assignment was made about 10 o'clock A. M. Before said assignment, but on the same day, at 9 o'clock A. M., the Third National Bank of Detroit put on record, in the office of the collector of customs at Detroit, where the vessels were registered and enrolled, bills of sale of the schooner "Colorado," the steam-barge "R. C. Brittain," and the schooner "Reindeer," all owned by the said Morley. It is admitted that the purpose for which Morley executed and delivered these bills of sale, as well as other instruments of conveyance of property, to the bank, was to secure the payment by Morley of any or all indebtedness owing by him to said bank at their date, or which might thereafter become due or owing to it, and all liabilities to said defendant by reason of any overdraft, discount, indorsement, guaranty, note, bill, bond or other instrument in writing. These bills of sale of the Colorado and the R. C. Brittain were executed and delivered March 5, 1888, a year before their recording, as above noted. They were not filed or recorded in any other public place or office. The bill of sale of the Reindeer was executed and delivered October 3, 1888. The possession of these vessels remained in Morley until his assignment. Since then they have been in the possession of the assignee.

April 2, 1889, the complainant, as assignee aforesaid, filed his bill in the Wayne circuit court, in chancery,

attacking the validity of the transfer of these vessels to the defendant, as well as other transfers of property, and praying for the appointment of a receiver, the issue of injunction, etc. It is alleged in this bill that Morley, while apparently doing a prosperous business, was in fact financially embarrassed, and obliged to borrow a large amount of money of the defendant; that his straitened and embarrassed situation was fully known to the defendant when these bills of sale and other securities were taken, and continued to be known to them up to the time of his assignment; that the defendant, with this knowledge of Morley's financial condition, connived and colluded with the said Morley for the purpose of making it appear to the public, and particularly to the other creditors of Morley, both present and future, that said Morley was not in the straitened and embarrassed financial condition in which in fact he was, and for the purpose of enabling said Morley to obtain a credit greater than his financial responsibility justified, and agreed to and did purposely withhold from record and concealed from the knowledge of the public, and especially of the other creditors of said Morley, the fact of the execution of these bills of sale and other conveyances; that said defendant was notified by Morley of his intended assignment, and thereupon it recorded these instruments, just before the execution of such assignment; that the creditors of Morley were ignorant of the dealings between Morley and the defendant, as above described, until these instruments were put on record. That the total liabilities of Morley aggregated about $136,000; a large amount of said indebtedness being contracted since March 1, 1888, the date of two of these bills of sale, and a good share of the same since the date of the bill of sale of the Reindeer; that the assets will not exceed $78,000, or about $35,000 excluding the property transferred to defendant,

consisting of real estate valued at $30,000, and the vessels, worth about $13,000.

That the defendant pretends that it has claims against Morley, secured by said transfers, to the amount of $17,000 or more, and insists that its claims upon the property covered by said transfers are superior in law and equity to those of the complainant, as assignee aforesaid, and threatens to take possession of said vessels, and to sell the same, and to deprive him, and the creditors of said Morley, from all share in the proceeds of such sale, and to enforce its claims against the real estate described in the other conveyances.

He avers that these claims are fraudulent and unlawful, as against the other creditors and the complainant, as their trustee; that these claims cast doubt and uncertainty upon complainant's title as assignee, thereby injuring the sale of the same, and seriously hindering, if not wholly preventing, the complainant from realizing anything from said property for the benefit of Morley's general creditors.

He prays that the transfers may all be declared void, as against the creditors of Morley, and that defendant be decreed to assign and convey its pretended interest under these transfers to the complainant, as the trustee of the creditors, and that it be perpetually enjoined from enforcing its claims under such transfers; that a receiver be appointed to take control, care, and charge of said vessels, or, in case of sale of them, or any of them, of the proceeds therefrom, to await the order and decree of the court.

The defendant answered, admitting the execution and delivery of the transfers as of the dates set forth in the bill, but denying that it was aware of the straitened or embarrassed financial condition of Morley at the time they were taken, and avers that it had reason to believe,

and did believe, that he was solvent up to the time of his assignment; that on March 1, 1889, Morley owed defendant $15,000 on his individual note, and $13,976.91 upon other commercial paper, as maker, indorser, or otherwise. It denies that it connived, colluded, or agreed with Morley to keep such transfers from record, or from the knowledge or notice of his creditors, or that it ever connived or colluded with him for any purpose.

It avers that when it learned of the assignment the defendant demanded the possession of said boats of Morley and complainant; which possession was denied. It also avers that said securities are valid; that it is entitled to hold the same, and to proceed, without the interference or hindrance of said complainant, or any one, to legally enforce the same, and apply the proceeds upon the said indebtedness of Morley to it.

That defendant has a paid-up capital of $300,000. Demurs to the bill for want of equity.

The answer fails to explain why these bills of sale were not recorded until the morning of the day the assignment was executed.

Upon motion for the appointment of a receiver, heard on bill and answer, it was ordered, April 22, 1889,—

"That Archibald G. Lindsay be appointed receiver of said vessels; that he have authority to sell the same, at public auction, to the highest bidder; and that he hold the proceeds of such sale subject to the further order of this court."

A bond in the sum of $15,000 was required of the receiver. From this order the defendant appeals to this Court.

The showing in the bill puts the value of the whole property transferred to defendant at $43,000. The answer does not dispute this value, and asserts the claim of the defendant against Morley to be, in all, $28,976.91.

The transfers are acknowledged not to be absolute, as the bills of sale purport to be on their face, but to have been given in fact as security for the payment of this sum. The defendant claims that the laws of this State in relation to the recording of chattel mortgages and bills of sale do not apply to vessels duly licensed and enrolled under the acts of Congress, and that no presumption of fraud which would arise under the State laws because of the failure to record these bills of sale in the office or place required by our statutes can prevail against the validity of these instruments. The answer denies any fraud in fact; and there can be no fraud in law, if its claim be correct.

It has been decided in this and other states, and also in the Supreme Court of the United States, that the act of Congress in reference to the recording of mortgages upon enrolled and licensed vessels supersedes so much of the state laws as refer to the recording of mortgages in the township or city clerk's office. See *Robinson v. Rice*, 3 Mich. 235; *Banks v. Smith*, 7 Wall. 646; *Aldrich v. Ætna Co.*, 8 Id. 491; *Best v. Staple*, 61 N. Y. 71; *Perkins v. Emerson*, 59 Me. 319; *Dent v. Beers*, 19 Ala. 730. It would therefore seem that, actual fraud being denied by the answer, and our State laws not applying to raise a constructive fraud, therefore, the bills of sale, although not absolute, but in effect chattel mortgages, must be here considered as valid, and the title of the defendant, or its lien, under these instruments, not here assailable on the ground of fraud, which is the only basis upon which complainant can ask that the vessels be placed in the hands of a receiver.

The United States statutes provide that no bill of sale, mortgage, hypothecation, or conveyance of any vessel of the United States shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and

persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation, or conveyance is recorded in the office of the collector of the customs where such vessel is registered or enrolled. Rev. Stat. U. S. § 4192. Under this statute, the assignment for the benefit of creditors to complainant, being a conveyance, and not recorded as provided by said statute, in the opinion of a majority of this Court, gives the assignee, the complainant, no right to these vessels, as against the defendant.

The order appointing the receiver must therefore be vacated and set aside, with costs to the defendant.

The other Justices concurred.

F. Hermann Zeigler v. Delos G. Henry and Eber Rice.

Appeal bond—Liability of surety.

In this case judgment was rendered at the circuit against an appellant from justice's court, and his surety, for $25.01 damages, with costs to be taxed, which were taxed at $50.35. The penalty of the appeal bond was $50.00, and the judgment, being otherwise upheld in the Supreme Court, is reversed as to the surety, and one entered limiting the recovery against him to $50.00, and with this modification the judgment is affirmed.

Error to Kent. (Grove, J.) Argued October 9 and 10, 1889. Decided November 8, 1889.

Assumpsit. Defendant Henry and his surety, Rice, bring error. Judgment modified as to surety, but otherwise affirmed. The facts are stated in the opinion.

Frank L. Carpenter, for appellants.

Myron H. Walker, for plaintiff.

SHERWOOD, C. J. This is an action of *assumpsit* upon a judgment. The declaration was upon the common counts. Defendants pleaded the general issue, with notice of set-off and recoupment. The judgment offered in evidence upon the trial, and which was the plaintiff's only cause of action, was rendered before a justice of the peace on July 22, 1881, for the sum of $14.13 damages, and $2.45 costs, in favor of the plaintiff and against Henry, as defendant.

The plaintiff obtained judgment on the trial of the case in the Kent circuit, on appeal, before Judge Grove, without a jury, for the sum of $25.01 damages, on November 8, 1888, with costs of suit. From this judgment the defendants bring error to this Court, and ask a reversal.

We have failed to discover any error in the record, except so far as relates to appellant Rice. After the cause was submitted to the court, counsel for defendant asked the court to make and file written findings upon the law and the facts, and the circuit judge made the following:

"In this cause, a written finding of facts having been requested, I hereby find as follows:

"That on July 14, 1881, suit was commenced before Robert Hunter, Jr., of Lowell, Mich., a properly qualified and duly elected justice of the peace of said county, by summons returnable July 22, 1881, in favor of F. Hermann Zeigler as plaintiff, and against Delos G. Henry as defendant.

"That on July 16, 1881, as appears by the docket entry of said justice, said summons was returned, 'that the same had been personally served on said defendant by reading the same, and giving a copy on July 15, 1881, by Oliver M. Coates, constable. Fees, 45 cents.' That on July 22, 1881, said defendant not appearing, judg-

ment was duly and regularly entered in favor of said plaintiff and against said defendant for the sum of $14.13 damages, and $2.45 costs of suit, which judgment remains unreversed, unappealed from, and unpaid.

"That said summons and the other files in said cause are lost; but I find from the oral proofs that said summons was actually returned by said constable, personally served on said defendant by copy, as required by law, and within said county; that said return was in fact true; that said defendant, at the time of said service, was a resident of the county of Kent, and that said justice had full authority and jurisdiction to render said judgment. I further find that the summons issued in this cause was actually issued and placed in the hands of the deputy-sheriff for service the day it bears date, to wit, July 22, 1887.

"I find, as matter of law, that said plaintiff is entitled to recover of said defendant the amount due on said judgment in favor of said plaintiff and against said defendant, for the sum of $25.01 damages, with costs of suit to be taxed."

We think the law, as applied, was fully warranted from the facts found, and that the testimony in the case sustains the facts as found by the circuit judge.

The court committed no error in permitting the declaration to be amended. It was verbal before the justice, and, with what occurred before him, and the statements made in regard to the plaintiff's cause of action, might have well been held a sufficient declaration without the amendment, which was a count upon the justice's judgment, inartistically drawn, but good without demurrer.

Defendant offered in evidence a letter from Jesse Tompsett to defendant D. G. Henry, dated "Aug. 1, '87," for the purpose of showing that the plaintiff since he commenced this suit had parted with his interest in the judgment sued upon. It was objected to by plaintiff on the ground that no proof was made of the letter by which the plaintiff could in any way be bound. The letter was properly rejected. So far as it appears, the testimony was

irrelevant. It appears from the record in the case that the penalty in the bond on appeal was but $50. The appellee prevailed in the circuit, and the judgment rendered by the circuit court was against both defendant and his surety for $25.01 damages, with costs to be taxed, which when taxed amounted to $50.35; thus making the sum for which execution could be issued against the surety, $75.36. This was a mistake. The amount of the judgment for which the surety is liable is specified in his bond, and the judgment against him should have been restricted to that amount. There must be a reversal, therefore, as to him, and a judgment thus limiting the recovery against the surety must be entered in this Court accordingly.

With this modification the judgment will be affirmed, with costs.

The other Justices concurred.

CHARLES G. WILDERMUTH v. WILLIAM COLE.

Intoxicating liquors—Sale of on execution—Officer need not pay tax or file bond required by liquor law.

A sheriff, in making a sale of intoxicating liquors under an execution, is not "engaged in the business of selling intoxicating liquors" within either the letter or the spirit of the liquor law of this State.

Error to Shiawassee. (Newton, J.) Argued October 10, 1889. Decided November 8, 1889.

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

Watson & Chapman, for appellant, contended:

1. In support of the claim that the sheriff had no right to make a sale of intoxicating liquors by virtue of a judicial writ, counsel cited *Barron v. Arnold*, 11 Atl. Rep. 298 (R. I.); *Ingalls v. Baker*, 13 Allen, 449; *Nichols v. Valentine*, 36 Me. 322; *Bagg v. Jerome*, 7 Mich. 145; *People v. Kropp*, 52 Id. 582.

Edmund Haug, for defendant, contended:

1. The sheriff was not engaged in the business of selling intoxicating liquors; citing *Overall v. Bezeau*, 37 Mich. 506.
2. The cases in which it has been decided that an officer cannot levy upon and sell intoxicating liquors arose in states where prohibitory laws were in force, or under statutes entirely different from those of Michigan.

LONG, J. The plaintiff, on November 15, 1888, was engaged in business as a retailer of intoxicating liquors at Owosso, Shiawassee county, this State. The defendant, as sheriff of that county, had placed in his hands on that day a writ of attachment, issued out of the circuit court of that county, against the goods, chattels, and property of the plaintiff; and by virtue of which he levied upon the stock of liquors of the plaintiff, and subsequently sold them, to satisfy the execution issued upon the judgment rendered in the attachment suit.

It is admitted that the liquors are of the value of $536. It is also admitted that the attachment was regular in form; and the proceedings in attachment are in no manner questioned. The plaintiff filed a petition for a dissolution of the writ, and failed in that proceeding. The cause in attachment proceeded to trial upon the merits, and the plaintiff in the writ obtained a judgment against the plaintiff in this suit for the sum of $334.39 damages, and costs taxed at $64.50.

This action is brought in trespass (on the case) against defendant, Cole, the officer executing the writ, for the value of the intoxicating liquors taken under the writ. The cause was tried before a jury, and the court directed

a verdict for the defendant. Judgment being entered on the verdict in favor of defendant, the plaintiff brings the case here by writ of error.

The contention of counsel for the plaintiff is that the sheriff could not legally levy upon and sell intoxicating liquors under attachment and execution. It is not claimed that the liquors levied upon were exempt under any statute of this State, but that, inasmuch as the sheriff had not paid the tax and filed the bond required by the liquor law from all persons selling intoxicating liquors, the levy and sale is void.

Section 1 of the Liquor Law of 1887 requires all persons engaged in the business of manufacturing, selling, or keeping for sale intoxicating liquors to pay the tax on the business. Section 8 provides that all such persons shall give a bond before commencing such business, etc.

The sheriff, in making sales of these liquors under his execution, was not, within either the letter or spirit of this statute, engaged in the business of selling intoxicating liquors. Under the conceded facts, the plaintiff was legally liable for the amount named in the execution; and there is no more reason why his property should not be sold to satisfy it than the property of another, which consists of horses or other chattels. The learned circuit judge was correct in directing the verdict for the defendant.

The judgment must be affirmed, with costs.

The other Justices concurred.

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JOHN C. GOODRICH v. JOHN C. MCDONALD.

Promissory note—Fraudulent inception—Good-faith purchaser—Burden of proof.

1. When in a suit upon a promissory note, by an alleged innocent holder, the defendant gives evidence, which is not disputed, that the note was given in an illegal transaction, *void* as between the original parties on the ground of public policy, it is not error for the court to instruct the jury that the evidence shows a fraudulent transaction as to the original consideration, and that the burden of proof is upon the plaintiff to show by a preponderance of evidence that he is a purchaser in good faith. *Mace v. Kennedy*, 68 Mich. 389 (head-note 5).
2. The rule is well settled that when there is nothing upon the face of a note to cast suspicion upon its character 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 circumstances surrounding each particular transaction, however, may be taken into consideration in determining this question, and, frequently, direct and positive proof may not be obtainable to show such bad faith.
3. In a suit upon a so-called "Red Lyon Wheat" note, the defendant may introduce in evidence the bond received by him as a part of the transaction in which the note was given, the two papers being construed together as showing the true nature of the contract. *McNamara v. Gargett*, 68 Mich. 454 (head-note 1).

Error to Wayne. (Reilly, J.) Submitted on briefs October 9, 1889. Decided November 8, 1889.

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

Chamberlain & Guise (*Edwin F. Conely*, of counsel), for appellant, contended:

1. The evidence did not present legally the question of good faith as an issue of fact; citing *Miller v. Finley*, 26 Mich. 248; *New York Iron Mine v. Citizens' Bank*, 44 Id. 344; *Davis v. Seeley*, 71 Id. 209.

2. The evidence must at least tend to show bad faith, and the jury cannot be left to suspect, conjecture, or speculate; citing *Wood v. Barker*, 49 Mich. 295; *People v. Millard*, 53 Id. 63; *Heineman v. Steiger*, 54 Id. 232; *Pigott v. Lilly*, 55 Id. 150; *Rayburn v. Mason Lumber Co.*, 57 Id. 232; *Cass v. Gunnison*, 58 Id. 108; *Barnes v. Gardner*, 60 Id. 133; and a *scintilla* of evidence upon a given point is not enough to justify its submission to a jury as a question of fact; citing *Conely v. McDonald*, 40 Mich. 150.

Atkinson, Carpenter & Brooke, for defendant, contended for the doctrine stated in the opinion.

LONG, J. This cause was tried in the Wayne circuit court, before a jury, where defendant had verdict and judgment. Plaintiff brings error.

On the trial plaintiff put in evidence the following note, the execution of which was not in dispute:

"$100. SPRINGWELLS, March 15, 1886.

"On or before one year from date, I promise to pay to O. H. Williams or bearer one hundred dollars, value received, payable with use at 7 per cent. For the purpose of obtaining this credit, I hereby certify that I am legally responsible for the above amount.

"J. C. McDONALD.

"P. O., West End, Wayne Co. County of Wayne."

Plaintiff here rested his case. The defendant then introduced testimony tending to show that the note was given on the purchase by him of 20 bushels of what is called "Red Lyon Wheat," and that at the time of the execution and delivery of the note, with another note of $200, he received from Mr. Williams and a man named Sherwood a bond in the following form:

"THIS BOND IS USED FOR WHEAT ONLY.

"No. —. Capital stock, $50,000.

"BOND FROM AND BETWEEN THE OHIO AND GREAT WESTERN SEED COMPANY AND ———.

"Incorporated July 21, 1885, under the state laws of Ohio, for the production and sale of grain.

"HOME OFFICE, NAPOLEON, O., U. S. A.

"Mr. J. C. McDonald, of Dearborn township, Wayne Co., Mich.

"*Witnesseth*, 1st. That on or before February 11, 1887, the Ohio and Great Western Seed Company does hereby agree to sell responsible parties 40 bushels of Mr. J. C. McDonald —— wheat at $15.00 per bushel.

"2d. The said J. C. McDonald does hereby acknowledge that he bought the said wheat as a speculation, and that $15 per bushel is a speculative value, and agrees to pay said company 33⅓ per cent. commission in notes on all said wheat they sell for him at $15 per bushel.

"Signed and sealed in duplicate, this fifteenth day of March, 1886.

"THE OHIO AND GREAT WESTERN SEED CO,

"[Seal.] Per B. N. Hanes, Secretary.

"J. C. MCDONALD.

"Attest: J. B. AUGENSTEIN, Pres."

Defendant testified that these men told him the company was good,—had a paid-up capital of $50,000,—and that some of the members of the company were very rich, one man, by name of Hawes, being worth from $200,000 to $300,000; that the wheat was worth not to exceed one dollar per bushel; that the bond had never been kept, and no wheat ever sold for him. On cross-examination the defendant testified that he made no agreement with Williams and Sherwood outside of the bond, and that the bond contained the agreement which was made. Defendant further testified that he went into it as a speculation. Defendant here rested his case, and the plaintiff then gave evidence upon his part showing the circumstances under which he procured the note, and from which he claimed to be a *bona fide* holder for value, under a purchase before maturity.

Plaintiff testified that he acquired the note on March 1, or the last day of February, 1887, and he thought the last day of February; that he was a dealer in real estate, and also engaged in insurance business, and made a trade of real estate with Elijah Bigelow, in which he deeded some real estate he had in Detroit, valued at $4,500, upon which

was a mortgage of $2,000, and took in exchange a deed of real estate from Bigelow valued at $1,600, and $900 in notes for the balance; that when he came to make his deed, at the request of Elijah Bigelow, his son, Warren Bigelow, was named as the grantee; that the deed was delivered to Elijah Bigelow in his (plaintiff's) office. Plaintiff then says:

"He took it, and handed it back to me, and said I had better put it with his other papers, because he would not record it just yet."

The deed was put, with Elijah Bigelow's other papers, in plaintiff's safe, which had a combination lock,—the combination known only to the plaintiff and his two brothers. At the time of making this deed, plaintiff lived on the property described in the deed, and claims that he then made a verbal arrangement with Elijah Bigelow to continue in possession of it at a rental of $25 a month in advance; that he paid the rent for the month of March by giving Bigelow credit for it on his books. This deed was afterwards taken from the safe with the consent of plaintiff, and given to Elijah Bigelow, and put on record on April 18, 1887. It appeared further in the case, upon the cross-examination of the plaintiff and by direct proofs offered by defendant, that while this deed was yet in the safe of the plaintiff that plaintiff commenced suit on some of these notes in justice's court; was present at the trial; and the whole transaction was gone into, as to the manner of obtaining the notes, giving the bond, etc.; the same defense being made as to those notes as made in the present case in the court below.

Defendant also gave evidence tending to show that among the notes so held by plaintiff was one against Sylvester Losey, who called upon the plaintiff in response to a letter informing him of the fact that plaintiff held the note, and in a conversation then had regarding these

notes plaintiff said he got them of Mr. Bigelow, who told him they were wheat notes. This conversation was had while the plaintiff still held the deed in his safe.

It appears that some time after this exchange of property was made between plaintiff and Elijah Bigelow, Warren Bigelow, the grantee in the deed from plaintiff, filed a bill in the circuit court for Wayne county, in chancery, against plaintiff and Elijah Bigelow, to set aside the deed from his father to plaintiff, and for other purposes. Plaintiff filed an answer to this bill.

From these proceedings it appears that Warren Bigelow did not know that the deed was to be executed to him, and that neither plaintiff or Elijah Bigelow ever informed him of the fact until after the time of the commencement of the suits on the notes and the trial of some of the cases in justice's court; and that he never knew of it until after the deed had been recorded by his father.

It was claimed on the trial in the court below, and is claimed here, that under these circumstances plaintiff was not a *bona fide* purchaser—

1. Because he did not part with any value until after he had notice of the illegality of the note.
2. That he knew of its illegality at the time he acquired it.

The court, in instructing the jury upon these questions, stated:

"Now, the question which you are to determine from all the evidence in this case is whether the plaintiff took the note in good faith; * * * for a person must not only pay for a note, but he must also buy it in good faith,—that is, take it without knowledge of the illegal or fraudulent character of the note originally. * * * I think the burden is upon the plaintiff to show by a preponderance of evidence that the purchase of this note was in good faith."

There was no error in these instructions. The defend-

ant gave evidence, which was not disputed, that the note was given in an illegal transaction. The transaction was in all respects similar to the Bohemian oat deals which were held void by this Court on the ground of public policy in the cases of *Sutton v. Beckwith,* 68 Mich. 303 (36 N. W. Rep. 89); *Mace v. Kennedy,* Id. 389 (36 N. W. Rep. 187); *McNamara v. Gargett,* Id. 454 (36 N. W. Rep. 218); *Davis v. Seeley,* 71 Id. 209 (36 N. W. Rep. 901).[1] When this was made to appear by undisputed evidence, the court was not in error in stating to the jury that the evidence showed a fraudulent transaction as to the original consideration, and that the burden of proof was upon the plaintiff to show by a preponderance of evidence that he was a purchaser in good faith, and for value. *Mace v. Kennedy, supra.* It is claimed, however, by counsel for plaintiff that the evidence given upon the trial had no tendency to show that the plaintiff had any notice or knowledge that the note was tainted with fraud; that he bought and paid for it in good faith; and that the mere fact that plaintiff may have known that the note was given in a wheat deal was not sufficient notice to put him upon inquiry, and which rendered him guilty of bad faith in taking it.

The rule is well settled that when there is nothing upon the face of the paper to cast suspicion upon its character 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 circumstances surrounding each particular transaction, however, may be taken into consideration in determining this question. Frequently, direct and positive proof may not be obtainable to show the bad faith of the purchaser. Plaintiff in this case testifies that he had no knowledge

[1] See, also, *Ward v. Doane,* 77 Mich. 328.

or notice that the note was tainted with fraud. He does not, however, testify positively that he did not tell Losey that Elijah Bigelow told him that all the notes were given in wheat deals. He says he does not recollect telling him that. It is apparent, however, that long before he parted with his deed, while he had it in custody and under his control, and before he had parted with a dollar of money, he had full knowledge of the manner in which the notes were obtained. Losey advised him of the fact as early as March 15, and the whole facts were developed on the trial of the cases in justice's court in reference to the notes then in suit; and he must have known then, from his own testimony, that the note in controversy here was tainted with the same fraud. Yet he voluntarily surrendered his deed, and, according to his answer in the chancery case, advised its being put on record, for the purpose of showing consideration for these notes.

These were circumstances to go to the jury, in determining the *bona fides* of the plaintiff's purchase, and, we think, tended very strongly to show that he had full knowledge that the notes were tainted with fraud before he had put himself in a position where he could not rescind the trade made with Bigelow, and recall his deed, if it did not carry conviction that he knew when he obtained them of their fraudulent character.

The whole circumstances, taken together, made a very strong case, showing plaintiff's bad faith in the purchase. It would seem strange that a man of average intelligence, after all that has been said through the public press of Bohemian oat and Red Lyon wheat deals, and the frauds practiced upon the unwary by sharpers engaged in such questionable transactions, should not, when making a purchase of $900 worth of notes, and being told that they were given in a *wheat deal*, make some inquiry, at

least of the seller, what the wheat deal was. These matters are of such common knowledge that a jury would naturally take with some degree of suspicion the statement of a purchaser who is informed that a note is given in an oat deal or a wheat deal, and yet claims to have made no further inquiry, and insists that he is an innocent purchaser. It may be true; but it would, under proper circumstances, be a question of fact, for the determination of the jury. The facts that came to his notice were that $900 in notes had been taken from parties in the sale of wheat. These notes were against different parties, the defendant's note among them. An ordinarily prudent business man would naturally inquire why these men were buying wheat, and why the sellers were taking notes for a commodity which has a present cash value, and for which there is always a ready market for cash. It is a staple production, and represents so much cash; the values being quoted in the market from day to day, and very rarely sold in such quantities on time. These facts, with the almost common and universal knowledge that wheat and oat deals were being fraudulently made, are circumstances which the jury should be permitted to take into consideration in determining the *bona fides* of such purchasers.

The court was not in error in admitting in evidence the bond given to defendant on the giving of the note, nor in permitting the defendant to put in evidence the plea and notice in justice's court in the cases tried there. These notes were all of the same character, as appears by this record, and were purchased at the same time as the defendant's note, making up the $900.

We think the court left the only fact in the case to the jury, and they have found that the plaintiff was not a *bona fide* purchaser, under evidence tending strongly to show the fact.

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

The other Justices concurred.

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DANIEL COX v. FREDERICK CHESTER.

Replevin for beasts distrained—May be brought under general statute if defendant acted in bad faith—Division fences.

1. No person has a right to distrain cattle lawfully upon adjoining land which have escaped therefrom in consequence of his own neglect to maintain his part of the division fences; and the owner of such cattle, if distrained, may replevy them under the *general* statute.
2. How. Stat. chapter 289, relative to distraining and replevying beasts, was intended to provide a summary remedy for any person injured in land by certain enumerated beasts *trespassing* thereon; and when a party has in *good faith* taken cattle *damage-feasant*, thereunder, and the owner desires to bring replevin to test the legality of such taking, he must proceed under the *special* provisions of said chapter. *Johnson v. Wing*, 3 Mich. 163; *Hamlin v. Mack*, 33 Id. 103; *Campau v. Konan*, 39 Id. 362.

Error to Washtenaw. (Kinne, J.) Argued October 9, 1889. Decided November 8, 1889.

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

Samuel W. Burroughs, for appellant.

J. Willard Babbitt, for defendant.

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

CHAMPLIN, J. The plaintiff brought suit in replevin, in the ordinary form, to recover possession of certain cattle belonging to the plaintiff. The defendant pleaded the general issue, and set up—

"That said plaintiff's cattle broke into said defendant's inclosed lot, and damaged said defendant's crops to the amount of twenty dollars, for which said defendant asks judgment against said plaintiff, together with distraining fees and costs of suit."

The plaintiff recovered before the justice, and defendant appealed. In the circuit the case was tried before a jury. Upon the trial the plaintiff introduced testimony tending to show that the plaintiff and defendant were owners of adjoining premises, and that they had mutually agreed upon a partition of the line fence between them, and that each agreed to build his share; that plaintiff went on and built his share, but the defendant neglected to build his, and there was no fence upon that portion which he had agreed to build; that a few rods distant, upon defendant's land, there existed an old fence, which was in some places three feet in height, and at others four to four and one-half feet high; that before he turned his cattle into his lot he informed defendant of his purpose; that defendant told him to turn them in; that plaintiff told him that his fence would not stop cattle, and he said, "You turn them in there, and it will be all right," and so he turned them in; that the cattle passed upon defendant's land, where he had neglected to build his share of the line fence, and passed over the old fence upon defendant's land, where defendant found them, and impounded them in his cow-yards, and gave plaintiff notice, and requested him to come and pay damages and get the cattle.

The testimony as to the agreement to partition and to build the line fence, and his consent that plaintiff might

put his cattle in the field, was denied by defendant. The court submitted questions to the jury to find specially upon, which, with their answers, were as follows:

"1. Do the lands of defendant join immediately on the lands from which the cattle came?

"*A.* Yes.

"2. Did plaintiff erect his part of the line fence as agreed?

"*A.* Yes.

"3. Was there an agreement between the plaintiff and defendant to build a line fence?

"*A.* Yes.

"4. Has defendant, Chester, made his line fence, and is there a line fence on the part of defendant?

"*A.* No.

"5. Did the cattle get over south and east of the board fence, and over the old rail fence, if they got over at all?

"*A.* Yes.

"6. Did defendant, Chester, actually find plaintiff's cattle on his (defendant's) land doing damage, and shut them up in his yard, and notify plaintiff that he held them for the damage they had done?

"*A.* Yes; but we believe the cattle got into said Chester's lot by reason of his failure to build a line fence as agreed, and we therefore find for the plaintiff, and assess his damages at six cents."

The jury came into court, and returned a general verdict for plaintiff, which was entered in due form, upon which judgment in favor of the plaintiff and against the defendant was rendered on May 10, 1889. On May 13 the defendant moved to set aside the judgment, and that a new judgment be entered in his favor, upon the ground that the special findings were inconsistent with the general verdict of the jury. After argument and consideration, the court set aside the judgment, and rendered one in favor of the defendant for costs. He bases his action upon the last finding of fact by the jury, and upon the theory that the plaintiff had mistaken his remedy; that,

instead of bringing the ordinary action of replevin, he should have brought it under chapter 289, How. Stat., relative to distraining and replevying beasts; in support of which he cites the following cases: *Campau v. Konan*, 39 Mich. 362; *Marx v. Woodruff*, 50 Id. 361 (15 N. W. Rep. 510), and 51 Id. 605 (17 N. W. Rep. 76).

In reviewing this action of the circuit judge, it is proper to call attention to the charge of the circuit judge to the jury, and the bearing of the general verdict rendered under such charge. The learned judge explained to the jury that there were two forms of replevin,—one what is known as the "general form;" the other a "special form," where defendant has distrained animals doing damage upon his premises. And he charged that where animals are distrained for doing damage, and the plaintiff wishes to obtain his property by an action of replevin, he must plant his action on this special or particular form of replevin, and if he fails to do so he mistakes his remedy, and must fail in his action. And he said to the jury:

"In this case Mr. Chester claims to have taken these animals while they were trespassing upon his premises, and to have shut them up, and notified the owner, claiming damages. Now, gentlemen of the jury, if that be true, if you find from the evidence that it be a matter of fact, then I charge you that the plaintiff in this case has mistaken his remedy, and I give you this question of fact for you to determine, about which, perhaps, there is not any serious controversy, and yet there may be; it is for you to say. If you find from the evidence in this case that the defendant, Chester, actually found plaintiff's cattle in his field doing damage, and that thereupon defendant, in good faith, took the cattle and shut them up in his yard, and notified the owners thereof, and claimed damage for the trespass they had committed, then your verdict should be for the defendant. Of course, if if you should find the other way, your verdict should be for the plaintiff."

He also instructed the jury as follows:

"If the jury believe from Daniel Cox's testimony that there was an agreement between him, acting for Charles Cox, and defendant to build the line fence, and that Cox did build his part as agreed, and the cattle got over the rail fence ten rods south and east of the new board fence, then defendant had no right to shut the cattle up, and plaintiff is entitled to recover in this action."

Under these instructions, the jury returned a general verdict for the plaintiff. That the defendant found the cattle upon his premises doing damage, that he shut them up, and notified the plaintiff, and claimed damages for the damage done, are facts found by the special verdict, and must be taken as established. But the court submitted to the jury an additional fact, not in conflict with the special verdict, but which lay at the foundation of the defendant's right to distrain the animals at all; and that was the question of his good faith in shutting them up and claiming damages.

In finding a general verdict for the plaintiff, under the charge, the jury must have found that the defendant did not act in good faith in distraining the cattle. If the jury found from the testimony that there was an agreement as to the division and building of the line fence, and plaintiff built his, and defendant did not, and if he was informed by plaintiff that he desired to turn his cattle into his own field, and expressed an opinion that the old fence mentioned in the testimony was insufficient to keep them from getting into defendant's field, and defendant told him to turn them in, and it would be all right, and the plaintiff, acting upon this interview, did put his cattle in his own field, the jury would be justified in finding that the cattle entered upon defendant's premises with his consent, and that he had waived in advance any claim that

the cattle in thus entering his fields committed a trespass; and they would be also justified in finding from such testimony that the defendant did not act in good faith in distraining the cattle. In *Campau v. Konan* it was said:

"Where the defendant has in good faith taken the cattle *damage-feasant*, then, if the owner desires to bring replevin to test the legality thereof, he must proceed under chapter 214 [C. L. of 1871]."

The general verdict was consistent with the judge's charge upon the question of good faith, and the special findings nowhere contravene the general verdict in this respect.

The statute relative to distraining and replevying beasts was intended to provide a summary remedy for any person injured in his land by certain enumerated beasts trespassing thereon. How. Stat. § 8358 enacts:

"When any person is injured in his land by sheep, swine, horses, asses, mules, goats, or neat cattle, he may recover his damages * * * by distraining the beasts doing the damage, and proceeding therewith as hereinafter directed; but if the beasts shall have been lawfully on the adjoining lands, and shall have escaped therefrom in consequence of the neglect of the person who has suffered the damage to maintain his part of the division fences, the owner or person having the control of the beasts shall not be liable for such damages."

This statute gives a remedy by distress against the owner of cattle which are committing a trespass. But no person has a right to distrain cattle lawfully upon adjoining land which have escaped therefrom in consequence of his own neglect to maintain his part of the division fences. And he cannot by distraining in such case, and claiming damage which the statute says he shall not recover, or the owner of the cattle be liable for, drive his neighbor to proceed under this special

statute, nor can he deprive him of any remedy the law affords to him to recover property wrongfully taken and detained.

Under the special findings in this case, the defendant has no right whatever to take the cattle up, and withhold the possession of them from the plaintiff; and under such findings of fact it is clear that he acted in bad faith in distraining the cattle.

It follows that the judgment last entered by the circuit judge in favor of the defendant must be reversed, set aside, and held for naught, and the order setting aside the original judgment vacated, and the judgment as originally entered will stand as the judgment in the cause. Plaintiff will recover his costs in this Court.

The other Justices concurred.

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In re Estate of Daniel Nugent, Deceased.

[See 59 Mich. 593; 70 Id. 52.]

Estates of deceased persons—Appointment of administrator—Object of petitioner.

1. Property rights cannot be litigated in proceedings to appoint an administrator.
2. It is no legal objection to the appointment of an administrator that the object of the petitioner is to file a bill in equity to set aside a deed, executed by the deceased, upon the ground that it is fraudulent and void as to the petitioner,—a judgment creditor. The statute expressly confers this right in certain contingencies (How. Stat. § 5884); and, unless an administrator is appointed, the remedy is lost to the creditors of the intestate.

Error to Kent. (Grove, J.) Argued October 8, 1889. Decided November 8, 1889.

Appeal from an order of the circuit court, on appeal from the probate court, dismissing a petition for appointment of administrator. Action of circuit court reversed, and that of probate court affirmed. The facts are stated in the opinion.

Tatem & Quinsey, for petitioner, James Nugent.

Taggart, Wolcott & Ganson, for respondent, Emanuel Nugent.

CHAMPLIN, J. John Bresnahan was appointed administrator of the estate of Daniel Nugent, deceased, by the probate court of Kent county.

The petition for the appointment was made by James Nugent, as one of the next of kin, and a creditor, of the deceased. The petition set forth that Daniel Nugent was not an inhabitant or resident of the State of Michigan at the time of his death, but was an inhabitant of the state of Colorado; and was possessed of estate situated in the county of Kent, to be administered, and that the estimated value thereof was as follows: Real estate, $1,000 and upwards; and personal estate, $1,000 and upwards,—as the petitioner was informed and believed. The petitioner then sets forth the names and residences of the heirs at law, and others interested in the estate, and prays for citation and the appointment of Bresnahan. The appointment by the probate court was opposed, but by whom, or upon what ground, does not appear from the record before us.

Emanuel Nugent, a brother of the deceased, appealed from the order appointing Bresnahan administrator, to the circuit court for the county of Kent, for the following reasons:

1. The deceased was not a resident or inhabitant of the State of Michigan.

2. The deceased, at the time of his supposed death, resided in the state of Colorado, and did not leave any estate or property to be administered within the county of Kent, or within the State of Michigan.

3. The probate court had no jurisdiction in the matter.

4. As appeared in the evidence adduced upon the hearing in said matter, the whole purpose of the application for administration of the estate of said deceased was to cause a suit in equity to be commenced against the appellant, Emanuel Nugent.

The matter was tried in the circuit court, before the court without a jury, and the parties were permitted to go into an extended investigation upon the question as to whether Daniel Nugent had any estate in Kent county, to be administered; the petitioner claiming, and introducing testimony tending to prove, that the deceased was the owner of certain land, which he had fraudulently conveyed to his brother, Emanuel Nugent, with intent to defraud the petitioner, as a creditor of said Daniel. This showing was controverted by the contestant; and testimony was introduced, tending to show that James Nugent had recognized the validity of such conveyance, and had received benefits thereunder.

The circuit court made a finding of facts, and, as conclusion of law, held that Daniel Nugent did not reside in the State of Michigan at the time of his death, and had no estate to be administered in this State, and that the probate court of the county of Kent had no jurisdiction to appoint an administrator of his estate; and that the claim made by the petitioner was to enable him to cause a bill in equity to be filed to set aside the deed made by the deceased to Emanuel Nugent in 1879, on the ground that it was fraudulent and void as to petitioner; and that, from facts appearing in the testimony

of the petitioner himself, a court of equity should decline to entertain a bill or grant relief such as the petitioner sought to obtain through the appointment of an administrator; that his demand is stale, and his action in accepting the conveyance of the larger portion of the land affected by the transfer now alleged to be fraudulent, and relying thereon as a valid title, was inconsistent with the present claim,—and dismissed the petition.

The court erred in dismissing the petition. Property rights cannot be litigated in proceedings to appoint an administrator. The petition was sufficient in form and substance to confer jurisdiction upon the probate court to take action towards appointing an administrator, and no objection is made that the proper notice was not given. It was no legal objection that the object of the petitioner was to file a bill in equity to set aside a deed to Emanuel Nugent, executed by the deceased, upon the ground that it was fraudulent and void as to the petitioner. The statute expressly confers this right in certain contingencies (How. Stat. § 5884); and, unless an administrator of the estate of Daniel Nugent is appointed, this remedy is lost to the creditors of the intestate. The court of chancery is the proper forum in which to litigate the questions of fraudulent conveyances by the deceased, as against his creditors, and to settle the question whether the petitioner is entitled to any relief in that court.

The order of the circuit court dismissing the petition must be reversed, with costs, and the order of the probate court appointing an administrator will be affirmed. Let it be certified to the respective courts accordingly.

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

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CLARENCE W. PERKINS, EXECUTOR, v. CHARLES E. HERSHEY.

Principal and agent—Declaration—Inconsistent causes of action—Verbal promise to pay debt of another.

1. An agreement by which a party is to loan out to borrowers money furnished by another party, at an agreed rate of interest, he to collect and account for all over one per cent., which he is to retain as his compensation, constitutes him an agent coupled with an interest, and he is bound to discharge his duties with fidelity and good faith towards his principal.
2. An agreement by an agent to stand as security for all loss the principal might sustain on loans made by the agent, by reason of insufficient security or defect of title, is held not to apply to prior loans, nor is evidence of such an agreement admissible in a suit against the agent unless specially counted upon.
3. No recovery can be had upon the common counts in *assumpsit* for property received by an agent, without authority, in payment of the amount due the principal upon a mortgage, the principal not having ratified such unauthorized act of the agent, nor released the mortgagor from his obligation in reliance upon the agent's liability or obligation to pay to the principal the avails or value of said property.
4. A declaration in a suit by a principal against an agent averring the duty of the agent to pay to the principal certain moneys and property received by him upon a mortgage belonging to the principal, and sufficient in amount to pay the same in full, and also counting upon the promise of the agent that, if the principal would make a sale of the mortgaged premises under a decree before then taken on a foreclosure of the mortgage, he would pay him any deficiency arising on such sale, sets forth two inconsistent causes of action.
5. A verbal promise by an agent to pay the principal any deficiency which might arise upon a sale under a foreclosure decree, if the principal would make such sale, is void under the statute of frauds, the principal being the owner of the decree, and the agent being under no prior legal obligation to pay the mortgage debt
6. "In many cases the test whether a promise is or is not within the statute of frauds is to be found in the fact that the original

debtor does or does not remain liable on his undertaking. If he is discharged by a new arrangement, made on a sufficient consideration, with a third party, this third party may be held on his promise, though not in writing; but if the original debtor remains liable, and the promise of the third party is only collateral to his, it will, in strictness, be nothing more than a promise to answer for the other's debt. But where the third party is himself to receive the benefit for which his promise is exchanged, it is not usually material whether the original debtor remains liable or not." *Calkins v. Chandler*, 36 Mich. 324. This principle, applied to this case, shows very clearly that the defendant is not liable under his promise to pay the deficiency on the foreclosure sale.

Error to Shiawassee. (Newton, J.) Argued October 10, 1889. Decided November 8, 1889.

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

Watson & Chapman, for appellant, contended for the doctrine stated in the opinion.

W. M. Kilpatrick and *G. R. Lyon*, for plaintiff, contended:

1. When one person for a valuable consideration engages with another by a simple contract to do some act for the benefit of a third, the latter may maintain an action for the breach of the engagement. The law, operating on the act of the parties, creates the duty, establishes a privity, and implies the promise on which the action is founded; citing *Schemerhorn v. Venderheyden*, 1 Johns. 140; *Canal Co. v. Bank*, 4 Denio, 97; *Farley v. Cleveland*, 4 Cow. 432; *Lawrence v. Fox*, 20 N. Y. 268; *Mallory v. Gillett*, 21 Id. 412; *Arnold v. Lyman*, 17 Mass. 460; *Hall v. Marston*, Id. 574; *Brewer v. Dyer*, 7 Cush. 337; *Stariha v. Greenwood*, 28 Minn. 521; *Clopper v. Poland*, 12 Neb. 69; *Hoile v. Bailey*, 58 Wis. 434; *Calkins v. Chandler*, 36 Mich. 320; *Barker v. Bucklin*, 2 Denio, 45.

CHAMPLIN, J. The declaration in this case contains a special count and the common counts in *assumpsit*. The special count sets out that about the year 1873 defendant became and was agent of William Perkins, deceased, for

loaning money in Shiawassee and adjoining counties, and about July, 1873, defendant received $800 to loan to one Leander Merrill, of Chesaning, Saginaw county, which about that date he loaned to said Merrill upon his note, taking as collateral security a mortgage to said William Perkins upon certain saw-mill property; that the interest was regularly paid by defendant, Hershey, to Perkins as it became due, until his death, which occurred January 9, 1881, and after that event to the plaintiff as executor of the last will of William Perkins, until on or about the year 1885, since which time no interest has been paid.

That the defendant in the year 1876 caused the mortgage to be foreclosed in chancery to the taking of a decree therein, and after, at different times, Hershey received from Merrill large quantities of lumber, timber, and other property to the full amount due for principal and interest on said note and mortgage, which timber, lumber, and other property was delivered to Hershey by Merrill for the purpose of paying and satisfying the note and mortgage, and was of more than sufficient value to pay and satisfy the same, with the understanding with Hershey that such timber, lumber, etc., so delivered, and the avails thereof, were to be applied upon and go to the satisfaction of said mortgage and note; that Hershey, in fraud of plaintiff's rights, retained said lumber, timber, and other material, and the money received therefor, without accounting to or paying over the same, or any part thereof, to Perkins, deceased, in his life-time, or to plaintiff as executor.

That the property covered by such mortgage was of the value of $5,000, and ample security for said sum of $800, and in the year 1885 Hershey represented to plaintiff that said note and mortgage had not been paid by Merrill, as he (Merrill) then claimed, and that if plaintiff would go

on and have the property sold under said decree of foreclosure he (Hershey) would pay to plaintiff whatever deficiency there might be after such sale, and that said plaintiff, relying upon such promises, caused the same to be sold by the circuit court commissioner for the county of Saginaw, on June 20, 1887, and the premises were bid off by plaintiff for the sum of $250, leaving unpaid and due to plaintiff on the note and mortgage, after deducting the $250, a large sum of money, to wit, the sum of $1,100.

That said defendant, wholly ignoring his said promises and undertakings, but contriving and intending to deceive and defraud the said William Perkins in his life-time, and the plaintiff, as executor, in this behalf, has refused to pay the said plaintiff the moneys and properties so received by him from said Leander Merrill in payment and satisfaction of said note and mortgage, or to pay said deficiency, or any part thereof, to plaintiff, although often requested so to do, and the said defendant has become, and still is, indebted to said plaintiff as executor in a large sum of money, to wit, $1,100.

It appears from the plaintiff's testimony that William Perkins entered into an arrangement with Hershey by which Hershey was to loan out to borrowers money furnished by Perkins, upon interest, at the rate of 10 per cent., one per cent. of which was to go to Hershey as his compensation, and nine per cent. to Perkins; that Hershey would collect the interest, and account to Perkins for his share, and retain the amount due himself. This constituted him an agent coupled with an interest, and he was bound to discharge his duties with fidelity and good faith towards his principal, without fraud or overreaching.

At the time the loan was made to Merrill, Hershey did not undertake to guarantee the repayment of such loan,

or to stand as security for its repayment, or for the sufficiency of the security taken as collateral thereto. Plaintiff was allowed to introduce testimony, against defendant's objection, tending to prove that at a later date defendant did undertake to stand as security against all loss for money he should loan for Perkins that might arise from insufficient security or defect of title. The admission of this testimony was an error. No such undertaking was counted on in the declaration, and, if it had been, the testimony would not have been admissible, as this loan was made before any such offer was made by the defendant.

It appears that Hershey forwarded the interest due upon the mortgage, which was payable to Perkins annually, and the same was indorsed upon the note and mortgage, and that in 1876 Hershey claimed that Merrill owed him, and would not pay, and requested William Perkins, who resided at Seneca, Ontario county, New York, to send him the note and mortgage against Merrill, and he would foreclose for not paying the interest when due, in order to force him to pay him, and he would see that Perkins should lose nothing. The note and mortgage were sent, and foreclosure proceedings were commenced about October 2, 1876, in the circuit court for the county of Saginaw, in chancery, in the name of William Perkins, complainant, and against Merrill and his wife and one John Hershey. Such proceedings were thereafter had that a decree was entered by said court on February 14, 1877, for a sale of the mortgaged premises to pay the amount reported due on January 29, 1877, for interest upon the principal, including solicitor's fees, of $380.94. The note and mortgage were filed in the cause, and all indorsements had been erased therefrom.

Testimony was introduced, against defendant's objection, which tended to prove that large quantities of lumber

and timber were delivered to Hershey to be applied upon the mortgage debt; and Merrill testified that in 1877 he settled with Hershey, and it was then agreed that there was $250 then due upon the note and mortgage, and that he should continue to deliver lumber and timber until such balance was paid, and he testifies that he delivered more than sufficient to pay such balance. In the statement as to the amount then due upon the note and mortgage he is corroborated by his brother, Ira Merrill, who testifies that in September, 1878, his brother and Mr. Hershey disagreed as to the amount of lumber which had been delivered, and that they finally came to a compromise, "and agreed to call it $250 now due upon the mortgage." He knew there had been a foreclosure,—that is, he had heard they commenced,—and he asked Hershey if that amount included the costs and interest up to that time, and he said it did. The amount then claimed to be due could not have included the principal of $800, which did not become due until 1879, and the decree was only for the interest due, solicitor's fees, and costs. Whether sufficient lumber was delivered afterwards to pay the mortgage debt in full was, if admissible under the pleadings and facts, a question for the jury. We shall consider this question later on.

In 1881, the interest, at Hershey's request, made to Mr. Perkins, was reduced from 10 to 7 per cent. per annum; and Mr. Hershey continued to pay to Mr. Perkins, and to his executor, the interest to the year 1885. In 1886 the plaintiff first learned that Merrill claimed the mortgage was fully paid. In February, 1887, he saw Hershey in Owosso, and talked with him about the Merrill matter. He testifies that Hershey claimed that it was not paid. Plaintiff wanted Hershey to take an assignment of the decree, and he would take his note for it, due in eighteen months. Hershey refused to do that. He then said, if

plaintiff would go on and have the property sold under the decree, he would pay up the deficiency. Plaintiff asked him if he would put it in writing, and he said he would, but afterwards refused, but said he would do just as he agreed, if he would go on and have it sold under the decree, and be to as little expense as possible. Under the plaintiff's directions, the premises were advertised and sold on June 20, 1887, and bid off by plaintiff for $250. The sale was confirmed, and a circuit court commissioner's deed executed and delivered to plaintiff of the premises covered by the mortgage. Witness Perkins further testified as follows, on cross-examination:

"*Q.* When you were out here, in 1881, Hershey wanted you to take his note for the mortgage?
"*A.* Yes, sir.
"*Q.* You finally refused to do it?
"*A.* Yes, sir.
"*Q.* You thought you would rather have the Merrill mortgage than his note?
"*A.* Yes, sir; I thought it was good.
"*Q.* Your father was dead at that time?
"*A.* Yes, sir.
"*Q.* So you continued to hold the Merrill obligation, and hold them liable on it?
"*A.* It stood as it had before my father's death, up to the change of the per cent.
"*Q.* You never had any agreement with Hershey to receive any lumber for you?
"*A.* No, sir; I don't know anything about the lumber.
"*Q.* You had no agreement with Merril that Merrill should let Hershey have any lumber?
"*A.* I never had seen Merrill at that time.
"*Q.* Did you know anything about the lumber being delivered to Hershey on this mortgage until 1887?
"*A.* Not that I can recollect.
"*Q.* You at no time had any arrangement with Hershey by which he should be your agent to receive money for you?
"*A.* Nothing more than when my father was alive.

"*Q.* Your father didn't make any arrangement with him to receive lumber?

"*A.* No, sir.

"*Q.* So whatever Hershey may have received by way of lumber or timber he received without your knowledge or consent?

"*A.* Yes, sir.

"*Q.* And without any authority from you?

"*A.* Yes, sir.

"*Q. Mr. Kilpatrick.* When did you first learn that Merrill claimed payment of this mortgage?

"*A.* That was in 1886.

"*Q. Mr. Chapman.* Whatever Mr. Kilpatrick or the ones who were handling it did, in 1887, the sale was made by and under your authority,—they had authority to make that sale?

"*A.* Certainly. We advised on the matter with my attorney, at Penn Yan, and talked it over with Mr. Kilpatrick, and talked it over with my attorney there, and they corresponded, and thought it would be the best way to do.

"*Q.* You sold it?

"*A.* Yes, sir.

"*Q.* The bid that was made on it was made with your authority?

"*A.* Why, yes, certainly; they had a right to bid it off for me.

"*Q.* So the sale, in every particular, was your sale?

"*A.* Yes, sir.

"*Q.* At the time you made this sale you knew the Merrills claimed the mortgage had been paid?

"*A.* Yes, sir; I was not in the State when the sale was made, and knew nothing about it personally."

Plaintiff further testified that up to 1879 no agreement had been entered into whereby Hershey had agreed to pay the Merrill mortgage, or was liable for it, but that it was his understanding, and his father understood, that Merrill was obligated for this indebtedness; that up to the time of his father's death his father did not rely upon Hershey for the payment of the claim, but his father knew it was Merrill's debt. He further testified as follows:

"*Q.* The first time that there was any reliance upon Hershey for the payment of this debt was the promise he made you in 1887, when he agreed to pay the deficiency?

"*A.* Yes, sir; and that was the first time that either father or I had claimed any liability on the part of Hershey, and that claim was based on the promise he made to me.

"*Q.* Before this time you and your father had always relied upon Merrill to pay that mortgage, hadn't you? (Objected to as incompetent. Objection sustained, and defendant excepted.)

"*A.* When I had the talk with defendant about assigning the decree, I did not have any assignment there.

"*Q.* You bid off the property when it sold,—it was bid off in your name?

"*A.* I think it was,—yes, sir; and I still have the title to that property.

"*Q.* You still hold the decree for the balance that is unpaid, and claim the balance due on it, don't you? (Objected to.)

"*Q.* And claim the balance due on the decree as your property?

"*A.* Why, I suppose so; yes, sir.

"*Q.* That is what you claim, isn't it?"

"*A.* Yes, sir."

No recovery can be had in this case under the common counts in *assumpsit*. No authority existed from Perkins to Hershey to receive lumber and timber in payment of the amount due to him upon the mortgage, and neither he nor his executor have ever, until the commencement of this suit, ratified such unauthorized act of the agent. But they have repudiated it, in so far as they claim the whole amount of principal and unpaid interest is still due to them. The plaintiff has not released Merrill from his obligation in reliance on any obligation or liability on the part of Hershey to pay the avails of the lumber and timber or its value to him.

There are two causes of action alleged in the special count, and they are inconsistent with each other. One is

based upon the duty of Hershey, as the agent of the plaintiff, to pay to the plaintiff the moneys and property received by him from Merrill, which it is alleged were sufficient to pay and satisfy the note and mortgage in full; and the other is based upon the promise of Hershey that if plaintiff would go on and have the mortgaged premises sold under the decree he would pay to plaintiff whatever deficiency there might be after such sale. He nowhere alleges that Hershey received such money and property as Perkins' agent, or that he was authorized to do so, but testifies that he had no such authority. Neither the allegations of the declaration nor the testimony disclose any duty of Hershey as agent of Perkins to receive lumber and timber from Merrill, and convert it into money, and pay it over to the plaintiff. There was no consideration alleged or shown for the promise to pay the deficiency. Plaintiff testifies that until this promise was made there was no undertaking or obligation on the part of Hershey to pay the Merrill debt. Plaintiff was the owner of the decree, and in enforcing it he was enforcing his own remedy. The debt was not Hershey's, and the promise to pay it was to pay the debt of another. Such promise is void, unless in writing, and this was not. If it was a fact that he had received property from Merrill sufficient to pay this debt under a promise to Merrill to do so, he was liable to Merrill for the violation of that promise. And he would incur a further liability in permitting the land to be sold. It is difficult to see how he would be benefited by a sale.

The case of *Calkins v. Chandler*, 36 Mich. 320, is relied upon by plaintiff, but it is not analogous to this. In that case there was a forbearance to enforce a remedy against the debtor, and the Court held this a good consideration for the promise. In this case, instead of a

promise based upon a forbearance, it is just the reverse. It was a request to proceed to the enforcement of a remedy. It is claimed, also, that the case is in point upon the statute of frauds. But the facts are quite different. In that case, as was said in *Gower v. Stuart*, 40 Mich. 748,—

"The creditor, debtor, and the surety were all parties to the arrangement, and it was for their mutual convenience."

In that case Medlar Bros. were sawing lumber for Chandler by the thousand feet, for which Chandler was to pay them. They owed Calkins, and it was mutually agreed by the three parties that Chandler should retain, out of the moneys to become due Medlar Bros. for sawing, the sum of 50 cents per thousand feet, and pay the same over to Calkins. Here was money which Chandler owed to Medlar Bros. which he agreed to pay to Calkins, which was assented to by Calkins and Medlar Bros. The promise was made to Calkins, and operated as a novation, by consent of all parties. But here there was no promise from Hershey to Perkins to pay the money he might receive from the sale of Merrill's property to him. In *Calkins v. Chandler* it was said:

"In many cases the test whether a promise is or is not within the statute of frauds is to be found in the fact that the original debtor does or does not remain liable on his undertaking. If he is discharged by a new arrangement, made on a sufficient consideration, with a third party, this third party may be held on his promise, though not in writing; but if the original debtor remains liable, and the promise of the third party is only collateral to his, it will, in strictness, be nothing more than a promise to answer for another's debt. But where the third party is himself to receive the benefit for which his promise is exchanged, it is not usually material whether the original debtor remains liable or not."

This principle, applied to the case under consideration, shows very clearly that defendant is not liable under his promise to pay the deficiency. *Stewart v. Jerome*, 71 Mich. 201 (38 N. W. Rep. 895); *Pfaff v. Cummings*, 67 Id. 143 (34 N. W. Rep. 281).

The judge charged the jury on behalf of and as requested by the plaintiff as follows:

"No written assignment is necessary to transfer the title to a note and mortgage, but the same may be transferred by a simple delivery of the note and mortgage; and in this case, if you find that, when nothing was due upon the note and mortgage to Perkins, the defendant requested him to send him the note and mortgage, so that he might by foreclosing it compel the mortgagor to pay him a debt he owed him, and said that he should lose nothing upon it, and he would assure the plaintiff the payment of the whole of it, and he afterwards erased the indorsements of payments upon it, and procured a decree for the whole amount due upon it, without the plaintiff's knowledge, then the defendant is estopped from denying the transaction was a purchase of the note and mortgage by him, and he would be liable to the plaintiff."

The difficulty in sustaining this part of the charge is that there is no count in the declaration which alleges a sale of the note and mortgage to the defendant, and that there was no testimony to support such charge. The nearest proof of a sale is that at one time the defendant proposed to buy the note and mortgage, and give his own note therefor, and plaintiff refused to sell, and at a later date the plaintiff offered to sell to defendant, and he refused to buy.

The court further instructed the jury that, if they found for the plaintiff under the above instruction, they should find damages for the amount of $800, and interest at seven per cent. from January 1, 1885; that the interest would be $230.22,—making in all $1,030.22. The jury returned a verdict for $1,030.22.

He further instructed the jury, as requested by the plaintiff, as follows:

"2. If the jury find that the defendant bought timber and lumber of the mortgagor (that is, Merrill), and in consideration of the same agreed with him to pay for the same by payment of his (Merrill's) debt to Perkins upon this note and mortgage, such promise was an original promise of his own to pay his own debt, and is not within the statute of frauds, and the plaintiff could sue upon it, even if he was not privy to the contract between Merrill and Hershey.

"3. Bearing upon the question whether the defendant assumed the payment of the Merrill debt to plaintiff, or substituted himself instead of Merrill therefor, the jury may consider the facts that the defendant promised plaintiff that if he would furnish him money to loan he would be surety to him for the amount so loaned; that, if he would let him have the note and mortgage to foreclose for his own purposes, he should lose nothing; that nothing was due upon it; that he asked for an assignment of the decree to himself; that he agreed to pay any deficiency after the sale; that he obtained from the plaintiff an agreement to receive a less rate of interest, without the request and knowledge of the mortgagor; that he offered to give the plaintiff his note for the whole amount; and that he promised his attorney to pay the whole debt,—if you find these facts are satisfactorily proven to you by a preponderance of evidence, you may consider them in determining the question.

"5. If the jury find that Hershey received timber and lumber of Merrill, and you find it was intended by both Merrill and defendant to be used by the defendant himself, or to be sold by him, and the value of that used and the proceeds of that sold were to be applied upon the mortgage debt of Merrill to Perkins by Hershey, then the plaintiff would be entitled to a verdict in this case for the amount in value of the lumber you may so find he received, with interest at seven per cent. from the time of the delivery of the lumber to him."

We have already said that there could be no liability based upon what transpired between defendant and Merrill, arising out of the lumber transaction, and hence the

instructions given above were erroneous. The judgment must be reversed, and a new trial granted.

SHERWOOD, C. J., and CAMPBELL, J., concurred with CHAMPLIN, J.

MORSE and LONG, JJ., concurred in the result.

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FRANK D. HYDE AND GEORGE S. HYDE v. ALONZO M. SHANK.

Chattel mortgage—Attachment of property in defiance of—Replevin by mortgagee—Good faith of parties to mortgage material—Evidence—Mortgage to secure future advances—Charge to jury.

1. Upon the trial of issues involving fraud, a pretty large latitude of inquiry is permitted; and all facts and circumstances tending to throw light upon the transaction between the parties alleged to have been implicated are allowed to be given in evidence.

   So *held*, where a mortgagor conveyed to the mortgagee, after an attachment of the mortgaged property by his creditor, and its replevin by the mortgagee, his interest in 480 acres of land which he held under a contract of purchase, and was credited in account with the amount he had paid on the contract and for taxes, after which the mortgagee paid the balance of the contract price and secured the title contracted for, and it was claimed on the trial of the replevin suit that the value of the land was largely in excess of the sum paid, and the amount credited by the mortgagee in reduction of the indebtedness secured by the mortgage, in support of which claim defendant was allowed to prove what the mortgagor claimed the land was worth, and its actual value, which are held proper subjects of inquiry as affecting the question of the intent of the parties.

2. A provision in a chattel mortgage allowing the mortgagor to retain possession until the debt is due is for his benefit, and may be waived by him at any time. *Ganong v. Green*, 71 Mich. 1.

3. The waiver by a mortgagor of his right to the possession of the property until the maturity of the mortgage debt, and his consent that the mortgagee may take immediate possession, cannot affect the rights of an attaching creditor, who, if he regards the mortgage as valid, should levy subject to the rights of the mortgagee, and if he claims it void as to creditors, and succeeds in showing such fact, the agreement as to possession will not affect that question.

4. A mortgage given in good faith to secure future advances agreed to be made by the mortgagee, as well as present indebtedness, is valid.

5. An instruction to a jury in a case involving questions of law and fact that there is no law involved in the case that amounts to any thing is erroneous.

6. An instruction that the jury should find which side is in the right is too general, as it allows them to enter the domain of morals, and measure the liability of the parties by the individual notions of the jurors as to whether the conduct of the parties was right or wrong.

7. An instruction which leaves the jury judges of the law as well as of the facts, and allows them to render a verdict based upon their abstract notions of what is right between man and man, is erroneous. *Lumber Co. v. Gray*, 73 Mich. 356.

Error to Osceola. (Judkins, J.) Submitted on briefs October 11, 1889. Decided November 8, 1889.

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

George S. Steere, for appellants, contended:

1. In cases of fraud great latitude is allowed in the introduction of evidence, and no definite or fixed rule can be laid down, as to do so would, in many cases, be laying down rules for the guidance of parties about to perpetrate frauds; much must be left to the discretion of the trial judge; citing *Jacobson v. Metzger*, 35 Mich. 103; *Gutsch v. Pittsley*, 51 Id. 566; *Ross v. Miner*, 67 Id. 410.

2. This mortgage was claimed to be fraudulent, and all that was said or done between the parties at and before the time of the agreement was competent; citing *Angell v. Pickard*, 61 Mich. 561, 570; and, as to the general history of the transaction, subsequent as well as previous, see *Ross v. Miner*, 64 Mich. 204.

3. It is not easy to draw the precise line separating those circumstances which are fairly admissible from those which ought to be excluded. The true test is whether the fact can throw light upon the transaction, or is altogether irrelevant; citing *Zerbe v. Miller*, 16 Penn. St. 488; *Heath v. Page*, 63 Id. 208; *Blue v. Pennington*, 27 Mo. 272; *Wright v. Linn*, 16 Tex. 34; *Cooke v. Cooke*, 43 Md. 522; Bump, Fraud. Conv. 579.

4. In so far as the value of Edgett's interest in the land in question was material, the value at the time the mortgage was given was the true inquiry, and not at some subsequent time; citing *Oppenheimer v. Halff*, 68 Tex. 409.

5. A charge that has no testimony to support the theory upon which it is based is erroneous; citing *Dodge v. Brown*, 22 Mich. 446, 453; *Leslie v. Smith*, 32 Id. 64–67; *Hunt v. Strew*, 33 Id. 85, 91; *Byles v. Golden Tp.*, 52 Id. 612; *Folkerts v. Standish*, 55 Id. 463; *Hudnut v. Gardner*, 59 Id. 341; *Hewitt v. Railroad Co.*, 67 Id. 61.

6 Where creditors attach mortgaged property, in defiance of the mortgage, evidence that it was a *bona fide* security for actual indebtedness at the time of the attachment, will entitle the mortgagee to recover in replevin for the property; citing *Norris v. McCanna*, 29 Fed. Rep. 757; and, to the effect that such an attachment is a conversion as against the mortgagee, see *Rand v. Barrett*, 66 Iowa, 731; and no demand is required before bringing replevin for the property; citing *Adams v. Wood*, 51 Mich. 411.

7. In trover by a mortgagee against judgment creditors who have sold the property on execution, evidence is admissible of an arrangement between the plaintiff and the mortgagor, made after such levy, giving plaintiff the right to immediate possession; citing *Ganong v. Green*, 71 Mich. 1.

8. A mortgage is not fraudulent for including contemplated advances, and a charge to this effect should have been squarely submitted to the jury; citing *Newkirk v. Newkirk*, 56 Mich. 525.

N. O. Griswold, for defendant, contended:

1. Evidence of the value of the land, and of the claim of Edgett as to its value, was admissible; citing *Stone v. Covell*, 29 Mich. 359.

2. No exceptions were taken, and error is assigned under Act No. 101, Laws of 1885, in which case rule 12 requiring assignments of error to be specific should be strictly adhered to. In this case we have no exception or reason given by counsel for his objection, or to explain his position; citing *Baylis v. Stout*, 49 Mich. 217.

CHAMPLIN, J. Alonzo M. Shank, as sheriff of Osceola county, seized certain chattels by virtue of a writ of attachment sued out of the circuit court of that county in favor of Daniel M. Gardner, against the goods, chattels, lands, and tenements of John R. Edgett. The writ was tested on February 4, 1887, and was served on the 11th of that month.

On November 3, 1886, John R. Edgett executed a mortgage to Frank D. and George S. Hyde, under the name of "Hyde Bros.;" which was duly filed on November 6, 1886. The mortgage recited that Edgett was justly indebted to Hyde Bros. in the sum of $2,000, and that he expected to receive other and additional moneys, notes, and indorsements from them, from time to time, during the continuance of the mortgage; and, as the indebtedness of Edgett to them was liable to change in amount and time of payment, and as he had agreed that the payment of the existing indebtedness of Edgett to Hyde Bros., and also the payment of other indebtedness for moneys, notes, and indorsements to be furnished and given to Edgett by them should be secured, therefore the party of the first part agreed to pay the parties of the second part the sum of $2,000, on or before one year from the date thereof, with interest at 10 per cent., payable annually, until paid; and that Edgett would pay to them such bills, notes, advances, and indemnify from such indorsements, as should be made, at such time and times as they should thereafter be due, with interest at the rate of 10 per cent., payable annually, until paid. And, in pursuance of such agreement, the said party of the first part granted and sold to the party of the second part certain goods and chattels particularly described in said chattel mortgage. The mortgage was so written as to cover after-acquired property.

It was conditioned that Edgett should pay the sum of

$2,000 at the time and manner therein set forth, and the interest, and also pay, or cause to be paid, all bills, notes, and accounts thereafter made by Edgett to Hyde Bros., and indemnify them for all indorsements and accommodation paper furnished by them to him during the continuance of the agreement, as the same became due, respectively. The mortgage contained a clause relative to insurance; and it was expressly agreed that, should Edgett neglect to insure, or should he make default in the payment of any of said bills, notes, indorsements, accounts, or indebtedness on any day whereon the same became due and payable, and remain unpaid and in arrear for the period of 30 days, then and from thenceforth, in any one of such events, the entire amount secured by the mortgage should, at the option of Hyde Bros., be due and payable immediately thereafter.

It was further agreed by the terms of the mortgage that in case default was made in the payment of the said several sums of money or interest, or any part thereof, at the time the same should become due, or in case the whole amount should be declared due by reason of any default therein contained, or in case of sale, etc., by Edgett without written consent, in either event, Hyde Bros. were licensed and authorized to take possession and sell at private sale or public auction.

Edgett at the time was engaged in the manufacture of shingles, and Hyde Bros. were purchasers of the cut of the mill, under certain contracts under which they claim to have made advances. The mortgage covered the entire plant for manufacturing shingles, including boiler, engine, shingle-machines, shaftings, horses, oxen, trucks, etc. A further proviso was contained in the mortgage, as follows:

"Provided, always, that in default in, or the violation of, one or more of the covenants or agreements herein

contained, the said party of the first part, his executors, administrators, or assigns, may possess, use, and enjoy, in the usual and regular manner appertaining to such mill business, without any disturbance or interference by the said parties of the second part, their executors, administrators, or assigns, all the goods, chattels, and personal property in this indenture mentioned, including all which may be added, after-acquired, or substituted; and it is further agreed that, in case of any auction sale by reason of the power of sale contained in this indenture, the said parties of the second part, their executors, administrators, or assigns, shall have full power and authority, and be at liberty, to bid on and buy in for themselves the whole, or any part, of the property so offered for sale, the same as any other bidder might do."

Gardner claimed that the mortgage was absolutely void as to the creditors of Edgett, and levied his attachment upon that theory. After the attachment was levied, Hyde Bros. and Edgett looked over their accounts, and had, at least, a partial settlement, and found a balance due from Edgett to Hyde Bros., and it was then agreed that Hyde Bros. might treat the whole amount as due under the mortgage; and they claim that the whole debt, on or about February 1, 1887, was about $1,200.

Upon the trial of issues involving fraud, a pretty large latitude of inquiry is permitted; and all facts and circumstances tending to throw light upon the transaction between the parties alleged to have been implicated are allowed to be given in evidence. We do not think the court erred in permitting the testimony to be introduced upon which error is assigned. What Edgett claimed the property was worth which he transferred to Hyde Bros., and its actual value, were proper subjects of inquiry, as affecting the question of the intent of the parties.

The remaining assignments of error are directed to the charge of the court. The fifth and sixth assignments are considered together in the brief of plaintiffs' counsel.

We see no error in this part of the charge, and it is unnecessary to repeat it.

The seventh assignment is as follows:

"The court erred in instructing the jury in said case as follows: 'Now, in regard to this question of fraud, gentlemen, the mere fact that the mortgage upon its face was taken for more than there was due is not conclusive proof of fraud; it is a mere circumstance tending in that direction, for what it is worth. If a man gives a mortgage for a little more than there is due, it is very unimportant, as a general rule, but, if he gives the same for a large amount more than there is due, it is a badge of fraud, as the authorities say; and it is a circumstance tending to show that it was not given in good faith, but it is not conclusive.'"

It is urged, in support of this assignment of error, that the court should have charged that the mortgage would not be fraudulent for contemplating future advances. But the learned judge covered this objection in the following portion of his charge, namely:

"If you find it to be true; if that mortgage was given in good faith, to secure an honest indebtedness at the time,—it would secure it as between all the parties to this contention, and it would also secure them in subsequent indorsements, bills, notes, and advances made by them for the benefit of Edgett coming within the contemplation of the paper; and if, 30 days before this suit was commenced, they had made notes, bills, and advances, and they were due and payable, and not paid 30 days before the suit was commenced in this case, the plaintiffs are entitled to recover."

And, again, he instructed them at the very close of the paragraph excepted to that the fact was open to explanation at the hands of the party claiming under it; and—

"You have heard the explanation of the parties; and, if you believe that the plaintiffs' theory is true; that the mortgage was given in good faith, to secure a present indebtedness, and to secure this further indebtedness, and

the future indebtedness, if there was any, became due 30 days before this suit was commenced,—then the plaintiffs are entitled to recover at your hands; otherwise, not."

And he further charged them, as requested by the plaintiffs' counsel, as follows:

"There has been something said to the effect that this mortgage was fraudulent. Now, gentlemen, while it is a badge of fraud to give a mortgage for more than is due, a mortgage is not fraudulent for including future advances."

The court, in the instruction given to the jury, ignored the testimony introduced by the plaintiffs tending to prove that before the writ of replevin was issued it was agreed between the plaintiffs and Edgett, the mortgagor, that they might take immediate possession of the chattels covered by the mortgage. On the contrary, he charged the jury that the plaintiffs could not recover unless some, at least, of the indebtedness secured by it had become due 30 days before the replevin suit was commenced. This was error. The point was directly ruled upon in *Ganong v. Green*, 71 Mich. 1 (38 N. W. Rep. 661). The provision in the mortgage as to the mortgagor's retaining possession was for the benefit of the mortgagor, and it was competent for him to waive it at any time. Such waiver did not in any manner affect the attaching creditor's rights; for, if he regarded the mortgage as valid, he should have levied subject to the rights of the mortgagee, which were to have the mortgaged property subjected to the payment of the amount due him, and, if he regarded it as void, such waiver would not have affected his rights; for, if he should succeed in showing that the mortgage was void in its inception, the agreement as to possession would not affect that question.

Exception, however, is taken to the concluding portion of the charge, which was as follows:

"The whole sum and substance of all that talk is this: If that mortgage was made in good faith, and was due, by its terms, when these parties took possession of it from the sheriff, they have the right to recover at your hands; and otherwise, not. And the burden upon them is to show that it was due and operative in such a sense as would justify them in taking it from the sheriff upon the ground that it gave them the right to the property. That is all there is to the case. There is no law involved in this case that amounts to anything. It is simply a question of fact; and it will be for you to say, under your oaths, which side is in the right. Look it all over carefully and honestly; and, if you believe this mortgage was all right, and was due, find for these plaintiffs six cents damages. If you are satisfied that it was not due, or was fraudulent, or was satisfied, find for the defendant six cents damages. Take into consideration all the dealings of these parties; all the evidence one way and another; the arguments of counsel, and everything in the case—and do what is right between man and man. That is all that I care to say to you."

We think that the instruction to the jury that there was no law involved in the case that amounted to anything was erroneous. The court had given five instructions as to the law of the case, asked for by plaintiffs' counsel, in the very words of the requests, besides his own instructions previously given; and the questions in dispute involved both law and facts; and the law should not, in effect, have been withdrawn from the jury.

The instruction that the jury should find which side is in the right was too general. It allowed the jury to enter the domain of morals, and measure the liabilities of the parties by the individual notions of the jurors as to whether the conduct of the parties was right or wrong. The instruction also repeated the error above mentioned, relative to the account or paper being due, by the terms of the instrument, 30 days before the commencement of suit.

The concluding portion of the charge was especially

objectionable. It called particular attention of the jury to a consideration of the dealing of the parties, the arguments of counsel, and everything in the case; and then to do what is right between man and man. Here the court fails to call attention of the jury to the law of the case, but leaves them to consider the arguments of counsel; whereas the jury should have been instructed to confine their consideration to the testimony introduced in the case, and ascertain what facts are proved; and to apply the law, as given by the court, to such facts, and to find a verdict in accordance therewith. As the instruction was given, it left the jury to be judges of the law as well as facts, and to render a verdict upon their abstract notions of what is right between man and man. This we have said was error, in the case of *Roby Lumber Co. v. Gray*, 73 Mich. 356 (41 N. W. Rep. 420).

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

The other Justices concurred.

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s43NW 893;
d130 2412;

ALICE F. BENNETT v. EDWARD C. CHAPIN.

Will—Construction—Restraints upon alienation—Administrator with the will annexed—Extent of powers.

1. In this case it is held that the complainant is the only person interested in the land devised to her in the will sought to be construed, and that the condition in said will in restraint of alienation is void.
2. The following propositions are summarized from the opinion of Mr. Justice LONG, in which MORSE, J., concurred:

a—A clause in a will stating that the testatrix desires a sale of the realty devised if the executors named therein shall at any time find such a sale necessary, or for the best interest of the estate, implies a personal confidence and trust in the judgment and honesty of the parties named as executors, and she cannot be said to have intended to confer such discretionary power upon any one whom the probate court might appoint, should the persons named fail to qualify, or refuse the trust.

b—An administrator *de bonis non* with the will annexed does not execute the powers and duties which lie outside the ordinary scope of an executor's functions, unless, by the terms of the will, such authority is clearly granted. Schouler, Ex'rs, § 413; Redf. Wills, pt. 2, 90, 222; *Ingle v. Jones*, 9 Wall. 486.

c—The powers conferred upon an administrator with the will annexed by How. Stat. § 5844, are only such as can be exercised by the executor as such, and a personal power or trust which might be exercised or performed by an executor independently of his office will not pass by devolution to the administrator. *Conklin v. Egerton*, 21 Wend. 430; *Ross v. Barclay*, 18 Penn. St. 179; *Evans v. Chew*, 71 Id. 47.

d—When a bare power of sale is given to executors merely to sell lands for the purpose of paying over the proceeds to devisees whose right under the will thereto is absolute and vested, such devisees may collectively, before the exercise of the power of sale, elect to take the land instead of such proceeds, and thus prevent a sale.

e—It is true that many restrictions or qualifications upon the rights of devisees or grantees may be made effectual by making the sale itself dependent upon such conditions; but where the estate granted is absolute, such restrictions can impose no legal obligation upon the devisees, or limit their power over the estate, when the observance or violation of the restrictions can neither promote nor prejudice any interest but their own. *Mandlebaum v. McDonell*, 29 Mich. 87; *Hall v. Tufts*, 18 Pick. 459.

f—When a restriction in a conveyance of a vested estate in fee-simple, in possession or remainder, is against selling for a particular time, such a restriction is invalid. When a person is entitled absolutely to property, any provision postponing its transfer or payment to him is void.

3. Mr. Justice CHAMPLIN concurred with LONG, J., upon the ground that the will sought to be construed is void as contravening How. Stat. § 5531.

4. CAMPBELL, J., and SHERWOOD, C. J., concurred in the *result*, holding that, inasmuch as complainant is the only person

interested in the devised land, the other questions are not important.

Appeal from Ingham. (Peck, J.) Submitted on briefs October 11, 1889. Decided November 8, 1889.

Bill filed to obtain construction of a will. Complainant appeals. Decree dismissing bill set aside, and decree entered in accordance with opinion, in which the facts are stated.

Frank E. Robson, for complainant.

Jay P. Lee, for defendant.

LONG, J. The complainant, who is now about 31 years of age, is the only child and heir at law of Eliza J. Bennett, deceased, who departed this life in September, 1879, leaving a last will and testament. The main provisions of the will are as follows:

"I, Eliza J. Bennett, of the city of Lansing, county of Ingham, and State of Michigan, do make and publish this my last will and testament.

"*First,* I direct that my executors shall, during the minority of my daughter, Alice Florence, provide for her education, clothing, and maintenance in a suitable manner, and that they shall thereafter pay to her the sum of one thousand dollars per annum until she shall have attained the age of thirty-five years: *Provided,* That, in case she shall receive any funds from any other source at any time, my executors shall pay to her only such sum as may be necessary to make her total annual income one thousand dollars: *Provided, further,* That, if any portion of said yearly allowance shall not be expended within any one year, for the purposes aforesaid, the difference between the sum actually expended in such year and the sum of one thousand dollars shall in no case nor in any event be subject to the order or control of my said daughter, but any such sum shall be treated in the same manner as any other funds that may remain in the hands of my executor.

"*Second,* If the executors shall at any time find it necessary, or shall deem it for the best interest of my estate, to sell any of the realty, I desire sale to be made in the following order: First, my property at Grand Ledge, Michigan; second, lot No. ten (10), block sixty-six (66), in the city of Lansing; third, the south-east quarter of the south-east quarter of section thirty-six (36), in the township of De Witt, Michigan; fourth, lots two and three (2 & 3), of block sixty-seven (67), in the city of Lansing. And in no case shall said last-named lots be sold before my said daughter shall attain the age of 35 years, unless she shall become incompetent, from any cause, to earn a livelihood, and in no event for less than the sum of fifteen thousand dollars, by my executors.

"*Third,* My estate shall remain in the hands of my executors until my said daughter shall attain the age of thirty-five years, and whatever surplus there may be from year to year, after the payment of said thousand dollars, together with the taxes and other liabilities of said estate, shall be by them invested in first-mortgage securities on well-improved farming lands.

"*Fourth,* If my said daughter, Alice, shall live to attain the age of thirty-five years I direct that my executors shall then transfer to her absolutely my entire estate, both real and personal.

"*Fifth,* If my said daughter, Alice, shall die before attaining the age of thirty-five years, leaving no lawful issue, or, leaving lawful issue, such issue die, I give my entire estate to my well beloved husband, Jacob B. Bennett, if he survive her or her issue as aforesaid.

"*Sixth,* If my said daughter, Alice, shall die before attaining the age of thirty-five years, leaving lawful issue, such issue shall take said property at the time my said daughter should have taken it had she lived.

"*Seventh,* I do hereby constitute and appoint Jacob B. Bennett and Schuyler F. Seager, of the city of Lansing aforesaid, executors of this my last will and testament."

This will was duly executed on May 30, 1876. Afterwards, and on July 19, 1879, the testatrix added the following codicil:

"1. I don't wish the property on Washington avenue

sold until such time as it will bring not less than one hundred dollars per foot front.

"2. It is my wish that my daughter, Alice, should have such preparation as would enable her in any reverses of fortune to support herself by her own exertions. I therefore direct my executors to set apart from my estate a sum sufficient to give her a thorough course of kindergarten training; the money necessary for that purpose to be by them realized from the sale of properties other than the Washington-avenue lots."

This will and codicil were duly proved and allowed in the probate court for Ingham county on December 5, 1881.

Jacob B. Bennett, one of the executors named in the will, is the father of the complainant, but he and Mr. Seager, the other executor, are now both deceased. At the time of the probate of the will both executors refused to accept the trust, and thereupon the complainant was appointed administratrix with the will annexed, accepted the trust, and gave the requisite bond. She continued to execute the trust until November 16, 1888, when she filed her resignation with her final account in the probate court, and was duly released and discharged, and the defendant, Edward C. Chapin, duly appointed administrator *de bonis non* with the will annexed, and now continues to execute the trust.

The complainant claims by her bill that up to about the month of September, 1884, she has heretofore been able to support herself by her own exertions, and by means derived from sources outside of said estate, and a small sum from said estate, to wit, the sum of $589.19, but that since said time, and for the year last past, she has been in ill health, and unable to earn her own support, and has been obliged at times to appeal to the kindness of friends for support and assistance, so that at the present time she is indebted in personal obligations

to friends that have assisted her in about the sum of $1,500, and further says that the major portion of said indebtedness was incurred in fitting herself for the position of a teacher of kindergarten, and that she so fitted herself for such work, and has a portion of the time been able to pursue such employment, but, owing to her ill health, is no longer able to do such work; and further says that she no longer has any source of income from outside sources, and is wholly unable to support herself by her own exertions.

That, under and by the terms of the first paragraph of said last will and testament, she is entitled to have paid to her from said estate, as she believes, the sum of $1,000 per annum until she shall have attained the age of 35 years, or such sum as with any funds or support received from outside sources will make her annual income $1,000; that there is no personalty belonging to said estate other than a small sum, not exceeding the sum of $250 per annum, arising from the rents of certain of the real estate mentioned in said last will and testament and codicil of said deceased, which said sum is not sufficient to meet the items of insurance and the taxes on said property.

That of the real estate described in the second paragraph of the last will and testament of said deceased, the Grand Ledge property and lot No. 10, of block 66, of the city of Lansing, were disposed of by said testatrix in her life-time, thus leaving as the real estate belonging to said estate the south-east quarter of the south-east quarter of section 36 of De Witt township, in the county of Clinton, and lots 2 and 3 of block 67, in the city of Lansing; and says that said 40 acres in the township of De Witt are worth, as she is informed and believes, not to exceed the sum of $40, being wholly swampy and marsh, and covered with water the greater part of each year, lying in

what is known as the "Big Marsh," in the said county of Clinton; that lots 2 and 3 of block 67 of the city of Lansing are located on Washington avenue in said city, and near the business portion of said city, and are worth about the sum of $10,000; that she has at various times requested the defendant, as such administrator, to pay her the sum of $1,000, or such portion thereof as is necessary for her support, which defendant refuses to do.

The prayer of the bill is that the will may be construed and the rights of complainant and others thereunder may be determined and settled; that the powers and duties of the administrator *de bonis non* may be determined and he decreed to pay over to complainant a sum sufficient to pay her debts incurred in her support, and in educating and fitting her for a teacher of kindergarten, and such further sums from time to time as shall make her income the sum of $1,000 per annum; and, if it shall appear that he has not sufficient funds wherewith to meet such payments, that he shall be directed to sell real estate as shall be necessary therefor. The bill also contains the general prayer for relief.

The main facts stated in the bill are admitted by the answer, and the testimony of the complainant, which was taken in the cause, also supports the allegation of the bill. It is admitted that the complainant has only received from her mother's estate for her support the sum of $589.19; also that the lots on Washington avenue, described in the will, have a frontage of ten rods, and that the complainant is the sole heir of Jacob B. and Eliza J. Bennett.

On the hearing in the court below the court dismissed the bill, with costs. Complainant appeals.

It is conceded that a power of sale was conferred upon the executors named in the will; that this power was general as to all the real estate, and limited only by the

condition as to the price to be obtained for the Washington-avenue lots. It is contended, however, that this power is a personal one, conferred upon the husband of the testatrix and Schuyler F. Seager, the executors named in the will. In this contention there can be no doubt that counsel is correct. The language of the will is:

"If the executors shall at any time find it necessary, or shall deem it for the best interest of my estate, * * * I desire sale to be made," etc.

This language implies a personal confidence and trust in the judgment and honesty of the parties named, and it cannot be said that the testatrix intended by this provision to confer such discretionary power upon any one whom the probate court might appoint, should the persons named fail to qualify, or refuse to accept the trust. The administrator *de bonis non* with the will annexed does not execute the powers and duties which lie outside the ordinary scope of an executor's functions unless, by the terms of the will, such authority is clearly granted. Schouler, Ex'rs, § 413; Redf. Wills, pt. 2, pp. 90, 222; *Ingle v. Jones*, 9 Wall. 486.

Neither do we think such power is given to the administrator *de bonis non* by the provisions of section 5844, How. Stat., under circumstances where it clearly appears that the power is a personal one to the executors named in the will. This section provides:

"When all the executors appointed in any will shall not be authorized, according to the provisions of this chapter, to act as such, such as are authorized shall have the same authority to perform every act, and discharge every trust, required and allowed by the will, and their acts shall be as valid and effectual for every purpose as if all were authorized, and should act together; and administrators with the will annexed shall have the same authority to perform every act, and discharge every trust, as the executor named in the will would have had, and

their acts shall be as valid and effectual for every purpose."

The powers conferred by this section of the statute upon the administrator *de bonis non* with the will annexed are such only as can be exercised by the executor as such, and a personal power or trust which might be exercised or performed by an executor independently of his office as executor will not pass by devolution to the administrator. *Conklin v. Egerton*, 21 Wend. 430; *Ross v. Barclay*, 18 Penn. St. 179; *Evans v. Chew*, 71 Id. 47.

The will was executed on May 30, 1876, and Mrs. Bennett died in September, 1879. Before her death she had sold and disposed of all the property mentioned in the will except the 40 acres of land in Clinton county and the Washington-avenue lots. These Clinton county lands are of but little value. The only property remaining having any value are the lots in the city of Lansing, which are claimed to be worth the sum of $10,000. After providing for a sale of the property in the second paragraph of the will, and the order of sale, the testatrix proceeds as follows:

"And in no case shall said last-named lots be sold [the Washington-avenue lots] before my said daughter shall attain the age of thirty-five years, unless she shall become incompetent, from any cause, to earn a livelihood, and in no event for less than the sum of fifteen thousand dollars."

The codicil was added to the will on July 19, 1879. In this the testatrix refers again to these lots as follows:

"I don't wish the property on Washington avenue sold until such time as it will bring not less than one hundred dollars per foot front."

Again, in the codicil, the testatrix refers to these Washington-avenue lots. By the codicil she expresses a wish that her daughter may have a course of kinder-

garten training to enable her, in any reverses of fortune, to support herself by her own exertions. Her directions as to the training are as follows:

"I therefore direct my executors to set apart from my estate a sum sufficient to give her a thorough course of kindergarten training; the money necessary for that purpose to be by them realized from the sale of properties other than the Washington-avenue lots."

These Washington-avenue lots, it is conceded, have a frontage of 10 rods, or 165 feet, which, by the provisions of the codicil, were to be sold at the sum of $100 per foot, or at the sum of $16,500. The evidence shows the lots now to be worth only the sum of $10,000. What the lots may possibly be worth at the time the complainant reaches the age of 35 years (four years hence), it is, of course, impossible for any person now to determine. It was evidently the intent of the testatrix to preserve at least this portion of her estate until her daughter should attain the age of 35 years, and that, if then living, she should come into the possession and enjoyment of it. But the executors named in the will were given power to sell even this portion if her daughter should from any cause become incompetent to earn a livelihood, provided the sum of $15,000 could then be obtained therefor, or, under the codicil, the sum of $16,500. These conditions, upon which the executors named were empowered to make sale of these lots, may or may not have been impossible.

From the evidence in the case the contingency has now arisen which was provided for in the will. The daughter has become incompetent to earn a livelihood, but the executors named refused to assume the trust, and they are both now deceased. The power was a personal one to them, and the administrator *de bonis non,* by the terms of the will, cannot exercise it, and the statute itself confers

upon him no such power. Neither can the lots be sold for the price fixed by the testatrix in the will. The claim of the defendant is that, under these circumstances, the lands, known as the Washington-avenue lots, cannot be sold until the complainant arrives at the age of 35 years; that the administrator *de bonis non* cannot be empowered by the probate court to make the sale, and that a court of chancery giving this construction to the will cannot authorize the sale by the administrator; that in fact there is no power vested in the administrator to make sale to relieve the complainant in her distress until she shall attain the age of 35 years. This construction of the will is undoubtedly correct, there being no debts or legacies to be paid; yet, by the prayer of the bill, we are called upon to construe the will, and to determine the rights and interests of the complainant in the premises.

It is made apparent by the will that the complainant was the sole object of the testatrix's care and bounty, aside from her husband, who is now deceased. The executors named had a mere naked power of sale, coupled with no interest whatever in the estate. At the death of the testatrix the estate vested in the complainant in fee, the possession and enjoyment only being delayed until the complainant should arrive at the age of 35 years, and contingent, at her death before arriving at that age, that her father should take, if he survived her, provided complainant left no lawful issue, or, leaving such lawful issue, such issue died. The father is deceased, and the complainant is the only heir at law of the testatrix. There was no devise over, should the complainant die before reaching the age of 35, except to the father, if then living, and, the father being now deceased, no contingency can arise by which the complainant and her lawful heirs could be divested of the estate. Under these circumstances, what rule of law prevents the complainant

taking possession? She has the absolute title in fee, and only waits the arrival of her thirty-fifth birthday to take possession. When she can sell and dispose of the whole estate, why should the administrator control it? There is no one interested in it except the complainant, and at her death the estate would only be cast upon her heirs at law, or the person whom she might designate by will to take after her death.

The terms of the will, it is contended, place restraint upon the alienation. If the lands had been sold by the executors, the complainant, as devisee under the will, would have been entitled to the proceeds. No one but the complainant had a right to insist upon the performance of this trust by the executors, and no one else could complain of the breach. The devise is not made to the executors for the benefit of the devisee, but directly to the devisee. The estate devised is not a conditional one to be forfeited, except by a condition which cannot now happen, or to revert to the heirs of the testator, or go over to others on any condition; nor is it one which is to vest at some future day, but is an absolute vested estate in fee which the complainant is entitled to take in possession at the age of 35 years.

The restraint upon the alienation evidently was made solely for the benefit of the devisee. Why may she not now forego or release its performance? It may be contended that the executors named in the will, had they accepted the trust, and assumed control of the estate, might have insisted on holding the estate in possession until the period when the complainant, by the terms of the will, was to take in possession. This, however, was a mere naked trust, and one personal to the parties named. This trust they refused to accept, and the trustees are now dead. Who can complain if the devisee

now takes in possession and sells and disposes of the entire estate? It is well settled that when a bare power of sale is given to the executors merely to sell the lands for the purpose of paying over the proceeds to devisees whose right under the will to such proceeds is an absolute and vested right, all such devisees may collectively, before the power of sale is exercised, elect to take the land instead of the proceeds, and thus prevent a sale.

But we are satisfied that the restraint upon alienation contained in this will is void. Such restraints are not favored in the law. It is true that many restrictions or qualifications upon the rights of the devisee or grantee may be made effectual by making the estate itself dependent upon such condition; but where the estate granted is absolute, such restriction can impose no legal obligation upon the devisees, or limit their power over the estate, when the observance or violation of the restriction can neither promote nor prejudice any interest but their own. This rule was very fully discussed by this Court in *Mandlebaum v. McDonell,* 29 Mich. 87, and in support of this principle the Court cited *Hall v. Tufts,* 18 Pick. 459; *Bank v. Davis,* 21 Id. 42; *Brandon v. Robinson,* 18 Ves. 429; *Doebler's Appeal,* 64 Penn. St. 9; *Craig v. Wells,* 11 N. Y. 315.

Aside from these reasons, however, we think the restrictions upon the sale cannot be upheld. No such restrictions are valid. When a restriction in a conveyance of a vested estate in fee-simple, in possession or remainder, is against selling for a particular time, such a restriction is invalid. When a person is entitled absolutely to property, any provision postponing its transfer or payment to him is void. Gray, in his rules against Perpetuities, thus states the rule:

"Suppose property is given to trustees in trust to pay

the principal to A. when he reaches thirty. When any other person than A. is interested in the property, when, for instance, there is a gift over to B. if A. dies under thirty, the trustee will retain the property for the benefit of B.; but when no one but A. is interested in the property, when, should he die before thirty, his heirs or representatives would be entitled to it, when, in short, the direction for postponement has been made for A.'s supposed benefit, such direction is void, in pursuance of the general doctrine that it is against public policy to restrain a man in the use or disposition of the property in which no one but himself has any interest."

The principle is generally held to be that all rights of property are alienable, and that a condition or restriction which would suspend all power of alienation for any length of time is inconsistent with the estate granted, and void. The husband of the testatrix died in 1884. There has been no period of time since then in which the complainant did not have the right to the immediate enjoyment of the estate, and to mortgage, sell, or dispose of it as she saw fit, and appropriate the whole proceeds thereof, subject only to the debts of the testatrix, if any there be, and the expenses of administration, as during the life of her father they could, by their joint act, have conveyed it.

The decree of the court below must be set aside, and a decree entered in this Court in accordance with this opinion. No costs will be allowed, as the administrator seems to have acted in good faith and under what he believed to be the true construction of this clause in the will.

MORSE, J., concurred with LONG, J.

CHAMPLIN, J. I concur with Mr. Justice LONG upon the ground that the will is void as contravening section 5531, How. Stat.

CAMPBELL, J. I think that, inasmuch as complainant is the only person interested in the land, the other questions are not important, and I concur in the result.

SHERWOOD, C. J., concurred with CAMPBELL, J.

SOPHIA BALOW v. THE TEUTONIA FARMERS' MUTUAL FIRE INSURANCE COMPANY OF MACOMB AND WAYNE COUNTIES.

Fire insurance—Insurable interest—Vendor's lien.

1. Upon the undisputed facts in this case it is held that the plaintiff had no insurable interest in the insured property at the time it was destroyed by fire, and that a verdict should have been directed for the defendant.
2. A clause in a contract between a grantor and grantee made at the time of the execution of the deed, by which the grantee agrees that whenever he sells the granted premises,—which he agrees to do whenever a fair price can be obtained therefor,—he will pay the grantor $2,000 from the proceeds, if there shall be enough remaining after paying certain incumbrances upon the property, and, if not, that he will pay over to the grantor the residue of said proceeds, creates no more than a personal obligation on his part, in a certain contingency, to pay to the grantor an amount of money which can only be determined in the future, and depending entirely upon the amount he may receive in case of a sale of the property, and is not made a charge upon the land, nor does it create an insurable interest therein in favor of the grantor.
3. A vendor's lien is always in the nature of a mortgage, and must be for some certain amount, known to exist at the time the lien is created.

Error to Wayne. (Reilly, J.) Argued October 10 and 11, 1889. Decided November 8, 1889.

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

James H. Pound, for appellant, contended:

1. It is only the individual property of its members that a mutual fire insurance company can insure, and they must have the legal title thereto, or at least the equitable one; citing How. Stat. § 4247; *Ins. Co. v. Riker*, 10 Mich. 282; and, as tending at least inferentially to support this position, see *Van Buren v. Ins. Co.*, 28 Mich. 398, 400; and, for a case where a barely legal owner was held not entitled to recover, see *Ins. Co. v. Salt & Lumber Co.*, 31 Mich. 346; and, for a case where the right of a merely equitable owner to maintain a suit was denied, see *Ins. Co. v. Davenport*, 37 Mich. 613; *Ins. Co. v. Resh*, 40 Id. 241; and see, also, 4 Wait, Act. & Def. 22, 23; May, Ins. § 75; *Warren v. Ins. Co.*, 31 Iowa, 464.
2. There can be no insurable interest where there is no right in or out of the property, derivable by virtue of a contract relative thereto, which in either case may be lost by the contingency insured against, and an expectation of a grant, trust, or possession, however well founded, is not insurable; citing *Craufurd v. Hunter*, 8 Term R. 13; *Lucena v. Craufurd*, 3 Bos. & P. 75, 5 Id. 270, and 1 Taunt. 324; *Routh v. Thompson*, 11 East, 428; 4 Wait, Act. & Def. 26.

M. B. Breitenbach (*W. B. Jackson,* of counsel), for plaintiff.

SHERWOOD, C. J. The two important questions in this case were—

1. Did the plaintiff have an insurable interest in the property insured at the time the application was made for insurance?
2. If she had, did that interest continue until the time of the fire by which it was destroyed?

The plaintiff claims in her declaration to have been the owner of the property, both when insured and when it was burned.

The general issue was pleaded by defendant's counsel, together with notice that evidence would be given that, if the property was burned, the fire was an incendiary

one, and was started by plaintiff's husband, or some one of her agents; that she knew of the fire, and therefore she is not entitled to recover; and that at the time of taking said insurance she was not the owner of the property, and has never since had an insurable interest therein.

The cause was before Judge Reilly, by a jury, in the Wayne circuit court; and the jury found for the plaintiff.

They also found, in answer to special requests by defendant's counsel submitted to them, that the plaintiff did not herself start the fire that burned the property insured; neither did she know that the fire was started, or about to be started, by her husband, at the time the property was burned. The defendant asks a review of the case in this Court.

The defendant's counsel, after the evidence was closed, asked the court to instruct the jury to return a verdict for his client, under the pleadings and proofs in the case; and the court refused the request. This raises the first question to be considered. Certain evidence appears in the case, undisputed; and, if it is sufficient to dispose of the case, it will be unnecessary to go further with our discussion.

Among the facts upon which there is no dispute upon this record are the following: That the plaintiff became a member of the company, for the purpose of insurance, in April, 1884; that, before effecting the insurance in this case, the plaintiff conveyed by warranty deed the property in question to Ervin Palmer; also made, at the same time, a contract with him, which contains an agreement on the part of Palmer that he will try and sell and dispose of the 80 acres of land, including the insured property, and from the proceeds, provided a certain limit was reached, a portion was to go to the plaintiff; and she further covenanted that the sale, under Palmer's deed,

was not to be construed conditional, in the following words:

"It is hereby distinctly understood and agreed that the sale of said premises is absolute, and nothing herein contained shall be construed to make said sale conditional."

That said insurance was effected October 22, 1884, and the deed to Palmer was made on August 6 preceding, as well as the said contract; that said deed to Palmer was duly recorded in the register's office in Wayne county, among the records of deeds, when the plaintiff took her insurance.

That, the complainant claiming that she had some equitable interest in the property insured, arising under the contract with Palmer, above referred to, and which, she claimed, furnished a proper basis for the insurance she obtained in the defendant company upon the property in question, she and her husband, David Balow, filed a bill of complaint against said Palmer and others on October 8, 1885, to enforce her claimed rights, and praying, among other things, that her said deed to Palmer might be decreed a mortgage, and her rights secured to her as mortgagor of the property, instead of grantor in fee. That said Palmer answered said bill fully, denying the equity of the same; that proofs were taken, and upon which, and the pleadings, the cause was heard in the Wayne circuit court, in chancery; and the circuit judge made a decree therein, dismissing the complainant's bill absolutely, and which is still in force, it never having been appealed from, or in any way modified; which decree was rendered previous to the destruction of the insured property by fire, on April 19, 1886.

It is claimed by counsel for the defendant that these undisputed facts show that the plaintiff, at the time the property burned, had no interest therein which would entitle her to recover; and that the circuit judge should

have given his request to charge as asked. We think the counsel is correct, and the ruling otherwise was error.

The decision made in the chancery case conclusively shows the title to the insured property passed to Palmer by the plaintiff's deed to him. The contract of August 6, 1884, entered into at the time the deed was made to Palmer, contains the following clause:

"In consideration of said deed, and the undertakings herein contained to be performed by said Palmer, it is hereby agreed that said Palmer, whenever he sells said premises,—and he agrees that whenever he can sell said premises for a fair price he will sell the same,—he will pay out of the proceeds of the premises the Miller mortgage, to whomsoever holds the same. And he is to retain in his hands sufficient to pay his said mortgages, and the indebtedness due him from said parties of the first part, or either of them. He is also to pay out of said proceeds all liens, taxes, and other incumbrances on said premises. He is to pay, and said Palmer hereby agrees to pay, to said Sophia Balow, out of the proceeds of said sale, the sum of two thousand ($2,000) dollars, if there shall be enough of said purchase price or proceeds remaining after paying the above amounts, including the mortgages of said Palmer; and, if there shall not be $2,000 remaining of said proceeds after paying said amounts above specified, then said Palmer is to pay to said Sophia Balow what shall remain of said proceeds."

This clause of the contract creates no more than a personal obligation on the part of Palmer, in a certain contingency, to pay to this plaintiff an amount of money which can only be determined in the future; depending entirely upon the amount he may receive in case of sale of the property mentioned in the deed. It may be $1, or $2,000, or none at all. In no way is it, whatever may be the amount, made a charge upon the land, nor does it create an interest therein, in favor of the plaintiff, upon which she could obtain insurance.

It is claimed by plaintiff's counsel that the contract was part of the consideration for the deed to Palmer, and for

what was secured under it to plaintiff; that she had a vendor's lien upon the property sold; and this, coupled with the possession which she held at the time the buildings were burned, gave her an equitable interest in the property, which was insurable. But this proposition cannot be maintained, under the undisputed facts in this case. A vendor's lien is always in the nature of a mortgage. The decree of the court in the chancery suit was to the effect that plaintiff had no such interest, and that she was not entitled to the possession of the property. But, independently of this, a vendor's lien must always be for some certain amount, known to exist at the time the lien is created. In this case, it was not known that any amount would ever become due to the plaintiff from Palmer under the contract by which she claims the lien. Certain it is that no indebtedness to her had been ascertained at the time this suit was brought; neither does the record disclose that any amount has become due to her since. This claim to such lien is therefore unfounded.

We find nothing else in the record needing further consideration; and her claim, as now presented, cannot be maintained.

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

The other Justices concurred.

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HELENA A. FISHER, ADMINISTRATRIX, ETC., v. THE CHICAGO & GRAND TRUNK RAILWAY CO.

Negligence—Master and servant—Risks assumed by servant.

In this case the direction of a verdict for the defendant on the ground that it appeared from the evidence that, whatever risks there were in regard to the employment, they were not concealed, but were open and visible, and known to the deceased, who must be deemed to have accepted and continued in the employment with reference to the same, is held fully justified. *Swoboda v. Ward*, 40 Mich. 423; *Balle v. Leather Co.*, 73 Id. 158; *Kean v. Rolling Mills*, 66 Id. 277; *Melzer v. Car Co.*, 76 Id. 94.

Error to St. Clair. (Canfield, J.) Argued October 17, 1889. Decided November 8, 1889.

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

James L. Coé, for appellant.

E. W. Meddaugh, for defendant.

CHAMPLIN, J. In the summer of 1885 the Chicago & Grand Trunk Railway Company was engaged in building a slip in the waters of the St. Clair river, in the city of Port Huron. This slip was constructed by driving piles in the usual manner; securing them with ties and bolts, and sheeting up the outer side. In prosecuting the work, two pile-drivers were used, and a small scow constructed for the purpose of transporting piles, and for the workmen to stand upon in securing and sheeting up the slip. In the center of this scow was a small derrick, used to assist the workmen in handling the piles. There were

also two small boats used in connection with the work, —one a yawl-boat, and the other a bunty, about 16 or 18 feet in length, 4 feet in width, flat-bottomed, and propelled by sculling from either end. The scow above mentioned was moved from place to place with pike poles in the hands of the workmen.

On the morning of August 4, 1885, one of the pile-drivers was anchored at a point where the workmen were engaged in driving piles, and it lay at right angles to the row of piles, and across the current of the river. There were at this time four men upon the scow, who had been a short distance below, and laden the scow with some square timbers, to be used upon the row of piles above the pile-driver. A short time before 12 o'clock the men were engaged in taking the scow around the rear end of the pile-driver. In doing so, they passed along the lower side of the pile-driver, until the scow projected about half its distance past the rear end, when a line from the pile-driver was made fast to a timber in the forward part of the scow, and two of the men pulled in upon the line, and the third took in the slack; and Fisher, being upon the scow, went back with a pike pole, to push off. The efforts of the men pulling upon the line caused the forward part of the scow to swing towards the rear of the pile-driver; and, as the corner of the driver operated as a fulcrum, the rear end of the scow swung off at the same time. William Powers, who was upon the pile-driver, was the only eye-witness who testified as to the manner in which the accident occurred. His testimony was as follows:

"*Q.* What was he doing?

"*A.* He was shoving this float around the end of the pile-driver. He had a pike pole in his hand; standing on the scow, with the end of the pike pole on the pile-driver. He was on the lower end. There was two or three other gentlemen there.

"*Q.* What caused him to fall in?

"*A.* I think the pike pole slipped,—stuck in the timber and slipped out; and I think he overbalanced himself, and fell in.

"*Q.* What was done to try to rescue him?

"*A.* Well, I went out and threw him a plank. The plank did not reach him; so I jumped in the boat, and went out to get him. Joe Le Bow and I went out."

Mr. Bethune, one of the men who was pulling in the line, heard the cry that Fisher had fallen overboard, and ran around, expecting to pull him up; but by the time he got there Fisher was ten or twelve feet away,—carried down by the stiff current of the river, which was pretty strong there. When he first saw him in the water the pole was under his left arm. The yawl-boat was not at hand, it having been taken, by direction of the foreman, to get some piles which were four or five hundred feet distant. The other small boat was tied in the slip, about 100 feet away, and Powers and Le Bow ran and got into it, and attempted to rescue Mr. Fisher from drowning. They had succeeded in getting within eight or ten feet of him, when he sank from their sight, and was drowned.

Plaintiff was appointed administratrix of his estate, and brought this suit to recover damages from the defendant for his death. It appeared in the testimony, and was not disputed, that Fisher had been in the employment of the Grand Trunk Railway for six or seven years, and had been engaged in the same and similar work as he was at the time he was drowned. That he had worked upon a scow of similar construction, although smaller, and was familiar with the work for which he was employed, and with its exposures and dangers, which, whatever their nature, were open and apparent.

The duty of the defendant towards the deceased, and

the violation of that duty, are alleged in the plaintiff's declaration as follows:

"And plaintiff avers that the location of said slip or landing at the place aforesaid was in a dangerous place for men to work,—one of great hazard, as workmen engaged in the construction of said slip or landing were liable to fall into the said river, and liable, from the nature and character of the work required of such workmen, under the circumstances, to be knocked, brushed, pitched, or tossed into the river and be drowned, unless proper vigilance was kept over the men, and proper appliances were constantly kept on hand to rescue any who might fall or otherwise get into the river, from the nature and dangerous character of the employment; all of which was then and there known to defendant. * * * Yet the said defendant, not regarding its duty in that behalf, and not using due care to keep workmen from falling into the river, while engaged at work on said slip, and not keeping on hand proper appliances to protect and prevent workmen from falling into the river, but were negligent in that behalf, and were also negligent in not keeping on hand the proper boats, floats, or any other means or devices that could be readily used to save from drowning any of the workmen who, while employed in and about said work, might fall and did fall into said river."

And it is further alleged that deceased, while using due care, was, by and through such neglect of duty on the part of defendant, drowned.

At the close of the plaintiff's testimony the court directed a verdict for the defendant, on the ground that from the evidence it appeared that, whatever risks there were in regard to the employment, they were not concealed, but were open and visible, and known to the deceased; and that he must be deemed to have accepted and continued in the employment with reference to those known risks. We think the court was fully justified in so holding. *Swoboda v. Ward*, 40 Mich. 423; *Balle v. Leather Co.*, 73 Id. 158 (41 N. W. Rep. 216); *Kean v. Rolling Mills*, 66 Id. 277 (33 N. W. Rep. 399); *Melzer v.*

Car Co., 76 Id. 94 (42 N. W. Rep. 1078); *Berger v. Railway Co.*, 39 Minn. 78 (38 N. W. Rep. 814); *Woods v. Railway Co.*, Id. 435 (40 N. W. Rep. 510).

Judgment must be affirmed.

The other Justices concurred.

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HARVEY FARRINGTON ET AL. v. BARCLAY SMITH.

Sale—Warranty of quality—Rescission—Delay.

1. No doubt, when goods are bought as corresponding to samples, and so appear, a reasonable delay in examining is proper; but, when it is once ascertained that they are not supposed to conform to the sample, great promptness is required both in examining and in rescinding with as little delay as the usual methods of business will permit.
2. It is the duty of a merchant buying goods by sample to ascertain without any unreasonable delay their quality, and if complaints are made by purchasers to at once investigate them, and make up his mind what he will do, and notify the vendor of such decision. What he may have sold before being led to suspicion will not affirm the purchase for the remainder; but he has no right to thereafter offer the goods for sale, and at the same time repudiate the contract of purchase.

Error to Wayne. (Brevoort, J.) Argued October 18, 1889. Decided November 8, 1889.

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

Frank F. Williams (*Charles K. Latham*, of counsel), for appellants, contended:

1. The question of acceptance or non-acceptance is a question as to what was the intention of the buyer, as signified by his out-

ward acts; citing Benj. Sales, 128; and receipt becomes acceptance if the right of rejection is not exercised within a reasonable time; citing Newmark, Sales, §§ 263, 265; Benj. Sales, § 703.

2. Retention of goods received, without rejection or offer to return, estops the purchaser from all claims of damage, and turns receipt into acceptance; citing Newmark, Sales, §§ 261, 265; *Reed v. Randall*, 29 N. Y. 358; *Weaver v. Wisner*, 51 Barb. 638; *Leavenworth v. Packer*, 52 Id. 132.

James H. Brewster, *John W. A. S. Cullen*, and *James V. D. Willcox*, for defendant.

CAMPBELL, J. In November, 1886, plaintiffs, a tea firm of New York, through Mr. Schuyler, their Detroit agent, received and filled an order from defendant for two kinds of Japan tea, in half chests; five half chests, and 12 boxes of 20 pounds each, of tea billed as Formosa, of four different prices, ranging from 25 to 35 cents a pound; four half chests of Congou, at 22 and 30 cents a pound; and 11 boxes of Congou, of 20 pounds each, at 24 and 32 cents a pound. The whole bill amounted to $359.21, due March 24, 1887. The Japan tea amounted to $84.

The tea was at once shipped, and reached Detroit in a few days. When the draft was drawn for payment at the end of four months, defendant refused to pay it by a letter which stated he had still on hand almost the entire bill; that he had informed plaintiffs' agent twice in regard to the goods, more especially the English breakfast and Oolong, that they did not come up to what they were represented to be; that he had had both English breakfast and Oolong returned as not fit to steep. He asked for advice what to do.

This letter makes no reference to Japan tea, and makes no discrimination among the other kinds at all definite. It makes no offer to pay for anything.

The bill contained a printed notice that all claims for

damages or deduction were to be made immediately after receipt of goods.

On the trial most of the material facts were disputed. Defendant claimed that the order was given on samples which were represented by Schuyler, the agent, to correspond with those in defendant's stock on sale. He also claims that within a very short time after the goods arrived he sold a 20-pound box to one Alexander, and another to one Thom, which were returned as not up to the standard. The testimony is not very definite in identifying these. Defendant sold all the Japan tea without complaint. He says more or less complaint was made about some other tea. He further testifies that, after being fully informed about the complaints of quality, and after he claims to have notified Schuyler of the difficulty, he sold a part of the tea to customers.

Bearing in mind the fact that there were several different grades and prices of each kind of tea, it is noticeable that there is no testimony which fixes how much of each kind was disposed of, and how much remained on hand. Allowing defendant's asserted right to be relieved from paying for all he did not sell, no criterion is furnished for getting at any result. Whatever difficulty may have existed concerning items of sale and items of return, the description of what was left on hand was possible and necessary.

The defendant had the duty laid on him of finding out, with no unreasonable delay, the quality of the teas. As soon as complaints arose it was his duty to investigate at once, and to make up his mind what he would do. He had no right to offer them for sale thereafter, and at the same time repudiate the bargain. What he sold before being led to suspicion would not affirm the purchase for the remainder; but it was his business to make no fur-

ther sales except on his own account, and it was his duty to notify plaintiffs at once of his decision.

We shall not undertake to pass upon disputed facts. It is doubtful, on his own statement, whether he gave notice to Schuyler of a rescission of the purchase, and Schuyler denies it altogether. What may turn up in another trial we shall not anticipate; but, unless the sales made after the alleged repudiation are more fully explained than the record explains them, they are not consistent with such repudiation. The letter of March, 1887, is a practical assertion that the whole purchase was wrong, when the Japan teas had been sold without reserve.

Among other things, the court below told the jury that, if there was a usage or custom of trade not to examine such goods until they are sold to customers, the buyer is not bound to make an examination of the goods at once; but if they are sold in the ordinary course of trade, and then examined, that might be regarded as a reasonable time, and notification within a reasonable time thereafter would be sufficient.

This instruction is not based on any evidence that such a custom existed. No doubt, when goods are bought as corresponding to samples, and so appear, a reasonable delay in examining is proper; but, when it is once ascertained that they are not supposed to conform to sample, great promptness is required both in examining and in rescinding with as little delay as the usual methods of business will permit.

The court also called the attention of the jury more than once to $84 as what defendant had received on sales. That sum was the price of the Japan tea alone, and did not include any other sales. It was defendant's duty to show what tea he had on hand, and of what kinds and prices. This he failed to do, but he did testify to sales

enough allowed at the lowest prices to considerably enlarge the verdict.

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

The other Justices concurred.

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MARY A. COPELAND AND WILLIAM COPELAND v. THE DWELLING-HOUSE INSURANCE COMPANY OF BOSTON, MASS.

Insurance policy — Forfeiture clause — Estoppel — Application for insurance—Evidence.

Where an insurance agent who had authority to make and deliver policies of insurance without referring the applications to the company, prior to such delivery, agreed with an applicant that she might incumber the property in a given amount, and that he would indorse such agreement upon the application, and there is nothing in the policy limiting the power of the agent to make such an agreement, the company is estopped from claiming any forfeiture by reason of such additional incumbrance.

Error to Lapeer. (Moore, J.) Argued October 18, 1889. Decided November 8, 1889.

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

Millis & White, for appellant, contended as stated in the opinion, citing authorities found in foot-note.

Geer & Williams, for plaintiffs, contended for the doctrine stated in the opinion.

LONG, J. This action is brought to recover upon a policy of insurance, issued by defendant company to plaintiffs, on April 15, 1886, for $1,000; $300 of the insurance being upon the barn and sheds, $100 upon the hog-pen, granary, and hen-house, $400 on hay, grain, farming implements, wagons, carriages, etc., and the balance of $200 on live-stock. A premium of $9.50 was paid for the policy to William Murch, defendant's agent at North Branch, Lapeer county.

On the morning of November 17, 1886, the barns, sheds, and a large quantity of hay, farming implements, etc., were consumed by fire. Proofs of loss were thereafter made in due form, and payment of the loss demanded. The defendant company refused payment, and at the time of joining issue in the suit brought on the policy gave notice with its plea:

"1. That the policy mentioned in said declaration was issued by said defendant on the faith of an application therefor, partly in writing, and partly in print, signed 'Mary Copeland, per Wm. Copeland,' in which application it was represented and warranted that the property insured, and for the burning of a portion of which property recovery is sought in this cause, was unincumbered, while in truth and fact the barn mentioned in said declaration and in said policy was incumbered by a certain mortgage, which said mortgage is as follows, to wit: One certain mortgage given by Mary A. Copeland to one John M. Wattles, bearing date September 15, 1885, for the sum of $300, which mortgage remained unpaid at the time of the fire mentioned in said declaration.

"2. That said plaintiff Mary A. Copeland, after the issuing of said policy, and before the fire mentioned in said declaration, did, without the consent of said defendant, further incumber said barn by a mortgage, which last aforesaid mortgage is described as follows, to wit: One certain mortgage given by Mary A. Copeland to one John M. Wattles, bearing date September 15, 1886, for the sum of $100, which last aforesaid mortgage remained unpaid at the time of the fire mentioned in said declaration.

"3. That the burning of the property for the recovery of which this action is brought was procured by the said plaintiff William Copeland."

The only question presented by counsel for the defendant company arises under the second paragraph of the notice attached to the plea. There is no controversy but that Mary A. Copeland, one of the plaintiffs, and the one in whom the title to the real estate was vested upon which the barn and other property destroyed were situated, on September 15, 1886, and after the issue of the policy by defendant's agent, placed a mortgage upon the realty for the sum of $100, running to John M. Wattles, mortgagee, and that said mortgage remained unpaid at the time of the fire. It is this act of which the defendant complains, and which it is claimed violates the policy.

On the trial of the cause plaintiffs claimed that at the time of the making of the application (which was in writing) for the policy, and prior to the time the policy issued, they informed Mr. Murch, the defendant's agent, that they expected to put the mortgage of $100 upon the property in a short time and that he assented thereto. This Mr. Murch denies. The question was submitted to the jury by the court in his general charge. The court directed, if they found that Murch made such an agreement with plaintiff, the company would be bound by it; and the fact that plaintiffs, subsequent to the time of the issuing of the policy, placed the mortgage upon the property without further notice to the company would not invalidate the policy.

It appears that Mr. Murch, the agent of the company, had authority to make and deliver policies of insurance without referring the application to the company prior to the making and delivery of the policy. Before the policy was made he inspected the property, and concedes

that the farm upon which it was situated was worth $2,000. The plaintiffs, it appears, were insured in the Lapeer County Mutual Insurance Company, and the policy therein was in force at the time the application was made in the defendant company. Murch, however, solicited the plaintiffs to change their insurance, and first took the application of the husband, who signed Mary A. Copeland's name thereto, "per William Copeland." The title to the farm was in Mrs. Copeland's name, but the title to the personal property, or some portion of it, was in Mr. Copeland. Murch was fully informed of these matters, and advised the issuing of the policy to them both. A few days after the first application was made by William Copeland, Murch, the agent, called at the house, and there filled out a new application. Mrs. Copeland says:

"I took the application, and looked it over, until it came to the passage where it asked if there was any liens or incumbrances against the property, and the answer was 'No.' I pushed the paper aside. My husband came to me; he says, 'What is wrong with the paper?' I pointed to that passage. He turned to Mr. Murch and says: 'Mr. Murch, explain it to my wife as you did to me,' and he read the passage to him. 'Oh,' he says, 'that means that there isn't incumbrance enough to make the risk hazardous.' He says, 'It don't matter if there is an incumbrance, as long as there is not enough to make the risk hazardous.' I says, 'I object to signing under those circumstances;' and he said he would fix that all right, and I supposed he did. I told him then that John M. Wattles held a mortgage of $300, and my husband spoke up and said that we might want to get some further money,—one or two hundred dollars,—and he said it would be all right, or that he would fix it all right. * * * Before this policy was delivered to me I fully advised him in relation to the mortgage that was to be put upon it, and what I intended to do with it, and we relied upon and accepted that policy, supposing that he would make that indorsement upon the application that we signed. I accepted it upon those terms."

This testimony is fully denied by Mr. Murch, and he claims that there was no such arrangement or understanding; that nothing was said of any incumbrance being on the property, or that any was to be put on. Mrs. Copeland, however, is fully supported by her husband and by Mr. Daniel Draper, who was present when Murch, the agent, was looking the property over, and who says that William Copeland then advised him of the incumbrance, and their desire to put on another mortgage, when Murch said it would be all right.

It is a somewhat curious fact that on the trial the last application was not produced, nor in any manner accounted for. The application signed by William Copeland for his wife was the one produced, and which Murch himself testifies Mary A. Copeland never signed. It was the second application which Mary A. Copeland read over, and which she and her husband say Murch agreed to "fix all right," and upon which Mrs. Copeland says Murch agreed to make the indorsement. Whether it was fixed all right, or whether Murch made such an indorsement upon it, noting the incumbrance then existing, and an agreement for the placing of an additional mortgage of from $100 to $200 upon it, is not shown by the application introduced. Apparently this last application was the one upon which the policy issued, and was the only one defendant was entitled to have in evidence, even under its own testimony. The court, however, admitted in evidence the first application; but, inasmuch as the plaintiffs are not here complaining, we need not discuss this point in the case any further than it may be treated as a circumstance tending strongly to show the correctness of the plaintiffs' claim that such an arrangement was made, and that Murch had full notice of the incumbrance then existing, and agreed to fix the application so that the plaintiffs might place an addi-

tional incumbrance thereon of from $100 to $200, and that he did not regard this as increasing the hazard.

Under the finding of the jury we must consider the case upon the theory that such an arrangement was made, and that Murch agreed not only to fix the application so that it would show the incumbrance then existing, but to write an agreement on the application that would authorize the plaintiffs to put on from $100 to $200 additional. From the fact that this application was withheld on the trial, and the first one produced, a strong inference arises that, had it been produced and exhibited, it would have shown the indorsements claimed by plaintiffs.

Counsel for defendant contend that the court was in error in submitting the case to the jury upon plaintiffs' theory; that the case must be governed by the rule laid down in many cases, that parol agreements or representations, made at the time, or prior to the time, a contract is reduced to writing, cannot be received to add to, vary, or contradict the terms of a written instrument.[1] This is the well-settled rule, but counsel are in error in attempting to apply it to the present case. Even if the rule could be so applied, we must treat the contract as consisting of the application actually made, and which was not produced on the trial, and the policy itself. By the terms of the policy this application was made a part of the contract. The policy provides as follows:

"By the acceptance of this policy the assured covenants that the application herefor shall be and form a part hereof."

The policy provides further, however, that the application shall be treated as a warranty by the assured, and

[1] Counsel cited in support of this contention, *Moore v. Ins. Co.*, 72 Iowa, 414; *Ins. Co. v. Webster*, 69 Ill. 393; *Ins. Co. v. Davenport*, 37 Mich. 609; *Ins. Co. v. Burns*, 5 Ins. L. J. 69 (Ky.).

the company shall not be bound by any act or statement made to or by an agent unless inserted in the contract. There is nothing in the policy limiting the power of the agent to make just such an agreement as claimed by the plaintiffs. It only provides:

"If there is or shall be other prior, concurrent, or subsequent insurance, whether valid or not, on said property, or any part thereof, without the company's consent herein; or if said buildings, or either of them, now are or shall become vacant or unoccupied; or if the hazard shall be increased in any way; or if the property, or any part thereof, shall be sold, conveyed, incumbered by mortgage or otherwise, or any change take place in the title, use, occupation, or possession thereof whatever; or if foreclosure proceedings shall be commenced; or if the interest of the assured in said property, or any part thereof, now is or shall become any other or less than a perfect, legal, and equitable title and ownership, free from all liens whatever, except as stated in writing hereon; or if the buildings, or either of them, stand on leased ground, or land of which the assured has not a perfect title; or if this policy shall be assigned without written consent herein,—then and in every such case this policy shall be absolutely void."

If there was an incumbrance on the property, and the agent had notice of it, and agreed to note the fact on the application, and plaintiffs rested under the belief that it was so noted, there can be no doubt that the company would be estopped from setting up the fact to defeat a recovery upon the policy, even though not actually indorsed thereon, as such notice would be notice to the company.

In *Temmink v. Insurance Co.*, 72 Mich. 388 (40 N. W. Rep. 469), it was held by this Court that where a life insurance agent assumes the responsibility of filling out a blank application, and the applicant, presuming that he had acted honestly, signs it without any knowledge of its contents, a recovery may be had upon the policy, though

certain representations may be materially false. See, also, *Dunbar v. Insurance Co.*, 72 Wis. 492 (40 N. W. Rep. 386); *Insurance Co. v. Pearce*, 39 Kans. 396 (18 Pac. Rep. 291).

Counsel for defendant claim that however this may be in reference to incumbrance already existing on the property, yet if any such arrangement was made, as plaintiffs claimed it was,—one contemplated in the future,—the stipulation or understanding, if it amounted to anything, was an executory contract, intended to form a part of the contract of insurance, and that, this being so, the doctrine cannot be admitted that any part can rest in parol.

The agreement, as claimed by plaintiffs, amounted to more than this. They claimed the right to incumber the property further, and the defendant agreed, through its agent, that they might do so to the amount claimed, and that this should form a part of the writing, and should be indorsed on the application. If it had been so indorsed, no one would claim that the policy would be rendered void when the mortgage was so placed upon it, as the policy and application together formed the contract. The plaintiffs relied upon defendant's agent to write this agreement in the contract, and he agreed to so write it. The agent failing to do this, it is as much a fraud upon the plaintiffs as though he had written a clause in the application without the knowledge of the plaintiffs, making the policy void if such additional incumbrance was placed upon the property. The plaintiffs had a right to rely upon the agreement of the agent to so write the application, and when they took the policy they had a right to assume that the company waived any conditions in the policy inconsistent with their right to further incumber. Parol evidence was certainly competent to

show such an agreement, and it is not a violation of the rule that verbal testimony is not admissible to vary a written contract.

This whole controversy arises out of the forfeiture clause in the policy. The act complained of, which defendant claims forfeited plaintiffs' right of recovery, was one which the company or its agent could have given plaintiffs the right to perform, and, if assented to by the company, would not have worked a forfeiture. The company is now estopped from claiming any forfeiture by reason of this incumbrance. Through their agent they assented to it, and no further notice was required. This principle is sustained in *Brandup v. Insurance Co.*, 27 Minn. 393 (7 N. W. Rep. 165); *Kausal v. Association*, 31 Id. 17 (16 N. W. Rep. 430).

There was no error in the charge as given. If any error was committed by the trial court, it was in permitting the defendant to introduce in evidence an application which it was not pretended one of the plaintiffs ever signed or approved, and upon which it is not claimed the policy issued, and consequently formed no part of the contract. Of this, however, the defendant is not complaining.

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

The other Justices concurred.

BENONI LACHANCE v. THE AUDITOR GENERAL.

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Inquest and burial expenses—On body of non-resident stranger—Allowance of by circuit court final.

1. The Auditor General has no control over the action of the circuit court in allowing the account of a justice of the peace for expenses incurred under How. Stat. § 9593,[1] authorizing such officer to hold an inquest upon the view of the dead body of a stranger, etc., and *mandamus* lies to compel him to draw his warrant upon the State treasury for the account as allowed.
2. The following propositions are summarized from the opinion of Mr. Justice CAMPBELL:

   a—Under the Constitution, none of the powers of the Auditor General are defined as an auditing officer, and under the Constitution he is only empowered to examine and liquidate claims in cases provided for by law. How. Stat. § 274.

   b—The Auditor General is given no appellate power over other auditing bodies; and his duty in regard to allowances lawfully made by the proper bodies or persons is the ministerial duty of issuing the proper warrant.

   c—The auditing of claims against the State is not, and never has been, a proceeding in the nature of a suit. It is an administrative function, performed by the persons to whom the law has entrusted it; and the State imposes such duties where it is supposed they will be properly atttended to.

   d—It is to be taken for granted that the Legislature can protect the State by all necessary safeguards; and neither any State officer nor this Court has been given any power to substitute his or our judgment for that of the auditing authority, acting on matters legally referred to that person or body.

   e—It was not unlawful, which is all we can consider; and it is not, so far as we can judge, usually improper to have thorough medical examination upon an inquest. Its object at common law was to discover whether any occasion existed for criminal proceedings, or whether there is reason to suppose death was not by natural causes.

   f—The statute not only authorizes, but requires, a decent burial, and does not require the dead body of a stranger to be treated with neglect, or buried like a dog, without ceremony.

[1] Amended by Act No. 103, Laws of 1885.

Mandamus. Submitted October 24, 1889. Granted November 8, 1889.

Relator applies for *mandamus* to compel respondent to draw his warrant on the State treasury to pay relator's claim for burial expenses, etc., as allowed by the circuit court, under the statute. The facts are stated in the opinion.

Charles R. Brown & Son, for relator, contended:

1. The case of *Locke v. Wayne Circuit Judge*, 62 Mich. 408, holds that it is the duty of the circuit court to allow claims of the nature made by relator; that the petitioner's affidavit makes a *prima facie* case, and that the judge may require such further proofs as he may deem necessary; all of which was done in this case.

S. V. R. Trowbridge, Attorney General, for respondent, contended:

1. It may be admitted that a statute which should authorize any debt or damages to be adjudged against a person upon purely *ex parte* proceedings, without a pretense of notice, or any provision for defending, would be a violation of the Constitution, and void; citing Cooley, Const. Lim. (5th ed.) 499, 500 (note 1); *Rockwell v. Nearing*, 35 N. Y. 314; *Mason v. Messenger*, 17 Iowa, 270; *Strachan v. Brown*, 39 Mich. 168; *Denison v. Smith*, 33 Id. 158; *Nations v. Johnson*, 24 How. 195.
2. The circuit court, while acting under the statute in question, acts as a court of special and limited jurisdiction, which must appear upon the face of the proceedings; citing same authorities.
3. A glance at the items of this account is sufficient to convince every member of this Court that the claim is an extravagant and unjust one. Twenty dollars for clothes to dress the remains, as well as carriages to carry minister and bearers to officiate at such a funeral service as this appears to have been, are claims so evidently improper that it cannot be the duty of any person who is called upon to look after the rights or interests of the State to allow the same.

CAMPBELL, J. Relator applied to the Auditor General for a warrant on the State treasury for the amount of

his claim as a justice in holding an inquest on the body of a stranger, and for the expenses of burial. The claim was regularly presented to the circuit court, and testimony introduced concerning its items, and the claim presented to the Auditor General is the one audited by the circuit court.

Upon receipt of the claim the Auditor, by his deputy, objected to some of the items as larger than was necessary, and passed some strictures on the circuit court for acting without notifying the State; and in response to the order to show cause why *mandamus* should not issue the same reasons are suggested.[1]

By section 9593 of Howell's Statutes, the justice who holds an inquest upon the view of the dead body of a stranger, and finds and certifies that he was a stranger, not belonging to this State, is required to have the body "decently buried;" and it is declared that—

"The expenses of burial, with the justice's fees, and all the expenses of the inquisition, if any was taken, shall be paid to the justice of the peace from the State treasury; the account of such expenses and fees being first allowed by the circuit court for the county."

Under the Constitution, none of the powers of the Auditor General are defined as an auditing officer, and under the Constitution he is only empowered to examine and liquidate claims in cases provided for by law. How.

[1] The objections referred to are as follows:

1. One day's service to bury body	$3 00
(Objected to because there is another charge of $6.00 for digging grave and burying body.)	
2. Carriages to take minister and bearers out	5 00
(Not considered usual or necessary in such cases.)	
Fees paid minister	2 00
Fees for doctor aiding in medical examination	3 00
(Objected to because there is another charge of $5.00 for medical expert, which is believed to be sufficient.)	
3. Bill of clothes to dress, etc	20 00
(Objected to as not being needed. If anything was necessary, a simple winding sheet would have been sufficient.)	
Total	$33 00

Stat. § 274. He is given no appellate power over other auditing bodies; and his duty in regard to allowances lawfully made by the proper bodies or persons is the ministerial duty of issuing the proper warrant.

The auditing of claims against the State is not, and never has been, a proceeding in the nature of a suit. It is an administrative function, performed by the persons to whom the law has intrusted it; and the State imposes such duties where it is supposed they will be properly attended to. In a very large number of cases the courts and other auditing bodies would have their business greatly impeded, and witnesses would be put to oppressive delay and trouble, if a contest of litigious nature should be required before hearing and allowance. The laws have from the earliest period placed the allowance of local services in the control of some local body or officer, and the circuit courts have been selected for this in many cases. One object of such selection is to secure the best judgment of persons located where the facts and witnesses can be best considered, and who are assumed capable and likely to apply a legal scrutiny. It is to be taken for granted that the Legislature can protect the State by all necessary safeguards; and neither any State officer nor this Court has been given any power to substitute his or our judgment for that of the auditing authority, acting on matters legally referred to that person or body.

In the present case the claim was presented and heard by the tribunal appointed by law to pass upon it, and the items allowed are the result of that hearing. All of them are such as relate to the inquest or burial; and they, except for fees allowed by law, are for moneys expended by relator in the discharge of his duty. The circuit court was in a better position than either respondent or this Court can be to know whether they were more liberal than was desirable. But, however this may

be, they were actually incurred; and that court approved them, and is not, when so acting, subject to our criticism. If any further restrictions are required, the Legislature can provide them. There is no more legal reason to assume the circuit court will not do its duty than that any other officer or court will do so.

It was not unlawful, which is all we can consider; and it is not, so far as we can judge, usually improper to have thorough medical examinations upon an inquest. Its object at common law was to discover whether any occasion existed for criminal proceedings, or whether there is reason to suppose death was not by natural causes. There is nothing in this account indicating that the inquest was not properly and judiciously conducted.

The statute, also, not only authorizes, but requires, a decent burial, and does not require the dead body of a stranger to be treated with neglect, or buried like a dog, without ceremony. What was honestly done by the justice, and approved by the circuit judge, who sits in the vicinity, and has every means of judgment, is not outside of the discretion given by law, and is not open to review.

The Auditor General seems to have acted in a proper desire to have it determined how far his duties extend. He is not responsible for the law, and he has no control over its administration by the circuit courts.

The *mandamus* must be allowed, with the costs of this Court, according to law, payable out of the treasury.

The other Justices concurred.

The People v. James H. Harris.

Criminal law—Larceny—Value of property—Charge to jury.

1. The testimony of the owner, in a prosecution for the larceny of a cow, that he paid $50 for her a short time before she was stolen, and of a man then employed by the respondent, and who assisted him in trying to make a sale of the cow, that respondent told him to ask $30 or $40 for her, is sufficient to go to the jury upon the question of the value of the animal, and that it was in excess of $25.
2. An instruction in a larceny case, which in substance informs the jury that the respondent is charged with feloniously stealing, taking, and carrying away a cow, the property of another, and from his possession, of the value of $50, sufficiently describes and defines the charge made in the information, and states what acts are necessary to be done, and with what intent, to constitute the crime of larceny.
3. Where on the trial of a larceny case there is no testimony tending to show that the property is worth less than $30, it is unnecessary to instruct the jury that stealing property worth less than $25 will not constitute the offense charged.
4. A statement in a charge in a larceny case, made after the court had impressed upon the jury the gravity of the offense, and the care they should exercise in their deliberations, that the judge might take it upon himself to discharge the respondent, with which, however, the jury had nothing to do, is an unfortunate one, and is liable to provoke indifference in a proper discharge of the duty of the jury, prejudicial to respondent, and, as the court cannot certainly know but that such was the result, a new trial should be granted.

Error to Wayne. (Brevoort, J.) Argued October 24, 1889. Decided November 8, 1889.

Respondent was convicted of larceny, and sentenced to 18 months' imprisonment. Reversed, and new trial granted. The facts are stated in the opinion.

Peter E. Park, for respondent.

S. V. R. Trowbridge, Attorney General, and *James V. D. Willcox,* Prosecuting Attorney, for the people.

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

SHERWOOD, C. J. The respondent was informed against in the Wayne circuit court in two counts. The first count charges him with the larceny of a cow of the value of $50, and in the second he is charged with receiving the stolen property, knowing it to have been stolen. On the trial the respondent was convicted upon the first count, and sentenced to imprisonment for 18 months. The charge of the court only is complained of in this Court.

It is claimed the court should have charged the jury that there was no sufficient evidence of the value of the property, or that it was worth more than $25. The owner of the cow was sworn, and testified that but a short time before she was stolen he paid $50 for her; and at the time the respondent was trying to sell the cow he told the man who was in his employ, and assisting him in making the sale, to ask $30 or $40 for her. We think this was sufficient to go to the jury upon that point.

Respondent's counsel excepts to the charge because it does not sufficiently describe and define the charge made in the information, or state what acts are necessary to be done, and with what intent, to constitute the crime of larceny, and of which the defendant was found guilty.

It is difficult to conceive of a jury selected from the citizens of Detroit, under the statute prescribing the manner of selecting them in Wayne county, so ignorant as not to understand, when told by a court that the information charges the respondent with feloniously stealing, taking, and carrying away a cow, the property of another

and from his possession, of the value of $50, that such facts constituted the crime of larceny. This is in substance what the judge did tell the jury in this case, and it was sufficient upon that point.

There was no testimony in the case showing the property worth, or tending to show it worth, less than $30, so that it was unnecessary to tell the jury that stealing property worth a less amount than $25 would not constitute the offense charged.

No requests were made to the court to charge by respondent's counsel, nor were any special findings asked or made.

The portion of the charge most complained of, however, is that wherein the court, after he had impressed upon the jury the gravity of the offense, and the care they should exercise in their deliberations, said to the jury:

"I may take it upon myself to discharge this man. With that, however, you have nothing to do."

It is claimed that this was seriously prejudicial to the rights of the respondent; that the court really had no intention of so doing, but the statement was of a character well calculated to induce the jury to believe that it was unimportant what verdict they should give, as a new trial or discharge by the court would be the result. This statement in the charge was an unfortunate one. It was liable to provoke indifference in a proper discharge of the duty of the jury, prejudicial to respondent, and we cannot certainly know but that such was the result; and in such case a new trial should always be granted.

The verdict and judgment must therefore be set aside, and another trial awarded.

The other Justices concurred.

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THE PEOPLE v. CHARLES MOYER.

Criminal law—Improper statements to jury—Evidence.

1. A statement by the prosecuting attorney, in opening the trial of a criminal case, that one reason why he was more prejudiced against the respondent is because he has committed perjury in another court, for the purpose of assisting one of his fellow prisoners, and its indorsement by the court's statement, in answer to an objection by respondent's counsel, that "I must say that considerable of that has come under my own notice," are too plainly illegal to need comment, and entitle the respondent to a new trial.

Error to Wayne. (Look, J.) Submitted on briefs October 24, 1889. Decided November 8, 1889.

Respondent was convicted of receiving stolen goods. Conviction reversed, and new trial granted. The facts are stated in the opinion.

Alfred H. McDermott, for respondent.

Edward Minock, Assistant Prosecuting Attorney, for the people.

CAMPBELL, J. Respondent was convicted of receiving stolen goods, and brings the case before us on exceptions. The trial took place nearly two years ago, and the exceptions were settled, under the statute, from the stenographer's minutes, the judge who tried the prisoner being out of office. The Attorney General very justly declined to argue in favor of the proceedings, and they need but brief mention.

At the opening of the trial the prosecuting attorney's assistant, in charge of the prosecution, said to the jury:

"One reason why I am more prejudiced against this man is because he has committed perjury in the recorder's court, for the purpose of assisting one of his fellow prisoners."

Upon objection made to this by defendant's counsel, instead of rebuking it, the court remarked:

"I must say that considerable of that has come under my own notice. I don't see how you are going to deny that."

Further on, during the trial, under pretext of rebuttal, the prosecutor was allowed to bring in the minutes of respondent's testimony on the trial of another person, for an entirely different crime, in the shape of a long and rambling cross-examination upon matters irrelevant to either record, and only allowed through a very wide extension of discretion, as an inquisition into witness' life and doings. It was not of any special account in the main, and was not concerning facts which could be regarded as admissible proof in this case; while, if admissible, it could only have been on the main issue, and not in rebuttal. The purpose was to injuriously assail defendant's general history, and to infer perjury from the conviction of the other prisoner; which, of course, could not be done.

The assertions of the prosecutor and their indorsement by the court are too plainly illegal to need comment. We have had occasion altogether too often to condemn the failure of justice brought about by the reckless conduct of officers whose sworn duty it is to conduct prosecutions legally, and in conformity with settled principles. In some cases, there is some apparent palliation in the excitement of a contested trial, although that does not obviate the mischief. But here the wrong was done in making the opening, and before any testimony was in, and when the prosecutor knew, or should have known,

in advance what his case was to be, as he presented it. Nothing can bring more contempt and suspicion on the administration of justice than the failure of its ministers to respect justice. There seems to have been testimony of a proper sort before the jury; and therefore the prisoner cannot be discharged by our order; but he is entitled to a new trial, the expense and delay of which are due to errors that should have been avoided.

The verdict must be set aside, and a new trial granted.

The other Justices concurred.

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THE PEOPLE v. ALFRED P. SWINEFORD.

State funds — Disbursing agent — Assumpsit — Money had and received — Demand — Estoppel — Negative averments — Burden of proof.

The defendant was appointed by the Governor of Michigan a member of a commission to represent the State at the New Orleans exposition, and to collect materials to be represented there as an exhibit on the part of the State; and as such member received from the Governor a draft for $5,000 sent by the managers of the exposition to be used in furnishing said exhibit, which draft defendant indorsed over to the treasurer of the commission, and $1,000 of said sum was turned over to defendant for the purpose of securing an exhibit from the Upper Peninsula. This $5,000 being deemed insufficient, an additional $10,000 was raised on bonds issued by the commission, the payment of which bonds was provided for by Act No. 33, Laws of 1885, which authorized the Board of State Auditors to audit and allow to the commission said sum, or so much thereof as should be necessary to pay the expenses of said commission, which were to be paid by the Auditor General upon presentation of the proper voucher, and of the said $10,000 in bonds for cancellation. Under this act the treasurer of the commission was allowed for the expenses of the com-

mission $8,934.67. The State, claiming that the defendant had only paid $250 of the $1,000 received from the commission to secure said Upper Peninsula exhibit, demanded the payment of the balance of the money, and on the refusal of the defendant to comply with said demand brought an action of *assumpsit* against him, and recovered a judgment for said $750 and interest, in affirming which the Court hold:

1. The defendant accepted a place on the commission, and acted with it, and cannot now be heard to say that the funds which came into his hands from the commission were not State funds.
2. It is not material whether the $1,000 received by defendant was a part of the $5,000 received from the exposition managers, or of the proceeds of the bonds issued by the commission. It was a part of a general fund belonging to the State, to be used and expended under the direction of a commission appointed by the Governor, and whose acts were afterwards recognized as valid by an act of the Legislature.
3. While it may be true that the Governor had no power or authority to appoint such a commission, the defendant, having accepted the appointment, and acted under it, is estopped from making any such claim, at least after the Legislature has recognized such action, and authorized the payment of the balance of the expenses incurred by the commission.
4. The $5,000 was a gift to the State, to aid it in preparing its exhibits, which the Governor had authority to accept and apply to the purposes for which it was intended; and the legislative act is evidence that the Legislature approved the action of the Governor in the premises.
5. Even if How. Stat. § 309, providing for a settlement with disbursing officers or agents of the State, can be applied to this case, it sufficiently appears that the defendant refused to recognize the State as interested in this fund, and, on joining issue in the case, denied all indebtedness to the State.
6. It appearing that the only person living at the time of the trial who had any knowledge or information as to whether the defendant expended the balance of the $1,000 was the defendant himself; and the declaration charging him with retaining it, and he failing to adduce the requisite counterproof, the trial court was not in error in directing a verdict against him under the general rule that where the means of proving a negative are not within the power of the party alleging it, but all the proof on the subject is within the control of the opposite party, who, if it is not true, can at once disprove it, the law presumes the truth of such negative averment,

from the fact that such party withholds, or does not produce, the required proof.

Error to Marquette. (Grant, J.) Submitted on briefs October 24, 1889. Decided November 8, 1889.

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

A. B. Eldredge (*E. E. Osborn*, of counsel), for appellant, contended as stated in the opinion.

S. V. R. Trowbridge, Attorney General, and *Butterfield & Keeney*, for plaintiff, contended:

1. The defendant is not in a position to question in this case the validity of his own appointment, or the right of the State to recover the moneys held by him and received under it; citing *Mason v. School-dist.*, 34 Mich. 228; *Baldwin v. Potter*, 46 Vt. 407; and it is elementary that an agent, having by virtue of his agency received money, in the absence of the making of any claim against him by any other person, is estopped from questioning the title of his principal; citing *Day v. Southwell*, 3 Wis. 657; *Hancock v. Gomez*, 50 N. Y. 669; *Martin v. Brown*, 55 Id. 186.
2. That the Legislature could have authorized this appointment of commissioners, and given them full power to act as they did in the reception of this money, there is no question; and what they could do in the first instance, they can approve and give effect to by ratification; citing *Weed v. Donovan*, 114 Mass. 183; *State v. Torinus*, 28 Minn. 175; *Watson v. Mercer*, 8 Peters, 88; *Trustees v. McCaughy*, 2 Ohio St. 152; *Lewis v. McElvain*, 16 Ohio, 356; *Thomson v. Lee County*, 3 Wall. 330; *Gibson v. Hibbard*, 13 Mich. 217.
3. Defendant having repudiated the right of the plaintiff to the money, no demand was necessary; citing *Davenport v. Ladd*, 38 Minn. 545; *Bogle v. Gordon*, 39 Kans. 31; *Haas v. Damon*, 9 Iowa, 591; *Moore v. Garner*, 101 N. C. 374.
4. In support of the proposition that, where a defense is peculiarly within the knowledge and power of the defendant, the presumption will be against him if he fails to make the requisite proof, counsel cited *State v. Foster*, 23 N. H. 348; *Riley v. State*, 32 Tex. 763; *Harwich v. Gaunt*, 30 Eng. Law & Eq. 354.

5. Where money is in the hands of one, equitably belonging to another, the latter may recover in *assumpsit* for money had and received; citing *Beardslee v. Horton*, 3 Mich. 562; *Moore v. Mandlebaum*, 8 Id. 434; *Daniels v. Mosher*, 2 Id. 186; *Fiquet v. Allison*, 12 Id. 328; *Catlin v. Birchard*, 13 Id. 110; *Campau v. Shaw*, 15 Id. 236.

LONG, J. The defendant was appointed a United States commissioner at the New Orleans exposition in the years 1884 and 1885. He was also appointed, by the Governor of this State, as one of the commissioners to represent this State at that exposition, and to collect the materials to be represented there as an exhibit on the part of the State.

It appears that the managers of the exposition at New Orleans sent to Governor Begole, then the Governor of the State, their draft for $5,000, for the purpose of being used in getting up and forwarding an exhibit from this State to that exposition. This draft came to Governor Begole; was indorsed by him over to defendant, Swineford, who indorsed it over to Mr. Kanter, the treasurer of the commission appointed by the Governor. This commission consisted of five persons, who were to represent the State at the exposition, and who were charged with the duty of looking after the exhibits from this State, and of raising money for that purpose. One thousand dollars that came from the managers at New Orleans was turned over to the defendant for the purpose of getting up an exhibit from the Upper Peninsula. The money received from the exposition authorities being deemed by the commission entirely inadequate for the making of an exhibit, they applied to the people of the State for aid, and bonds were issued, payable within 30 days after the Legislature of the State should provide money therefor. These bonds were signed by the defendant, as a member of the finance committee

of the commission, and by the other members of that committee, and bear date October 27, 1884. The commission held the letter of Governor Begole, approving the raising the money, and promising to recommend to the Legislature the appropriation of money for the liquidation of the bonds.

The Legislature, at its session in 1885 (Act No. 33, Laws of 1885), passed an act entitled—

"An act to provide for the payment of the expense of the Michigan exhibit at the New Orleans exposition."

This act appropriated $10,000, and authorized the Board of State Auditors to audit and allow to the Michigan commissioners to the New Orleans exposition the sum so appropriated, or so much thereof as might be necessary to pay the expenses of said commission, and the Auditor General was directed to draw his warrant upon the State Treasurer for the amount so audited and allowed, upon the presentation of the proper vouchers, certified by the Board of State Auditors; but provided that, before any such appropriation should be paid, the bonds issued by the commission, which bonds amounted to $10,000, should be presented to the Board of State Auditors for cancellation. This act took immediate effect, and was approved April 1, 1885. On August 26 following, Mr. Kanter, treasurer of the commission, presented to the State Board of Auditors his account for the expenses of the commission, which was allowed at $8,934.67.

There were three exhibits from the Lake Superior district,—the Upper Peninsula. Two of these exhibits were prepared and furnished by the Michigan Land & Iron Company and the Marquette & Mackinaw Railroad Company, without expense to the commission. The other, the mineral exhibit, it is claimed by plaintiff, was prepared by Mr. A. C. Davis, now deceased, who was a mem-

ber of the commission,—appointed, at the request of the defendant, especially for that purpose. It is claimed further by the State that the defendant only paid, from the $1,000 placed in his hands for the purpose of these Upper Peninsula exhibits, the sum of $250, which was paid to Mr. Davis; and that the defendant still retains $750 of this fund. It is also claimed that a demand was made by the State upon the defendant for this sum, and payment refused, before suit was commenced. This action is brought to recover such balance. The cause was tried before a jury, and the State had judgment. Defendant brings error.

The first claim made by the defendant is that the money sued for, being a part of the $5,000 appropriated by the New Orleans exposition for the furnishing of an exhibit from the State of Michigan, never was the money of the plaintiff, nor did the plaintiff ever acquire any such interest in it as would authorize the plaintiff to demand or recover it.

It appears from the testimony of Gov. Begole that the moneys were sent to him as Governor of the State, and that he indorsed the draft over to Mr. Swineford, who indorsed it over to Mr. Kanter, treasurer of the commission. The money was treated as a part of the funds which the State would expend in making exhibits at New Orleans. It was not deemed sufficient for that purpose, and the commission borrowed an additional amount, to make up what was required. This amount or deficiency the State paid, under the direction of the act of the Legislature above referred to. The fund coming from New Orleans was treated by the commission, of which the defendant was a member, as State funds, or, at least, as a fund which lessened the amount which the State was to raise; and the act of the Legislature passed thereafter recog-

nized the acts of the commissioners as valid. The defendant accepted a place on that commission, and acted with it; and we think he cannot now be heard to say that the funds which came into his hands from the commission were not State funds. It did not matter whether the $1,000 was a part of the $5,000 coming from the managers at New Orleans, or from the sale of the bonds which the defendant and the other members of the commission issued. It was a part of a general fund belonging to the State, and to be used and expended under the direction of a commission appointed by the Governor, and whose acts were afterwards recognized as valid by an act of the Legislature. It may be true that the Governor had no power or authority to appoint such a commission; but the defendant, having accepted the appointment, and acted under it, is estopped from making any such claim, at least after the Legislature has recognized such action, and authorized the payment of the balance of the expenses incurred by them. This $5,000 was a gift to the State, to aid it in preparing these exhibits, and the Governor had authority to accept it and apply it to the purposes for which it was intended; and the legislative act is evidence that the Legislature approved the action of the Governor in the premises.

Claim is also made that there was no evidence introduced that the treasurer of the commission ever presented to the Board of State Auditors the bonds for cancellation, or that one dollar was ever paid by the State towards the expenses of this exhibit, or of the commission. In this the counsel for the defendant is in error. Some evidence was given of the fact, as shown by the record before us. This, however, is not very material to the issues presented.

It is also claimed by defendant's counsel that, though the defendant was the agent of the State, and this was

State money, the plaintiff is not in a position to claim this money; that, if the defendant is liable at all, it is because, as an officer of the State, he has failed to account for moneys which he has received to disburse as such officer. The claim is—

First, that no demand was made, and the defendant never refused to account; and,—

Second, that, under the provisions of section 309, How. Stat., it was the duty of the Secretary of State to notify the defendant (he being an agent of the State), and also the Board of State Auditors, to meet at the office of the State Treasurer for a final settlement; and that if, upon such proceedings, any balance was found due, a demand for payment must be made therefor; and, upon refusal, the Attorney General might then proceed to collect the balance.

Testimony was given on the trial by Mr. Hayden, prosecuting attorney for Marquette county, that in June, 1886, having heard from the Attorney General about the matter, he talked with the defendant upon the subject of the payment of these moneys, and the defendant protested that the State had nothing to do with it; that the defendant referred to the fact that some balance was demanded of him by the State, and stated that he had a notion to make a statement of the expenses through the Board of State Auditors. It appears, further, that the defendant from time to time, while acting upon the commission, drew from the funds in the hands of the commission certain sums of money for expenses, which were charged in the account of Mr. Kanter, as treasurer, and made a part of the claim presented and allowed by the Board of State Auditors. This suit was commenced in July, 1886, and defendant never presented any claim to the Board of State Auditors. Even if the statute referred to could be applied to the present case, it sufficiently appears that the defendant refused to recognize the State as interested in

this fund, and, on joining issue in the case, pleaded the general issue, denying all indebtedness.

It is further contended by defendant's counsel that if the defendant was responsible to the State, and not to the New Orleans exposition, for the unexpended balance of the $1,000, the plaintiff failed to make a case which justified the charge of the trial judge. The charge is as follows:

"Now, it is plain to see that the plaintiff in this case cannot ascertain what the defendant, Swineford, has done with this money. The facts are entirely within his knowledge. The law is reasonable, and does not require impossibilities; and I think, when a party who is intrusted with money to use for a specific purpose fails to account, or refuses to account, for it, that makes a *prima facie* case against him, for the donor of the money, or the party to whom it belongs, to recover it from him. It seems to me no hardship to say to him: 'The facts are within your knowledge; you can show whether or not you have disposed of this money in accordance with the provisions of the trust.' The other party cannot; and it seems to me that it is clear, under those circumstances, that the plaintiff has made out a case when it has shown a refusal on the part of the defendant to account for the trust funds under those circumstances."

This charge was followed by instructions to the jury to render a verdict for $750, with interest, being the amount received, less the $250 paid by defendant over to Davis. The case was presented to the court and jury, upon the evidence introduced by plaintiff; the defendant not offering testimony, and not testifying in his own behalf. The charge, as given, laid down the rule that, inasmuch as the State had proved the $1,000 in the hands of the defendant to be expended for a specific purpose, and the defendant had refused to account for it, the burden was therefore cast upon him to show that it had been so expended, or what disposition had been made of it.

The declaration contained five counts; the first three

setting out the circumstances of the defendant receiving the money, and an averment that he did not expend it as was his duty, and that he refuses to account, etc. The fourth charges a conversion of the whole $1,000. The fifth being the common counts in *assumpsit*, containing a count for money had and received.

Plaintiff's evidence shows this money in the hands of defendant, under an arrangement to pay it over to aid the Upper Peninsula exhibit. The exhibit to which it was applied, if at all, is the mineral, and it is shown that this was prepared by Mr. Davis, and the question is raised whether the defendant ever paid more than the $250 towards that. This $250, it is conceded, the defendant did pay. How far must the plaintiff proceed to make its case? The defendant's plea was a denial of all liability.

The general rule is that the party holding the affirmative of the issue takes the *onus* of proof, and that, in all instances where the right of action depends upon the negative averment, the party making it is charged with the burden of proving it. This is in obedience to the rule that the burden of proof is upon him who raises an issue which would be defeated if no proof was offered. There are, however, a multitude of instances where only slight proof of the affirmative of the issue is necessary to throw the burden of proving the negative upon the defendant; and there are also instances where the law presumes the affirmative of the issue. In an action on a promissory note, the mere production of the note, where its execution is not denied, is sufficient to establish the plaintiff's right of action; the law presuming non-payment from the fact of possession. If the defendant sets up payment, the burden is upon him to prove it. In actions upon book debt, the rule is different; and, unless a settlement is shown, and the amount due liquidated,

under the hands of the parties, the plaintiff is not only compelled to prove his account, but also that it has not been paid.

There are also exceptions to the general rule that he who takes the affirmative of an issue takes the burden of proof; as where the declaration sets up negative matter essential to the issue, which is peculiarly within the knowledge of the other party; and the general rule in such cases is stated to be that where the means of proving the negative are not within the power of the party alleging it, but all the proof on the subject is within the control of the opposite party, who, if the negative is not true, can disprove it at once, then the law presumes the truth of the negative averment, from the fact that such opposite party withholds, or does not produce, the proof, which is in his hands, if it exists, that the negative is not true. 2 Am. & Eng. Cyclop. Law, 652, tit. "Burden to Disprove Negative Averment;" *Railroad Co. v. Bacon,* 30 Ill. 347; *Insurance Co. v. Kearney,* 16 Q. B. 925; *Rex v. Burdett,* 4 Barn. & Ald. 95; *King v. Turner,* 5 Maule & S. 206; *State v. Crowell,* 25 Me. 171; *State v. Lipscomb,* 52 Mo. 32; *Sheldon v. Clark,* 1 Johns. 513; *State v. Richeson,* 45 Mo. 575.

I am satisfied, however, that this rule cannot be of universal application, but that each case must depend upon its own peculiar facts. Was the court in error in applying it in the present case? The facts proven showed the money in his hands under an agreement to apply it to a specific purpose; and, from the circumstances surrounding the case, the only purpose to which it could have been applied was the payment over to Mr. Davis to aid the mineral exhibit. Davis being deceased, his books were put in evidence, showing a credit to the defendant of $250, and no more. The only person living at the time of the trial who had then any knowledge or infor-

mation as to whether he paid the balance over to Davis was the defendant himself. The declaration charged him with retaining it; and before the action was commenced, when talked with upon the subject by Mr. Hayden, he not only did not claim to have paid it to Davis, but claimed it was not the money of the State, and asserted that the State had no interest in it, though he had thought some of making out an account for expenses, and presenting it to the Board of State Auditors. He did not know whether he ought to or not, but would see his attorney, and ask him what he thought about it. If these facts did not appear, a presumption might arise that he had carried out the trust reposed in him; but this presumption is removed by the claim then made by him, and it now clearly appears that the only means of proving the fact of the payment rests with the defendant himself. He is in possession of full and plenary proof to disprove the negative averment, and entirely rebut the evidence arising from the circumstances surrounding the case adduced by the plaintiff upon the question. It would therefore be most reasonable and just that he should be required to adduce it, or, upon his failure to do so, to presume that it does not exist; which, of itself, would establish the negative.

Some other questions are raised, but we do not deem them of importance, and will not discuss them. The court was not in error in this charge, and the judgment must be affirmed, with costs.

The other Justices concurred.

THE PEOPLE v. DANIEL GRIFFIN.

Criminal law—Burglary—Felonious intent.

1. In this case it is held that the facts stated in the opinion show the offense of burglary at the common law; that it cannot be said that the store room was *not* adjoining to, or connected with, a dwelling-house, and, had the offense been charged under How. Stat. § 9134, the respondent must have been acquitted under *Pitcher v. People*, 16 Mich. 142; *People v. Nolan*, 22 Id. 229; *Moore v. People*, 47 Id. 639; *People v. Calderwood*, 66 Id. 92.
2. Felonious intent is a question for the jury, to be inferred by them from all the facts and circumstances disclosed by the testimony.
3. In considering a statement made by the respondent, the whole statement must be received; but the credit due to it, and to each part of it, is for the jury, who may believe one portion and disbelieve another, and may give it such credit as they deem it worthy of.

Error to Wayne. (Gartner, J.) Submitted on briefs October 24, 1889. Decided November 8, 1889.

Respondent was convicted of burglary and sentenced to State prison for six years. Judgment affirmed. The facts are stated in the opinion.

Edwin F. Conely, for respondent.

S. V. R. Trowbridge, Attorney General, and *James V. D. Willcox,* Prosecuting Attorney, for the people.

CHAMPLIN, J. At the corner of Forest and Trumbull avenues in the city of Detroit, is the dwelling-house of Charles W. Griswold. On the first or ground floor there is a store, occupied by Griswold, extending from the front of the building on Trumbull avenue to the rear

thereof. Forest avenue lies along the side of this store. On the opposite side of the store from Forest avenue there is a dining-room and a kitchen. There is a passage-way from the rear part of the store to the kitchen by a door, and another door connects the kitchen with the dining-room. Over the store there are living and sleeping rooms. There are two stairways leading to the upper part of the house,—one from the kitchen and one from the dining-room. There is a cellar under the store, but not under the dining-room or kitchen. The cellar is connected with the store by a flight of stairs. There is a rear door to the store and to the kitchen. There are area windows in the Forest-avenue side of the cellar, covered with gratings made of wood. Mr. Griswold and family lived over the store.

The question of law presented by this record is whether a person who should in the night-time lift or remove the grating from the area, descend therein, break the area window, enter through it into the cellar, pass up the cellar stairs into the store-room, and from thence escape through the rear store door, which he unlocks for that purpose, is guilty of the crime of burglary in breaking and entering a dwelling-house, provided he did it with the felonious intent to commit the crime of larceny.

There is no doubt but the facts in this case show the offense of burglary at the common law. The breaking and entry was within the curtilage, and is embraced by the term "dwelling-house," occupied and used by the family for domestic purposes. It cannot be said that the store-room was not adjoining to, or connected with, a dwelling-house, and, had the offense been charged under How. Stat. § 9134, the defendant must have been acquitted under the following authorities: *People v. Nolan*, 22 Mich. 229; *Moore v. People*, 47 Id. 639 (11 N. W. Rep.

415); *People v. Calderwood,* 66 Id. 92 (33 N. W. Rep. 23). See, also, *Pitcher v. People,* 16 Id. 142.

The felonious intent was a question of fact for the jury, to be inferred by them from all the facts and circumstances disclosed by the testimony.

Counsel for defendant requested the court to instruct the jury that—

"The alleged statement of the defendant that he fell into the cellar is no evidence of the breaking or entering, or of the felonious intent charged; hence, if considered by the jury, must be taken as the defendant is claimed to have made it only."

The court instructed the jury that—

"The statement of the defendant that he fell into the cellar is no evidence of the breaking and entering, or of the felonious intent charged;"—

And he went on to say:

"Standing by itself, it is no evidence of the breaking and entering; but I will further say that you have the right, if you determine that to be a fact,—that is, if you should determine that such a statement was made,—you will have a right to consider that in connection with all the other evidence in the case. It is the same as the rule of law that, if a person is caught fleeing from a place where a crime was committed, the jury may consider that fact, if so found, and may consider it with the other evidence in the case. It is a proper matter for the jury to consider. This statement, standing by itself, would not be sufficient, but you have a right to consider it, as I said, with all the other evidence in the case."

There was no error to refuse to charge that if the statement was considered it must be taken as the defendant is claimed to have made it *only.* The whole statement must be received; but the credit due to it, and to each part of it, must be determined by the jury, who may believe one portion of it and disbelieve another.

They may give it such credit as they deem it worthy of. The charge was not open to objection.

There is no error in the record, and the judgment is affirmed.

The other Justices concurred.

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CAROLINE WEAVER v. PHŒBE VAN AKIN, IMPLEADED WITH EDWIN HADLEY.

[See 71 Mich. 69.]

Equity—Pleading—Multifariousness—Demurrer—Trusts—Settlement of estate in probate court.

1. Where one of two beneficiaries under a trust in their favor in a will refuses to join as a complainant in a bill to enforce the trust, such beneficiary is properly and necessarily made a party defendant.
2. Where the only living beneficiaries of a trust are of full age, and capable of settling with the trustee, or among themselves, without the intervention of the probate court, a bill to close said trust, and compel a conveyance by the trustee to the beneficiaries of the land devised to him in trust for them, filed seventeen years after the death of the testatrix, need not show that her estate has been settled in the probate court.
3. This case is supplemental to *Weaver v. Van Akin*, 71 Mich. 69; the bill being filed to enforce a trust in favor of the complainant and defendant Van Akin, and for an accounting by the trustee, Hadley; and the Court hold that the bill makes a case for equitable relief, and affirm the decree below overruling the demurrer of the defendant.

Appeal from Lenawee. (Lane, J.) Argued October 15, 1889. Decided November 8, 1889.

Bill filed to enforce a trust. Decree overruling

demurrer affirmed. The facts are stated in the opinion.

L. R. Pierson (*Richard A. Watts*, of counsel), for complainant, contended:

1. It will be seen from the statements in the bill that the entire title to the Hudson farm is in the trustee, Hadley; citing How. Stat. § 5578; *Noyes v. Blakeman*, 6 N. Y. 567–569; *Weaver v. Van Akin*, 71 Mich. 69; but the beneficiaries may enforce the trust in a court of equity; citing How. Stat. § 5578; *Noyes v. Blakeman*, 6 N. Y. 567–569.

2. Phœbe Van Akin was necessarily made a defendant, she having refused to join as a complainant; citing *Waldo v. Waldo*, 52 Mich. 91; she is directly connected with and has an interest in every allegation of the bill, and cannot raise the question of multifariousness; citing Story, Eq. Pl. §§ 271—271*b*, 544.

3. There is only one subject-matter. The relief asked for is not inconsistent or incongruous, hence proper for one suit; citing Story, Eq. Pl. §§ 278*a*, and note, 530–540; *Storrs v. Wallace*, 54 Mich. 112.

4. If the bill states a case entitling complainant to any relief, the demurrer must be overruled; and it is not essential that all of the relief prayed for be granted; citing *Cochrane v. Adams*, 50 Mich. 16; *Wilmarth v. Woodcock*, 58 Id. 482; *Darrah v. Boyce*, 62 Id. 480; *Carney v. Carney*, 63 Id. 382; *Glidden v. Norvell*, 44 Id. 206; *Hoffman v. Ross*, 25 Id. 175; *Clark v. Davis*, Har. Ch. 227.

5. This Court has held that, at the time the deed was executed by complainant to defendant Van Akin, complainant had no interest or title which she could convey; citing *Weaver v. Van Akin*, 71 Mich. 69; hence the deed, as alleged in the bill, is wholly void; citing *Noyes v. Blakeman*, 6 N. Y. 567–569.

A. L. Millard and *John Whitbeck*, for defendant Phœbe Van Akin, contended:

1. The bill has two principal objects,—

a—To set aside a deed made by complainant to her daughter, Phœbe Van Akin, of her interest in the Hudson farm.

b—To compel the defendant Hadley to execute his trust and close the same by conveying the farm in equal shares to complainant and her said daughter.

These objects are distinct and irrelevant, and the bill is therefore multifarious; citing *Taylor v. King*, 32 Mich. 42; *Woodruff v. Young*, 43 Id. 548; *Winslow v. Jenness*, 64 Id. 84; Story, Eq. Pl. § 276.

2. The bill makes no case for relief. The general statement that the will of Paulina Fish was duly admitted to probate, and the administration of the estate duly committed to Hadley, are conclusions and not statements of the facts which should appear by the bill. There is nothing to show that the time for proving debts against the estate has expired, or whether commissioners have been appointed; and under the statute it is never too late to prove debts until the estate is finally closed in the probate court; citing How. Stat. § 5894; and the bill shows no such settlement.

MORSE, J. The complainant filed her bill of complaint in the circuit court for the county of Lenawee, to which the defendant Phœbe Van Akin interposed a general demurrer for want of equity, and also that the bill was multifarious, in that she was joined with the defendant Hadley for distinct matters and causes, in which, as appears by the bill, the said defendants have no common interest, and in one or more of which one of said defendants is not in any manner interested or concerned. The demurrer was overruled in the court below. Defendant Van Akin appeals.

The allegations of the bill, in substance, are that Paulina Fish, a resident of Adrian, Lenawee county, Michigan, died September 5, 1872, leaving a last will and testament, providing:

"First, after the just payment of all my debts and funeral expenses, all of the remainder of my estate, both real and personal, of whatsoever name or nature, I give, devise, and bequeath to Edwin Hadley, of the city of Adrian, Lenawee county, Michigan, for the following purposes, viz.: To be held in trust by him, said Hadley, until my niece, Phœbe Fish, shall have become twenty-one years old. Then all my estate, both personal and real, and of whatsoever name or nature, so held by said Edwin Hadley in trust, shall be conveyed by him, said Edwin Hadley, to my two nieces, said Phœbe Fish and Caroline Hertzler, in equal parts.

"But said trust of said Hadley, and said devise and conveyance to my said nieces, are and shall be expressly

subject to and governed by the following requirements, namely: That said Hadley, during his trusteeship, shall apply and devote, from the rents, profits, and issues of my farm in Hudson township, Lenawee county, Michigan, viz., the south-east quarter of section number 19, in said township, so much as may be necessary towards and for the comfortable support of my sister Betsy A. Vining; and, on my said farm becoming vested in said nieces when said Phœbe shall become twenty-one, then said farm in Hudson, above described, shall be held by them subject to the above described provisions for my said sister, and shall be so held by them as long as she, my said sister, shall live.

"I hereby further direct that said trustee shall, during his said trusteeship, attend to the interest and affairs of my estate in a diligent manner, and that on said Phœbe Fish becoming twenty-one he shall, as before expressed and directed, after the discharge of such dues as may be against my estate, convey and transfer all to my said nieces, with my said farm in Hudson, subject to the above described provision in regard to my said sister Betsy A. I further direct that, in case of the death of either of my said nieces before said Phœbe shall become twenty-one, then the survivor shall have the whole of my said estate.

"Lastly, I direct that after my death said trustee shall, as soon as possible, collect all notes, accounts, and demands due me, and pay all just claims against my estate. And, further, I direct that in case either of my said nieces shall become actually needy and suffering for want, that then said trustee shall, from any part of my estate, advance sufficient to relieve them, and prevent any suffering from want. That, after so doing, said trustee securely invest any balance there may be, if any, until said Phœbe shall become twenty-one years old."

That said will, on October 7, 1872, was duly probated, and that said Hadley accepted the trusts created by said will, and entered upon the same; that, as such trustee, he took possession of all the property, including said Hudson farm, and controlled the same, and received the rents thereof, from the death of said Paulina Fish until in the year 1878; that the complainant, then Caroline

Hertzler, has married since the death of said Paulina Fish, and is now Caroline Weaver, and that Phœbe Fish has also married, and is now Phœbe Van Akin; that Betsy A. Vining died January 6, 1875; that Phœbe became of age in October, 1875.

That the said Paulina Fish was, as appears by the files and records of the probate court, and as complainant is informed, not indebted in any sum to any person at the time of her death; that no debts were ever proven against her estate; that said Hadley never rendered any account of his doings under such appointment to the probate court, or to complainant, or to said Phœbe; that he appropriated the personal property of said estate, and certain portions of the rents and profits of the real estate, to the support of the said Betsy A. Vining, and furnished small amounts to complainant and Phœbe

That the Hudson farm was inventoried and appraised as part of the assets of said estate at $8,000; that said Hadley has never rendered any account as such trustee to any one, nor made any settlement of said trust, nor made any transfer or conveyance of said real estate to complainant or Phœbe, or either of them; that he has fled from the State, and is now a fugitive from justice, and his whereabouts are unknown.

That, before leaving the State, the said Hadley fraudulently concocted a scheme to injure and defraud the complainant and Phœbe, who reposed full confidence in him, pretending and representing to them that there were certain persons who were making false and fraudulent claims to the property of the estate, to avoid and defeat which the said complainant and Phœbe, under Hadley's direction and advice, made certain exchanges and transfers of title to said farm and other property between themselves; among others, the said Phœbe made a deed of her interest in the Hudson farm to her mother, the said complainant, before

said Phœbe became of age; that afterwards, and after said Phœbe became of age, said Hadley represented to them that it would be necessary to raise $2,250 to be used in settling said pretended claims against the farm; and being ignorant of business matters, and having implicit confidence in Hadley, and believing what he told them, the complainant executed a mortgage upon said Hudson farm to one Elihu L. Clark, now deceased, which said Hadley took and delivered to said Clark, and received therefor the said sum of $2,250; that complainant had nothing to do personally with obtaining said loan or receiving said money, except her execution of the mortgage.

"But complainant says and shows to the court that neither she nor said Phœbe ever had any use or benefit of any of the moneys so delivered to said Hadley upon the execution of said mortgage; that in fact the said Hadley, as your oratrix believes and charges to be true, converted the whole thereof to his own use; that there were no such claims nor any persons pretending to have any claims against said estate; that said pretended claims were manufactured by said Hadley for the purpose of enabling him to frighten complainant and said Phœbe, and more easily impose upon and defraud them; that the whole proceeding was a scheme on his part for that purpose; though complainant always believed that Hadley appropriated said moneys for the use of herself and said Phœbe until about the year 1883."

That afterwards, in 1877, said Hadley, in further pursuance of his fraudulent scheme, advised further transfers and retransfers of their property between said complainant and Phœbe for the same pretended purpose of defeating said pretended claims aforesaid; that in pursuance of such advice the complainant reconveyed to Phœbe the undivided half of the farm which Phœbe had before then deeded to her, and on the day following complainant made another deed to Phœbe of complainant's undivided half of the farm, under the direction of Hadley, who also had

Phœbe convey to complainant three lots in the city of Adrian; that the expressed consideration of these deeds was $4,500, exchange of notes and personal property, but in fact complainant received no consideration for this deed of her interest to Phœbe, though it was provided in said deed that Phœbe should pay the Clark mortgage of $2,250; that the title of said lots in Adrian was not then in Phœbe, nor did she have any ownership or interest therein, but complainant at the time believed that Phœbe had a complete title to them, and that they were worth from two to four thousand dollars; that complainant does not know what became of said conveyances, but thinks they were left with Hadley, to make such use as he desired of them.

That the mortgage to Clark was never paid; that Clark took proceedings to foreclose the same by advertisement, and bid off the premises for the amount due; that the land was not redeemed; that after the expiration of the time for redemption Clark sold and quitclaimed the premises to Norman Weaver, the husband of complainant, who soon thereafter filed a bill in chancery in the court below against said Phœbe and said Hadley, for the purpose of testing the validity of said mortgage and said foreclosure proceedings; that neither the complainant nor said Hadley appeared in the cause, Hadley being then and still absent, and a fugitive from justice, on account of frauds perpetrated by him on his clients, he being an attorney at law; that Phœbe appeared and demurred to said bill; that said proceedings so commenced by said Norman Weaver have been pending until within a few weeks last past, when it was finally decided by the Supreme Court of this State that said mortgage, and all proceedings to foreclose it, were void, and that no title passed thereby. See *Weaver v. Van Akin*, 71 Mich. 69 (38 N. W. Rep. 677).

That since said decision the complainant has applied to the said Phœbe Van Akin, and requested her to reconvey to complainant her undivided half of said Hudson farm, and at the same time offered to reconvey to the said Phœbe the three lots in Adrian, but said Phœbe has refused said request, and declined to do anything further about the matter.

That Phœbe has occupied said farm since 1878, and now occupies the same, and has had the use and profits thereof all that time, and has never accounted, or offered to account, to complainant for the same, or any part thereof, and refuses so to do; that she also requested the said Phœbe to join with her in an application to the court of chancery to compel said Hadley to perform his trust, and close the same, and to deed said property, devised to them by said Paulina Fish, to said complainant and to said Phœbe, in accordance with the terms of his trust, which request the said Phœbe also declined and refused to comply with.

She charges that her deed to Phœbe was without consideration, and wholly void and of no effect, except as a cloud upon her title and interest in said land. She therefore prays that said deed may be declared void, and that Phœbe be required to execute and deliver to her a release and quitclaim of said undivided interest,—

"And that she account to complainant for the use of said undivided half during the time that she has had the possession and benefit thereof. Complainant further prays that said Edwin Hadley be required by the order of this court to at once render an account of his trust, and to close the same, and to convey to this complainant and the said Phœbe, in equal undivided shares, the said south-east quarter of section 19, aforesaid, and to fully perform his trust in accordance with the terms thereof. And that in default of the said Edwin Hadley complying with such order forthwith, that this court may make a decree declaring said trust closed, and the title of said property

passed and to be in complainant and said Phœbe, in accordance with the terms of said will; and that complainant may have such other and further relief as may be in accordance with justice and good conscience."

We are all agreed that the bill sets out an equitable claim for relief both against Hadley and Phœbe Van Akin. If the bill be taken as true, then Hadley has grossly violated his trust. The time within which he should have performed it has long since passed, and there is no reason why it should not long ago have been closed, and the land conveyed to the beneficiaries, complainant and Phœbe Van Akin, except the fact that Hadley has fled the State. As it is, the complainant can have relief only in equity. She has requested Phœbe to join with her, which Phœbe has refused to do; consequently she is properly and necessarily made a party defendant.

Under the case made by the bill, both complainant and Phœbe were grossly deceived by Hadley, in whom they reposed the most implicit trust and confidence. Phœbe, however, has by the fraud and deception of Hadley been placed in a position of undue advantage over her mother. She has been and is now in possession of the farm, one-half of which, under the will, the complainant is entitled to. If Phœbe is not willing to join with her mother in bringing this trust to a close by the only means that can be employed, and is unwilling to restore to her mother the rights and interests of the complainant which she has obtained by the deception and fraud of Hadley, and his violation of his trust under the will,—in other words, to restore to her mother her own,—a court of equity ought to, as speedily as possible, compel her to do so.

A great many technical defects are urged here against this bill, which should have been pointed out by special demurrer, and we need not notice them on this appeal. Such a clerical mistake, for instance, as writing in the

bill "Caroline Fish" for "Paulina Fish" would be amended in the court below as a matter of course, as soon as the same was pointed out.

We do not think it necessary that the bill should show that the estate has been settled in the probate court. The only living beneficiaries of the trust are complainant and Phœbe Van Akin, who are adults, and capable of settling with the trustee or among themselves, without the intervention of the probate court. It is now seventeen years since the death of Paulina Fish, and it is well to be surmised that, if she was owing anything at the date of her demise, the creditors have been long since satisfied, or they would have made some move to collect their claims.

If the defendant Hadley should appear and show that all the other property save this Hudson farm had been legitimately expended by him in the performance of his trust, and that the estate was indebted to him so that the whole of the Hudson farm ought not to be conveyed by him to the beneficiaries, it would not defeat the complainant's prayer for relief under her bill. She would be still entitled to her interest in the farm, or her share of the proceeds left after paying the legal expenditures of the trust, if the farm was forced to a sale under the trust, and in order to perform it. But the will did not provide for any sale of the farm, and the testator evidently did not expect that any such emergency would arise, and from the showing in the bill we are not warranted in supposing that it may happen.

The argument of defendants' counsel that when the trust is closed there may be no land to convey to her, based upon the idea that there must be a settlement of the estate in the probate court before the trust can be closed, and that, therefore, claims against the estate may

yet eat up the land, cannot prevail against the equity of the bill as above shown.

We do not express any opinion as to whether or not the defendant Phœbe should account for the rents and profits of the farm since 1878. This would depend on the proofs as to the nature and circumstances of her occupation of it. There are not facts enough set up in the bill to enable us to determine complainant's rights in this respect, but this does not go to the whole equity of the bill, as, under her showing, she is entitled to other relief against Phœbe.

The decree of the court below overruling the demurrer is affirmed, with costs. The defendant Phœbe Van Akin will be allowed 20 days in which to answer in the court below, if she so desires.

The other Justices concurred.

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HENRY HESS v. LEMAN L. CULVER.

Fraudulent representations—In pari delicto—Statute of frauds.

1. While a man is, for public reasons, held responsible for his conduct, although ignorant of law, there is no conclusive presumption that he actually knows the law. *Black v. Ward*, 27 Mich. 191; *Stanton v. Hart*, Id. 539.

2. Where a man is defrauded, as often happens, by the misrepresentation of some one who assumes knowledge, and where, under the circumstances, he is actually deceived, and not consciously wrong, the fact that the transaction is against public policy in law will not necessarily compel the victim to submit to the fraud of the actual villain.

3. The only rigid rule forbidding relief is where parties are in equal guilt. While the law does not draw fine distinctions in

ascertaining equality of wrong, it recognizes the fact that one party to such an arrangement is not necessarily an equal party in guilt, or consciously guilty at all, and will not deny relief to an injured party against the one who is really the deceiver, and who commits fraud by means of his persuasive or other influence over his victim.

4. How. Stat. § 6188, requiring representations in writing to sustain an action upon favorable assurances concerning the character, conduct, ability, trade, or dealings of another person, was intended to reach cases where the plaintiff has dealt with and given credit to the person favorably mentioned, and done so on the faith of the assurances. Nor can the statute apply to conspiracies or frauds, where the representation is made to enable the party making it to profit by it.

6. In this case, if the testimony is true, defendant, by false and fraudulent pretenses, and without any consideration at all, got from plaintiff notes which he had to pay, and divided the plunder between himself and his confederates. Upon the facts, if believed, the cause of action was complete, and the case should have gone to the jury.

Error to Bay. (Cobb, J.) Argued October 25, 1889. Decided November 8, 1889.

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

T. A. E. & J. C. Weadock, for appellant, contended for the doctrine stated in the opinion.

Simonson, Gillett & Courtright, for defendant, contended:

1. The scheme upon its face was a transparent fraud and a gambling contract, and was fully understood by plaintiff. The design to defraud third parties was mutual, and in such cases the Court leaves the parties where it finds them; citing *McNamara v. Gargett,* 68 Mich. 454; *Davis v. Seeley,* 71 Id. 209.

2. The representations, not being in writing, come squarely within How. Stat. § 6188.

3. On a careful reading of the record the Court will find that no representation was made except as to the character, credit, and dealings of the company, thus bringing the case within *Bush v.*

Sprague, 51 Mich. 41; *Osburn v. Lovell*, 36 Id. 246; 2 Add. Torts, § 1179.

4. False representations by an agent of an insurance company, concerning its ability and solvency, are within the statute, and must be in writing, even though it is alleged that his object was to secure his own commissions as agent; citing *Wells v. Prince*, 15 Gray, 562; and the motive of defendant is immaterial: citing *Kimball v. Comstock*, 14 Gray, 510; *Mann v. Blanchard*, 2 Allen, 386; Browns, Stat. Frauds, § 184; and no action can be maintained against the treasurer of a corporation for false oral statements as to the credit and ability of the corporation, though made in order to induce the plaintiff to receive a note signed by the defendant as such treasurer; citing *McKinney v. Whiting*, 8 Allen, 207.

CAMPBELL, J. Plaintiff, who is a farmer near Bay City, was induced by the representations of defendant to give his notes, payable to bearer, for $375 and interest, and deliver them to defendant, who got them discounted by a *bona fide* holder, and plaintiff had to pay them. This suit was brought to recover against Culver for having obtained the notes by fraud, and without consideration. The only consideration agreed on was the purchase of Bohemian oats at $15 a bushel, and the bond of what purported to be, but was not, a Michigan corporation, agreeing to sell for plaintiff 50 bushels at the same price on a commission of one-third. No delivery was made to plaintiff of any oats, and the bond was fictitious, if not in law a forgery, there being no such corporation as purported to issue it.

The declaration set forth, and the testimony showed, that plaintiff was led by defendant's persistent arts and misrepresentations concerning the salable prospects of the oats to be grown, and the responsibility and legal character of the mythical corporation, to give his notes, for which he received no consideration whatever. The court below, however, held that he had no cause of action, and directed a verdict for the defendant. This could only be upon one of two theories relied on, namely:

First, that the transaction was illegal, and the parties *in pari delicto;* and,—

Second, that defendant was not liable for false representations not in writing.

So far as the first point is concerned, it seems to be based on a false theory. If plaintiff were seeking to enforce such a bond as was palmed off on him, his ignorance that it was illegal in its purposes would not perhaps absolve him from the consequences of trusting to a void contract. But it has been held by this Court in repeated instances that, while a man is, for public reasons, held responsible for his conduct, although ignorant of law, there is no conclusive presumption that he actually knows the law. *Black v. Ward*, 27 Mich. 191; *Stanton v. Hart*, Id. 539.

Where a man is defrauded, as often happens, by the misrepresentation of some one who assumes knowledge, and where, under the circumstances, he is actually deceived, and not consciously wrong, the fact that the transaction is against public policy in law will not necessarily compel the victim to submit to the fraud of the actual villain. The only rigid rule forbidding relief is where the parties are in equal guilt. While the law does not draw fine distinctions in ascertaining equality of wrong, it recognizes the fact that one party to such an arrangement is not necessarily an equal party in guilt, or consciously guilty at all, and will not deny relief to an injured party against the one who is really the deceiver, and who commits fraud by means of his persuasive or other influence over his victim. Even actual knowledge of legal rights and liabilities is not always conclusive against relief. *Wartemberg v. Spiegel*, 31 Mich. 400; *Barnes v. Brown*, 32 Id. 146. Our statutes make this clear distinction in regard to gaming contracts. The winner cannot enforce his winnings against the loser, but

the loser may recover back money actually paid. How. Stat. § 2023. Where this may be done in case of open gambling, where the loser knew all about it, the law is not so squeamish as to refuse redress to a loser who was defrauded into paying money without understanding fully that the dealing was improper. One of the elements in this fraud was that defendant accomplished it by representing that the alleged company was a corporation authorized to do the acts referred to by the laws of this State, and therefore having full legal sanction and recognition in its doings, so that plaintiff had no reason to suppose the dealings would be subject to any lawful objection.

The other point suggested has no support in the statute. The legal provision concerning the necessity of representations in writing to sustain an action upon favorable assurances concerning the character, conduct, ability, trade, or dealings of another person, was intended to reach cases where the plaintiff has dealt with and given credit to the person favorably mentioned, and done so on the faith of the assurances. That statute cannot apply to conspiracies or frauds, where the representation is made to enable the party making it to profit by it. Moreover, in the present case, the false showing was not concerning the responsibility of an existing person whose personality was known, but concerning an alleged corporation that was no corporation, and whose pretense of legal existence was itself a fraud. *Bush v. Sprague*, 51 Mich. 41 (16 N. W. Rep. 222), is in point on more than one question in this case.

Here, if the testimony is true, defendant, by false and fraudulent pretenses, and without any consideration at all, got from plaintiff notes which he had to pay, and divided the plunder between himself and his confederates.

Upon the facts, if believed, the cause of action was complete. The case should have gone to the jury.

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

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

HENRY TURNER v. THE ONTONAGON RIVER IMPROVEMENT COMPANY.

Uses and trusts—Deed to trustees—Partnership.

A sale to a partnership has become a legally recognized method of sale to all persons interested, whether named or not. If it is a trust, it is, by long recognition, not such a trust as is forbidden by the statute of uses and trusts.

So *held*, where a land-owner executed articles of association designed to create a joint-stock arrangement, intended to be subsequently incorporated as a land company, but in the mean time to be a partnership, in which articles he named three persons as managing trustees, and, with several others, as partners or stockholders entitled to their shares on a certain contribution or payment, and conveyed to said trustees certain lands in trust for the stockholders of said land company, according to said articles of association; and, in an action of ejectment by a grantee of his heirs, against a party claiming through the grantee of said trustees, in which the plaintiff bases his right to recover upon the claim that the original deed to the trustees was void because not complying with the statute of uses and trusts, it is held that for all legal purposes the sale of said land was to a partnership, some of the partners in which were named, and the rest to be determined in the future, by admission; and that no reason is seen which would invalidate such sale that would not invalidate every transfer to a partnership that does not name all of the partners and define their estates.

Error to Ontonagon. (Williams, J.) Argued October 18 and 22, 1889. Decided November 8, 1889.

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

H. H. Hoyt, for appellant.

Norman W. Haire and *Stone & Gray* (*Ball & Hanscom,* of counsel), for defendant.

CAMPBELL, J. In March, 1850, Dr. William Pettit conveyed certain lands now in defendant's possession, to Solomon Alter, Clement March, and James G. Clark, in trust for the stockholders of the Ontonagon Land Company, according to the articles of association executed by Pettit. In 1853, Pettit died. On December 13, 1887, the heirs of Pettit quitclaimed to plaintiff the lands in question, then in defendant's possession, and now he brings ejectment. The only ground on which he relies, or can rely, is that the deed of 1850 was absolutely null and void. And this he claims for the alleged reason that it does not comply with the statute of uses and trusts.

It appears from the articles of association referred to, executed by Dr. Pettit, that their design was to create a joint-stock arrangement, intended to be subsequently incorporated, but in the mean time being a partnership, naming March, Alter, and Clark as managing trustees, and naming them and several others as partners or stockholders entitled to their shares on a certain contribution or payment. The articles, like most similar documents, pointed out how the business should be managed, and the rights, powers, and duties of all concerned.

For all legal purposes, this was neither more nor less than a sale to a partnership, some of the partners in

which were named, and the rest to be determined in the future by admission. It is in no way a trust, in any sense, beyond that which would exist in all partnerships when each and all, or where select members, of the firm may act in fiduciary relations with their associates. The firm is the beneficiary or grantee representing the members. A sale to a partnership has become a legally recognized method of sale to all persons interested, whether named or not. If it is a trust, it is, by long recognition, not such a trust as is forbidden by statute. We can see no reason which would invalidate this sale that would not invalidate every transfer to a partnership that does not name all the partners and define their estates. We are not, therefore, disposed to enter upon a discussion of statutory trusts. If this deed conveyed the land, nothing was left in Pettit's heirs, and they could convey nothing. It does not concern them what was done by the grantees. There is no other question which, in this view, is material.

The judgment must be affirmed.

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

JOSEPH H. HOLMAN v. TRUSTEES OF SCHOOL-DISTRICT NO. 5, TOWNSHIP OF AVON.

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Public schools—Suspension of pupils.

1. A boy ten years old, or even older, cannot be expelled or suspended from the public schools for a careless act, no matter how negligent, if it is not willful or malicious.

So *held*, where a boy ten years of age was suspended from school, for negligently and carelessly breaking a light of glass in a window in the school building, until the glass was replaced or satisfaction made therefor, and his re-instatement was compelled by *mandamus*.

2. The term "misdemeanor," as used in How. Stat. § 5069, authorizing the suspension or expulsion from school of any pupil guilty of gross misdemeanor or persistent disobedience, means gross misbehavior or misconduct,

3. Before a pupil can be suspended or expelled from the public schools, under How. Stat. § 5069, he must be guilty of some willful or malicious act of detriment to the school, and the misconduct must be gross,—something more than a petty or trivial offense against the rules,—or he must be persistent in his disobedience of the proper and reasonable rules and regulations of the school; but it is not necessary that he should be guilty of a criminal act.

Mandamus. Submitted October 15, 1889. Granted November 8, 1889.

Relator applies for *mandamus* to compel respondents to re-instate his son in the public schools. The facts are stated in the opinion.

Joseph Holman and *Henry M. Cheever*, for relator.

Edwin F. Conely, for respondents.

MORSE, J. Hearing on order to show cause why Joseph J. Holman, a son of the relator, of the age of 10 years, should not be re-instated in the schools of the above-named district, from which he had been suspended.

The return of the respondents shows that among the rules adopted for the management and government of the schools in said district is the following:

"Pupils who shall, in any way, deface or injure the school building, outhouses, furniture, maps, or anything else belonging to the school, shall be suspended from school until full satisfaction is made."

The power of suspension is vested in the teachers of the respective departments, but in this particular case the suspension by the teacher was approved and confirmed by the school board. The relator in his petition alleged that the boy was suspended for the reason that he had accidentally broken a window, and had not replaced it. That he applied to Julia Mason, the teacher who suspended his son, and requested her to re-instate him, but she refused, and he then applied to the trustees, a majority of whom also refused to receive the boy back into school.

The respondents show that on October 1, 1889, the pupil—

"Negligently and carelessly broke a window pane in said school building, the size of which was 14 by 40 inches, and that the actual cost of replacing it would be the sum of one dollar."

That after the breaking of the window pane, the teacher requested the boy to notify his father that the broken pane must be replaced; that the next day his father, the relator, sent word by his son to the teacher that if she wanted to know about the window pane to call and see him. The teacher again sent word to relator that the glass must be replaced or paid for, and received word in return that the pane would be replaced. It was not, however, replaced or paid for, and on October 7, 1889, the teacher again sent word to relator that the glass must be paid for or replaced at once, or she would be obliged to enforce the rules. The same day relator called upon the teacher, and refused to replace or pay for the glass, and threatened to prosecute her if she enforced the rules against his son. Miss Mason thereupon consulted with the director, who directed her to issue an order suspending the boy from school until the glass was replaced or satisfaction made therefor. The order was issued, and

notice of the same in writing served upon the relator, and notice also given the board of trustees of such suspension. October 11, 1889, the board met, and ratified and adopted the action of the teacher.

Attached to the return of the respondents, and made a part of it, are the affidavits of two boys, one 14 and the other 12 years of age, eye-witnesses, setting out the circumstances of the breaking of the window pane, and giving their opinion that it was carelessly and negligently done.

We think the writ should be granted. It will be noticed that there is no claim on the part of the respondents that the breaking of the window pane was malicious or willful. It is averred to have been done carelessly and negligently. The rule of the respondents, as it reads, is broad enough to include any accidental injury, and the respondents claim that they have the right to enforce it; that it is a reasonable and proper regulation, and is the same rule, in substance, adopted in other public schools in this State. They also seek to justify their authority to enforce the rule under section 5069, How. Stat., which provides that—

"The district board shall have the general care of the school, and shall make and enforce suitable rules and regulations for its government and management, and for the preservation of the property of the district. Said board may authorize or order the suspension or expulsion from the school, whenever, in its judgment, the interests of the school demand, of any pupil *guilty of gross misdemeanor or persistent disobedience.* * * * * * *"

Granted that "gross misdemeanor," as used in this section, means gross misbehavior or misconduct, and not criminal conduct, and yet the statute does not confer the authority claimed by the respondents in this case. We think the definition of "misdemeanor" in this section is as claimed by respondents' counsel. It means gross miscon-

duct or gross misbehavior. It is not necessary that a pupil shall be guilty of a criminal act before he can be suspended or expelled from school. But, before he can be thus dealt with, he must be guilty of some willful or malicious act of detriment to the school, and the misconduct must be gross,—something more than a petty or trivial offense against the rules,—or he must be persistent in his disobedience of the proper and reasonable rules and regulations of the school.

A boy 10 years old, or even older, cannot be expelled or suspended for a careless act, no matter how negligent, if it is not willful or malicious. The action taken in this case might, to a poor boy, mean indefinite suspension. This rule might in a great many cases, if enforced, prevent the further attendance of pupils at the public schools, while we have laws on our statute books compelling such attendance. It is not desirable nor permissible that a child may be excluded from the common schools because, by a careless or negligent act, without malice or willfulness, it has injured or damaged school property to such an extent that it is beyond its power, or that of its parent or guardian, to make compensation for it. This would be the effect of the rule, if carried out, in many cases.

In the present case, no doubt, the father could have replaced this glass without serious financial detriment, and it would have been much cheaper for him to have done so. But he saw fit to stand upon his rights, as he was privileged to do, and by so doing test the power and authority of school boards in this State to adopt and enforce such rules as the one before us, which, in other instances, might deprive poor children who are careless, as all children are careless, of the right to a common-school education, which the laws and policy of our State

have guaranteed to them so carefully that the parent is punished if he neglects or refuses to give his children the benefit of the public schools.

The writ will issue as prayed.

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

WILLIAM DEVOE v. SCHOOL-DISTRICT NO. THREE OF THE TOWNSHIP OF SPAULDING.

Schools and school-districts—Unqualified teacher—Verbal contract.

Where a teacher, holding a certificate from the county board of examiners having one month to run, contracted verbally to teach a five months' term of school, and, about the time of the expiration of his certificate, was refused a new one by the board, and a month later was again examined and met with a second refusal, but continued to teach the school for three weeks thereafter, when the school was closed by the secretary of the board, the teacher having received payment for his services up to the date of such second rejection, he cannot collect pay for the three weeks' teaching, nor can the school officers continue him in school, and bind the district to pay for such services, after such rejection; there being no difficulty in obtaining qualified teachers in the vicinity. *Lee v. School-dist.*, 71 Mich. 361.

Error to Saginaw. (Gage, J.) Argued October 31, 1889. Decided November 8, 1889.

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

Wilber & Brucker, for appellant, contended for doctrine stated in the opinion.

G. G. Laird and *L. C. Holden*, for plaintiff, contended:

1. The assignments of error all result in one question,—can plaintiff recover for valuable services rendered under a contract (not in writing, but about the terms of which there is no dispute), for teaching school when he had no certificate; the board of trustees of the district knowing that he had no certificate, yet saying that his services were satisfactory, and urging him to go on and teach, notwithstanding he had no written contract, and his certificate had expired; and having, as a further encouragement or inducement to him to continue, paid him for his first month's services when he had a certificate but no written contract, and having also paid for a second month's services when he had neither written contract nor certificate, said last month being precisely upon the same basis as his present claim? The only reason a contract was not signed was because the board had no form, or printed blanks. In support of an affirmative answer to this question, counsel cite: *Crane v. School-dist.*, 61 Mich. 299; *Holloway v. School-dist.*, 62 Id. 153; *Stockdale v. School-dist.*, 47 Id. 226; *School-dist. v. Estes*, 13 Web. 52; *Smith v. School-dist.*, 69 Mich. 589; *Hale v. Risley*, Id. 596; *School-dist. v. Brown*, 55 Vt. 61.

MORSE, J. Plaintiff sued in justice's court to recover balance of wages as school-teacher. He had judgment, and defendant appealed to the circuit court, where plaintiff again prevailed, the circuit judge directing a verdict in his favor for $28.32. Judgment was entered upon the verdict, and defendant assigns error.

When the plaintiff rested, the defendant asked the court to direct a verdict in its favor, which request was refused. It should have been granted. We are satisfied that the plaintiff had no case upon his own showing. He had taught the school the year before for eight months, and gave good satisfaction. He made a verbal contract in 1887 to teach the school for a term of five months. He held at that time a certificate from the board of examiners of Saginaw county, in which county the school was situated. This certificate would expire on

October 30, about a month after he commenced teaching. About the time of its expiration he went before the board of examiners, and a certificate was refused him. He was told, however, that the board would meet again in about a month, when he would be given a new trial. At the next meeting of the board, the last of November, he was again examined, and again refused a certificate. He kept on teaching until about three weeks after this second rejection, when the school was closed by the school board under the direction of the secretary of the board of county school examiners. The first month he received an order and was paid. When he went at the end of the second month to get his order, which was before his second rejection, but after his first examination, one of the officers, the moderator, hesitated about signing it, for the reason that he had been refused a certificate; but, as he was about to make a second trial for such certificate, the order was finally drawn, and he received the second month's pay upon it. His claim in this suit is for three weeks that he taught after this, and after he had failed on the second examination.

Plaintiff testifies that he spoke to the director about a contract about the time he commenced school, and that officer said he had no blanks, and requested him, when he went to East Saginaw, to get some. Plaintiff, when he went to East Saginaw, could find none, and so informed the director, who promised to obtain some as soon as possible. After plaintiff had taught about six weeks the director informed him that he had procured the blanks, but he would not enter into the contract until plaintiff obtained a certificate. He testifies that the director told him after the first examination to go on with the school until he was examined again, and that after he was rejected the second time the director told him to keep on teaching, but that he had no talk with the other officers about it.

and only notified the director that he had been rejected. The director denies that he told plaintiff to keep on teaching after the second rejection; but this is immaterial, as we are now dealing with the plaintiff's case as he made it. Plaintiff further testified that he knew that, unless he had a certificate, any contract he might make with the school board to teach would be illegal and void.

We think he was paid all that he ought to have been, under the circumstances. He knew that he could not legally teach school without a certificate, after his second rejection. His only claim for wages or pay for his services after that time is based upon the fact that the director told him to go on, and he was permitted to teach until the school was closed by the county board of examiners or its secretary. He had no arrangement with the other officers of the school-district, and did not talk with them on the subject, or notify them that he had been refused a certificate for the second time. The director had no authority alone to bind the district, and there is nothing in the case that estops the district from disputing the plaintiff's right to recover.

The case differs from *Crane v. School-district,* 61 Mich. 299 (28 N. W. Rep. 105), and *Holloway v. School-district,* 62 Id. 153 (28 N. W. Rep. 764). In the latter case the only invalidity urged against the written contract was that one of the school officers had not signed it, and there had been no adoption or ratification of the agreement at any meeting of the school board. We held that—

"Plaintiff had a right to suppose his contract was a valid one when it was signed by a sufficient number of the officers and he was, with the personal knowledge of the whole board, permitted, and apparently encouraged, to proceed;" and that "a contract valid on its face, actually carried out in full, with the acquiescence of all concerned, cannot be subsequently repudiated."

Crane v. School-dist., supra, involved a similar state of facts as the case above considered.

In the case at bar the plaintiff had no valid contract with the school board, and knew that he was running the risk of non-payment if he kept on teaching. The last order was signed by the moderator only in the hope that he might, on the second examination, procure a certificate. After he was rejected the second time, he was not authorized to teach any longer, according to his own testimony, except by the director. He did not see the other officers, and there is no evidence that either of them did anything upon which plaintiff acted in continuing the school. He knew that the director could not bind the district to pay him for the teaching he did after his second failure to obtain a certificate. He seems to have kept on, in the hope that he might obtain another order, and draw his pay for his work, instead of relying on any belief that he was legally entitled to such pay.

The district were entitled to a qualified teacher, under the law, and when plaintiff failed to procure a certificate, upon two trials, it was his business to quit. And after such failure neither one nor all of the district officers could continue him in the school, and bind the district to pay for his services, as it is shown that there was no difficulty in obtaining qualified teachers in that vicinity. See *Lee v. School-dist.*, 71 Mich. 361 (38 N. W. Rep. 867).

The judgment is reversed, and a new trial granted, with costs of this Court.

SHERWOOD, C. J., CHAMPLIN and CAMPBELL, JJ., concurred.

LONG, J., did not sit.

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IN THE MATTER OF HENRY FRANKLIN ON HABEAS CORPUS.

Criminal law—Horse stealing—Information—Inconsistent counts—General verdict.

1. Our practice has allowed indictments to contain various counts, charging the same transaction in different ways, so as to meet the testimony as it is given on the trial; and some liberality has been used in applying a general verdict when all of the counts can be harmonized. But we find no authority for sustaining a sentence under a general verdict upon inconsistent charges, and covering them all. 1 Bish. Crim. Proc. § 1015 *a*; Harris, Crim. Law (Force's ed.), 384.
2. How. Stat. § 9546, which provides that an indictment [information] for larceny may contain a count for obtaining property by false pretenses, or for embezzlement, or for receiving, having in possession, or aiding in concealing the same property, knowing it to have been stolen, and that the jury may convict of either offense, clearly requires the verdict to point out the crime of which the defendants are found guilty, and will not bear the construction that a conviction can be had on all the charges at once by *general* verdict.
3. A sentence to imprisonment for more than five years, upon a general verdict of guilty under an information for horse stealing contrary to How. Stat. § 9180, and for the larceny of the same horse under the general statute, and for receiving, and aiding in concealing, the stolen property, is void for the excess.
4. How. Stat. § 9180 (Act No. 102, Laws of 1877),[1] if valid, is aimed at preventing such horse stealing as should be done in this State, and disturb its peace, while the general statutes punish the receiver of property stolen beyond the State as well as any other.

[1] This statute punishes every person convicted of stealing any horse, etc., of any value, or who shall receive, buy, conceal, or aid in the concealment of any stolen horse, etc., knowing the same to have been stolen, by imprisonment in the State prison not less than three years, nor more than fifteen years, and on a first conviction the court may, in its discretion, sentence the respondent to the State House of Correction for a term not exceeding two years. This statute was held constitutional in *People v. Morris*, decided May 9, 1890, and reported in Vol. 45 N. W. Rep. 591.

5. It needs no discussion to show that under our statutes concerning receivers of stolen property it is not contemplated that the same person can be both thief and receiver.

Habeas corpus proceedings. Argued October 29, 1889. Prisoner discharged November 13, 1889.

Prisoner applied for his discharge from State prison on the ground that, if any part of his imprisonment was valid, the time allowed by law for holding him had expired. The facts are stated in the opinion.

Thomas A. Wilson, for petitioner.

S. V. R. Trowbridge, Attorney General, for the people.

CAMPBELL, J. The petitioner in this case, who is confined in the State prison at Jackson, asks to be discharged on the ground that, if any part of his imprisonment was valid, the time allowed by law for holding him has expired. He was convicted and sentenced in June, 1884, the sentence being for ten years, of which more than five years has expired. The people, by the Attorney General, resist his discharge, on the ground that he was sentenced under Act No. 102, Laws of 1877, entitled "An act to provide for the prevention and punishment of horse stealing," which fixes the punishment at not less than three, nor more than fifteen, years in the State prison.

Petitioner claims that the record and verdict do not warrant such a sentence. He also claims the statute is invalid, as against the constitutional prohibition of cruel and unusual punishments.

The indictment contains four counts. The first alleges the larceny of a horse worth $150, in Kalamazoo county, from one McElroy, and refers expressly to the statute of 1877. The second count is a charge, not under the stat-

ute, of the same offense. The third is for feloniously receiving a horse lately stolen from McElroy, knowing it to have been stolen, but averring neither time nor place of the theft. The fourth is for feloniously aiding in the concealment of a horse of McElroy, lately stolen, knowing it to have been stolen. This count refers to the statute of 1877, but gives no time or place of the theft. The verdict of the jury was a general verdict of guilty.

Our practice has allowed indictments to contain various counts, charging the same transaction in different ways, so as to meet the testimony as it is given on the trial. And some liberality has been used in applying a general verdict when all of the counts can be harmonized. But we find no authority for sustaining a sentence under a general verdict upon inconsistent charges, and covering them all. Mr. Bishop, referring to authorities, says:

"Nor yet should the verdict be general, if the conviction is thereby rendered repugnant or absurd." 1 Bish. Crim. Proc. § 1015*a*.

In Judge Force's edition of Harris' Criminal Law, 384, referring to a statute corresponding with the Michigan statute on the subject, it is said:

"Where the statute provides that counts for larceny, embezzlement, and obtaining goods by false pretenses may be joined in one indictment, and the defendant found guilty of either, a general verdict of guilty, under an indictment so drawn, is not valid."

Our statute adds to this list,—

"Receiving, having in possession, or aiding in concealing, the same property, knowing it to have been stolen," and says: "The jury may convict of either offense, and the jury who shall try the same may find all or any of the persons indicted guilty of either of the offenses charged in the indictment." How. Stat. § 9546.

This statute clearly requires the verdict to point out the crime of which the defendants are found guilty, and

will not bear the construction that a conviction can be had on all the charges at once by general verdict.

The importance of separating the counts on a verdict is the more apparent, in connection with section 9143, which provides that on a first conviction of receiving stolen chattels, when the theft is simple larceny, the party convicted, by making satisfaction, shall be exempted from State prison.

It needs no discussion to show that under our statutes concerning receivers it is not contemplated that the same person can be both thief and receiver. We cannot, from such a verdict, assume that the conviction was not intended to be made against petitioner under one of the common-law charges, as thief or receiver, or that if convicted as receiver he could not have avoided State prison by satisfaction.

It is also evident that if the statute of 1877 is valid it is aimed at preventing such horse stealing as should be done in this State, and disturb its peace, while the general statutes punish the receiver of property stolen beyond the State as well as any other; so that there is nothing in any but the first count necessarily indicating a Michigan larceny, actual and not constructive

Whether the judgment was altogether erroneous, or only void as excessive, and for the excess, is not important on this application, as petitioner has served out the full extent of any valid sentence under the general laws, which make five years the extreme penalty.

Under this finding, if valid at all, it is certain it can only be made valid by confining it to the least offense charged. The case is unlike those where the same fact is aimed at in all the counts, and we need not consider the rule in such cases.

As we do not consider the verdict as capable of being applied under the act of 1877, so that this statute is out

of the question, it is not perhaps desirable to consider the important question whether that statute is valid. The discussion would open very important and difficult questions of constitutional law, which deserve the fullest investigation and deliberation. On this summary hearing, although counsel have done much to throw light on the subject, no examination we could give would be exhaustive. When a case comes up on error and exceptions, so that we can know all its facts, it will probably be easier and safer to deal with the limitations on the power of criminal punishment relied on to defeat this act. We have had occasion heretofore to point out its remarkable and objectional features, which certainly indicate no underlying principle in harmony with the rest of our legislation. In all of the cases we have hitherto dealt with, as in this case, the convictions have been held bad without regard to constitutional questions. No hurried examination would be satisfactory.

Petitioner is unlawfully detained, and must be discharged.

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

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JESSE B. COLE v. INGHAM CIRCUIT JUDGE.

Practice in circuit courts—Settling bill of exceptions—Costs.

In this case the proper practice in making and settling a bill of exceptions under our rules and statutes is stated as follows:

1. Only so much of the testimony should be incorporated into a bill of exceptions as is necessary to fairly present the questions of law upon which a review is desired; which may be usually

given in narrative form, and thereby save much expense to litigants.

2. The party making the bill is under no obligation to secure a copy of the stenographer's minutes of any more of the testimony than he may deem necessary for this purpose; for which amount, when certified to by the circuit judge, he may tax as a part of his costs.
3. If the opposite party needs a copy of further testimony to enable him to propose desired amendments, he must procure it himself; nor can the appellant be required to pay for such testimony except as a part of the appellee's costs, in case he prevails and the necessity for the same is certified to by the circuit judge.
4. Amendments must contain a copy of whatever additional testimony, or exhibits, or other matter the party proposing same desires to have inserted; and copies thereof must be served on the opposite party before the time noticed for the settlement of the bill of exceptions.
5. If, when the bill and amendments are properly brought before the court for settlement, further testimony is desired by the court, to enable him to properly settle a true bill, he should direct the stenographer to transcribe the same from his minutes, and file such transcript, free of charge; and no costs should be taxed by either party therefor, the stenographer being an officer of the court for such purpose, and subject to his order and direction; at least, to that extent.
6. It is the duty of the court to see that all bills of exceptions are made in accordance with the rules of the court, and the statutes relating thereto.

Mandamus. Submitted October 29, 1889. Granted November 13, 1889.

Relator applies for *mandamus* to compel the circuit judge to vacate an order striking from the files a bill of exceptions heretofore signed and filed, and for other relief. Motion to vacate such order is denied, but the circuit judge is directed to proceed and settle bill of exceptions as now presented. The facts are stated in the opinion.

Q. A. Smith, for relator.

R. A. Montgomery, for respondent.

SHERWOOD, C. J. On March 19, 1888, a judgment was rendered in the Ingham circuit court against Jesse B. Cole, in favor of Simeon V. Kent. Time was given Cole to prepare a bill of exceptions, and to serve a copy of the same. The bill was made, and notice given for settlement. The parties were present at the time fixed, and counsel for Cole came before the court at the October term, and presented his bill of exceptions for settlement; but, the court not being ready to give the matter attention when the bill was presented, the matter was held open until November 16, 1888, when the case was called up by Cole's attorney, and, the attorney for the other side not being present, the bill was not consented to by Kent's attorney. The court signed the bill as presented by Cole's attorney, upon the understanding that said attorney would thereafter consent to any proper amendments the other party might thereafter desire to make to the same; and the bill was then filed.

The attorney for Kent, on the same day, and after the bill was filed, appeared before the court, and stated that he desired to propose amendments to the bill, and had the same then prepared; but, not being assented to by Cole's attorney, motion was made before the circuit judge by Kent's attorney, at the next term of the court, to strike out the bill as filed, which motion was heard, and thereafter, on February 16, 1889, granted; and in the same order time was given to settle bill on the case until March 18, following. Afterwards a motion was made by counsel for Cole to set aside said order, which was denied by the court. On March 18, 1889, the said bill of exceptions was re-presented to the court for settlement, and the proposed amendments were also presented. The cir-

cuit judge thereupon made an order, of which the following is a copy:

"The Circuit Court for the County of Ingham.

"SIMEON V. KENT

vs.

"JESSE B. COLE.

"In this cause said defendant having, since the decision of said court was announced striking the bill of exceptions heretofore settled and signed and filed therein from the files, re-proposed said bill of exceptions for settlement and signature, and the plaintiff having proposed amendments thereto, and to include therein, as such amendments, the testimony of Dr. Coad, Dr. A. B. Campbell, William Reeves, Charles Darrow, Charles Riggs, William Miller, James Manning, John Wood, John Hill, Summitt R. King, William Curtis, Charles Guchers, George Swiggert, and Mrs. Kent, on the part of said plaintiff, and the testimony of Jesse B. Cole, James Cole, Mack Cole, Mrs. Cole, Norman Cole, Newell Trumble, Frank Steadman, George Harvey, and Dennis Herron, on the part of the defendant.

"And the court having had said proposed bill of exceptions, and said proposed amendments, under advisement until now, and the court being of opinion that it is necessary, to properly settle such bill of exceptions, that the testimony of said persons, offered on the trial of said cause, be written out at length by the court stenographer, and the defendant having neglected, and still neglecting, to furnish a transcript of such testimony, it is ordered that the settlement and signing of such bill of exceptions be and hereby is denied, unless the defendant shall within a reasonable time furnish to the court a transcript of such testimony from such stenographer's minutes, for the use of the court; and that the time for settling said bill of exceptions be extended for sixty days from this date, to enable said defendant to procure and furnish the stenographer's extension of said testimony."

The relator now asks this Court to require the circuit judge to set aside the order striking said bill of exceptions from the files, and for such other directions in the premises as the nature of the case may require.

We think this motion to vacate the order striking the bill from the files should be denied, and the circuit judge should proceed and settle the bill of exceptions presented.

There appears to be a misunderstanding on the part of our circuit judges as to the proper practice in making and settling a bill of exceptions under our rules and statutes. Many of the bills of exceptions which reach this Court consist simply of a transcribed copy of the stenographer's notes, giving all the testimony in the case, with the formal comments and conclusion of a proper bill of exceptions added. This is not the bill of exceptions authorized by our rules and statutes.

Only so much of the testimony should be brought into the bill as is necessary to fairly present the questions of law raised upon which a review in this Court is desired. Usually, such testimony may be given in the bill in narrative form, and thereby save much expense to litigants; and the party making the bill is under no obligation to secure a copy of the stenographer's minutes of any more of the testimony than he may deem necessary for this purpose; and for this amount, when properly certified to by the circuit judge, if the party making the bill prevails on the appeal, he may tax as his necessary costs.

If amendments are proposed to the bill for allowance on its settlement by the opposite party, and he needs to have a copy of the reporter's minutes, or any part thereof, to enable him to prepare proper amendments, he must procure such minutes himself; and he cannot require the other party to furnish them, or to bear the expense of the same, except, in case he prevails in the suit, then the expense thereof may be taxed as part of the costs, if such minutes have been properly certified to, as necessary. And we may say further, here, that amendments, when properly proposed to a bill, must contain a copy of whatever additional testimony, or exhibits, or other matter

the party proposing the amendments desires to have inserted; and copies thereof must be served on the opposite party before the time noticed for the settlement of the bill.

If, when the bill and amendments are properly brought before the court for settlement, further testimony is desired by the court, to enable him to properly settle a true bill, he should direct the stenographer to transcribe the same from his minutes, and file such transcript, free of charge; and no costs should be taxed by either party therefor. The stenographer is an officer of the court for such purpose, and subject to his order and direction; at least, to that extent. It is also the duty of the court to see that all bills of exceptions are made in accordance with the rules of the court, and the statutes relating thereto.

The relator must be allowed in this case to have his bill of exceptions presented and settled, in the manner herein indicated, within such reasonable time hereafter as the circuit court may fix, not exceeding sixty days after the filing of this opinion, and the relator will recover the costs of this motion; and so much of the order, above mentioned, providing for the settlement of said bill as is in conflict with this opinion will be set aside.

The other Justices concurred.

AMOS CHAFFEE v. THE TELEPHONE & TELEGRAPH CONSTRUCTION COMPANY.

Electric wires — Obstructing firemen — Damages — Acquiescence — Estoppel.

A man cannot be permitted to erect a building upon his lot by the side of telegraph and telephone poles and wires maintained in a private alley, appurtenant to said lot, without any objection against their standing there, when they are on his own land, and go on for years, without finding any fault whatever, and allowing a tenant to use one of the wires for business purposes in said building, and then, when a fire arises, and the wires are found to hinder the firemen in their work of extinguishing it, charge up to the corporation maintaining them the loss occasioned by such fire.

Error to Wayne. (Reilly, J.) Argued June 5 and 6, 1889. Decided November 15, 1889.

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

Otto Kirchner, for appellant, contended:

1. The act of the defendant in planting the poles and stretching and maintaining wires over them through the alley in the rear of plaintiff's premises, was the proximate cause of the destruction of his building. There is no occasion for refinements or an analysis of cases bearing upon the question of proximate and remote cause. The building would have been saved had the defendant desisted from the wrong complained of. It is a begging of the question to say that the fire was the immediate cause of the destruction of the building. The fire alone did not and could not have destroyed the building. It was the presence of the wires that made the fire a destructive agency; citing *Casting Co. v. Railroad Co.*, 109 Mass. 277; *Ins. Co. v. Tweed*, 7 Wall. 52; Field, Dam. § 50; Sutherland, Dam. 48, 62; *Brooklyn v. Railroad Co.*, 57 Barb. 497; *Atkinson v. Water Works Co.*, 6 Exch. L. R. 404; *Scott v. Hunter*, 46 Penn. St.

192; *Allegheny v. Campbell*, 107 Id. 530; *Dickinson v. Boyle*, 17 Pick. 78; *McAfee v. Crofford*, 13 How. 447.

2. The claim that the wires were in the alley by our consent is utterly baseless. In *Reid v. Atlanta*, 73 Georgia, 523, it was held not to be a defense to an action for discharging sewerage on plaintiff's land that defendant began to do it more than four years before; and in *Pettis v. Johnson*, 56 Ind. 139, the court held that it was no defense to an action for a nuisance that it had continued for eighteen years; and see *Gray v. Gas Light Co.*, 114 Mass. 149; *Railroad Co. v. State*, 20 Md. 157.

William H. Wells (Ashley Pond, of counsel), for defendant, contended:

1. The wires were not the proximate cause of the loss. The fire was the first cause. In its origin it had no connection with the wires. The fire alone was adequate to cause the loss. The wires alone were inadequate. It was after the fire was started and the loss was initiated, and to some extent was inevitable, that the factor of the wires appeared in the problem. They did not originate the loss, but interfered, it is claimed, with arresting it. One is under obligation to do no act which will frustrate means which are in use to extinguish a fire. But one is not responsible for the existence of an independent condition of things, if it prove an unintentional interference with means which might be used to extinguish a fire. In the former case, the act would be the direct cause of the loss; in the latter, the remote; citing *Casting Co. v. Railroad Co.*, 109 Mass. 277, as an example of the first rule, and *Bosch v. Railroad Co.*, 44 Iowa, 402, as an example of the absence of liability. See, also, *Mott v. Railroad Co.*, 1 Robt. 585, 593; *Sharp v. Powell*, L. R. 7 C. P. 253; *Railway Co. v. Ware*, 67 Tex. 635; *Lewis v. Railway Co.*, 54 Mich. 55, where the various cases of remote causation are reviewed.

MORSE, J. Plaintiff was the owner of lot 73 in section 2 of the Governor and Judges' plan in the city of Detroit, and of a valuable brick building thereon that yielded a monthly rent of $250. It was situated on the south side of Larned street west, in the block bounded by Larned street and Jefferson avenue on the north and south, and by Griswold and Shelby streets on the east and west, respectively.

The block was intersected by an alley 20 feet wide, running between Jefferson avenue and Larned street, from Griswold street westerly to Shelby street. The defendant put up and maintained 60 wires, stretched on cross-arms, each 6 feet long, attached to poles planted in the ground (8 to each pole), through said alley, in the rear of plaintiff's building. There were also 12 telegraph wires stretched through said alley by another company.

On March 2, 1888, a fire broke out in the building, and everything burned, except the walls. Some of the brick walls were not damaged so as to require to be taken down, but a part of them were. It is claimed that these wires prevented the fire department from extinguishing the fire. Mr. Tryon, the secretary of the fire department, testified, as did Mr. Elliott, the assistant chief engineer, that on account of these wires it was impossible for the firemen to raise the ladders, which were on trucks. Mr. Tryon, some time before the fire, notified Mr. Phillips, the manager of the defendant company, that these wires in the alley would prevent the fire department from raising its ladders in the event of a fire. Mr. Phillips replied that this was undoubtedly correct, but that the defendant company were preparing to get their wires under ground, and that they would strip that alley as soon as possible,—probably the first thing they did. When the firemen first reached the premises the fire was in the third story. Evidence was given on behalf of the plaintiff tending to show that if it had not been for these wires the first and second stories of the building could have been saved intact, except the damage from the water thrown on the fire.

The plaintiff sues in trespass on the case, claiming damages, and contends—

1. That the alley was a private way appurtenant to his lot and building.

2. That the erection of the wires by defendant in the alley was a trespass, and their maintenance a nuisance, every continuance of which was a new nuisance.
3. That, in contemplation of law, defendant, by its wires, was at the fire, and by force and arms prevented its extinction, and in so doing was the direct and immediate cause of the destruction of plaintiff's building.

The defendant claims—

1. That the defendant was not unlawfully maintaining the wires in the alley.
2. The act complained of was not the proximate cause of the loss.
3. The damages sought to be shown by the plaintiff's testimony are vague and speculative.

The first contention of the defendant is based upon the long acquiescence of the plaintiff in the maintenance of the wires in the alley.

The circuit judge before whom the case was tried, Hon. Cornelius J. Reilly, of the Wayne circuit court, at the close of the testimony directed a verdict for the defendant.

In the view that I take of the case, it is not necessary to discuss much of the evidence, or any point in the case save the first plea of the defendant. The evidence is uncontradicted that the building was erected five years before the trial of the suit. Before the erection of the burned building the lot was occupied by a dwelling-house, which had been there a great many years. The plaintiff testifies that the wires were placed there—

"A good while ago, and were there when the brick building, which was burned, was erected."

He knew the poles were there, and what the wires were used for

"I asked no questions about it. From the time I first knew the wires were there, I understood what they were for."

He never asked the defendant to remove them, nor protested against their maintenance in the alley, nor in any way manifested any dissent to the action of the defendant in keeping and using them there. He testifies that one of his tenants used a telephone in his building, and says:

"I never objected, or found fault with the defendant company for maintaining their wires in the alley."

I can see no legal or equitable reason why the plaintiff, tacitly assenting to the maintenance of the wires in this alley, by allowing his tenant to use a telephone connected therewith, and by permitting them to remain there without the least objection, should be allowed, after this fire, to place the damage, or any part of it, upon the defendant, nor can I find any law to sustain his action. It is contended by the counsel for plaintiff that the maintenance of the wires in the alley was a nuisance, and a continuing one from day to day, each continuance being a new nuisance; that the defendant was liable to the plaintiff in an action at law for the obstruction of the alley every day, up to and including the day of the fire; and that therefore the acquiescence of the plaintiff for one or more days cannot be used to infer an implied license for its continuance another day. The following cases are cited to support this contention: *Reid v. City of Atlanta*, 73 Ga. 523; *Gray v. Gas Light Co.*, 114 Mass. 149; *Railroad Co. v. State*, 20 Md. 157; *Pettis v. Johnson*, 56 Ind. 139.

These cases do not meet the question presented here. Failure to protest against a nuisance for a long space of time will not prevent an action to abate it, upon the principle that each day of its continuance is a new nuisance; and many courts hold that the right to maintain a nuisance can never be gained by prescription. But I

can find no authority anywhere, and I should doubt its being good law if I did find it, that will permit a man to build by the side of these telegraph and telephone poles and wires, without any protest or demur whatsoever against their standing there, when they are on his own land, and go on for years, without finding any fault whatever, and allowing a tenant to use one of the wires for business purposes in his building, and then, when a fire arises, and the poles are found to hinder the firemen in their work of extinguishing it, charge up to the corporation maintaining these poles the loss occasioned by such fire. To do this would be to violate one of the plainest principles of justice; and the law, in my opinion, will not permit it. I do not doubt the right of Mr. Chaffee to have moved at any moment to abate this nuisance, but while he acquiesced in it, and virtually was using it, or deriving some benefit from it, through a tenant in his building, he cannot be permitted to recover damages because of its maintenance upon his premises.

If there can be any assent which is not shown by express words, the plaintiff assented to the continuance of these poles upon his premises, and such assent was not a question for the jury. It was shown without dispute by his own testimony. There was clearly, to my mind, an implied assent that the poles might remain there, and no hint anywhere, not even in his testimony on the trial, that he ever considered them a nuisance until they were demonstrated to be so by the fire. Until something was done by Chaffee to notify the defendant that he found some fault with the maintenance of these poles in the alley, he could not recover damages for their being there.

The judgment was right, and must be affirmed.

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

CAMPBELL, J., *(dissenting)*. Whatever may be its effect as a circumstance on the question of damages, I think there can be no doubt of the right of any land-owner to sue for some damages for any encroachment on his property rights. Delay in complaining may sometimes cut off a right to sue in equity, but nothing short of statutory limitations can bar a suit at law. And where a wrongful entry or intrusion is made without license or permission, no license can be legally determined from inaction.

There is some difficulty in ascertaining the precise effect of the wires in connection with the fire. But such difficulty is no defense to an action, and a wrong-doer, and not the injured party, must bear this difficulty. Whether the danger of interference with putting out fires is a natural one, to which damage may be attached, is at least a question for the jury. That serious damage and fatal casualties have arisen from the placing of numerous wires near high buildings is a matter of common knowledge, and there can be no doubt it is a wrong unless consented to. It is not in the power of a city to license any one to damage or encroach on the property of individuals, and no justification can be based on it.

I do not think it can be held, as matter of law, that Mr. Chaffee is estopped from complaining of the action of the defendant, or from recovering some damages. Nor do I think we can prevent a jury from considering the amount of damages, under proper instructions as to the law; the facts not being subject to judicial determination. I think there should be a new trial.

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DAVID M. RICHARDSON v. CHRISTIAN H. BUHL AND RUSSEL A. ALGER.

Monopolies—Public policy—Void contracts—Corporations.

1. Courts will take notice, of their own motion, of illegal contracts which come before them for adjudication, and will leave the parties where they have placed themselves.

2. If a contract is void as against public policy, the court will neither enforce it while executory, nor relieve a party from loss by having performed it in part. *Foote v. Emerson*, 10 Vt. 344; *Hanson v. Power*, 8 Dana, 91; *Pratt v. Adams*, 7 Paige, 616; *Piatt v. Oliver*, 1 McLean, 280; *Stanton v. Allen*, 5 Denio, 434.

3. A corporation organized for the purpose of controlling the manufacture and sale of matches, and by means of which scheme all competition is stifled, and opposition crushed, and the whole business of the country in that line engrossed by said corporation, is a menace to the public; its object and direct tendency being to prevent free and fair competition, and control prices throughout the national domain. It is no answer to say that this monopoly has in fact reduced the price of friction matches. That policy may have been necessary to crush competition. The fact exists that it rests in the discretion of the corporation at any time to raise the price to an exorbitant degree. Such combinations have frequently been condemned by courts as unlawful, and against public policy. *Hooker v. Vandewater*, 4 Denio, 349; *Stanton v. Allen*, 5 Id. 434; *Coal Co. v. Coal Co.*, 68 Penn. St. 186; *Salt Co. v. Guthrie*, 35 Ohio St. 672; *Craft v. McConoughy*, 79 Ill. 346; *Hannah v. Fife*, 27 Mich. 172; *Alger v. Thacher*, 19 Pick. 51.

4. The following propositions are summarized from the opinion of Chief Justice SHERWOOD:

a—Monopoly in trade or in any kind of business in this country is odious to our form of government. It is sometimes permitted to aid the government in carrying on a great public enterprise, or public work under governmental control, in the interest of the public. Its tendency is, however, destructive of free institutions, and repugnant to the instincts of a free people, and contrary to the whole scope and spirit of the federal Constitution, and is not allowed to exist under express provision in several of our state constitutions.

b—It is doubtful if free government can long exist in a country where enormous amounts of money are allowed to be accumulated in the vaults of corporations, to be used at discretion in controlling the property and business of the country against the interest of the public and that of the people, for the personal gain and aggrandizement of a few individuals. It is always destructive of individual rights, and of that free competition which is the life of business, and it revives and perpetuates one of the great evils which it was the object of the framers of our form of government to eradicate and prevent. It is alike destructive to both individual enterprise and individual prosperity, whether conferred upon corporations or individuals, and therefore public policy is, and ought to be, as well as public sentiment, against it.

c—All combinations among persons or corporations for the purpose of raising or controlling the prices of merchandise, or any of the necessaries of life, are monopolies, and intolerable, and ought to receive the condemnation of all courts.

Appeal from Wayne. (Gartner, J.) Argued June 13, 1889. Decided November 15, 1889.

Bill to enjoin defendants from selling stock in a manufacturing corporation, held by them as security. Defendants appeal from decree directing retransfer of stock to complainant, and that defendants pay a balance of $35,219.25 found due complainant. Decree reversed and bill dismissed. The facts are stated in the opinion.

Willard M. Lillibridge (*F. A. Baker*, of counsel), for complainant.

Henry A. Harmon (*Ashley Pond*, of counsel), for defendants.

SHERWOOD, C. J. In 1879 the Richardson Match Company was located at Detroit. It was organized under the laws of this State, and the complainant owned or controlled all of its stock. Its business was manufacturing matches, but for 16 months previous to July 3, 1879, its factory had not been in operation. The capital stock

of the company then was $75,000, consisting of 3,000 shares of $25 each. On the representations of the complainant to defendant Buhl as to the earning capacity of the match factory, the defendants became security for complainant on his bond to the government for $80,000, and indorsed the commercial paper of the company to the amount of about $50,000. To secure the defendants on these liabilities Mr. Richardson assigned to defendant Buhl 1,800 shares of the stock in the Richardson Match Company, and received from him therefor the following receipt and agreement:

"Received of Mr. D. M. Richardson one thousand eight hundred shares of the stock of the Richardson Match Company, to be held by me for three years from July 1, 1879, as trustee, for the following purposes:

"1. To vote the same at all stockholders' meetings, both regular and special.

"2. To receive the dividends paid thereon, and retain the same, except one-sixth portion thereof, which I am to pay to D. M. Richardson.

"At the expiration of said three years, if all the obligations which I or R. A. Alger have assumed for said company are fully paid and satisfied, I am to transfer said stock to said D. M. Richardson.

"*Detroit, July* 3, 1879. C. H. BUHL."

The 1,800 shares of stock thus assigned to Buhl gave him and Alger control of the Richardson Match Company, and the agreement that they should retain five-sixths of the dividends made upon that stock gave them one-half of all the dividends or profits earned by the company. After the receipt was given, Gen. Alger became president of the company and a director, and Mr. Buhl and two of his sons, with Mr. Richardson, were the other directors. Frank Buhl, one of the sons, was made secretary and treasurer, at a salary of $1,200 per year. The Richardson Match Company was conducted under

the arrangement above stated until December 24, 1880. The paper indorsed by Buhl and Alger was discounted at 7 per cent. at the Detroit National Bank, in which they were interested, and the interest paid by the company in its ordinary course of business.

The Diamond Match Company was organized December 3, 1880, under the laws of the state of Connecticut, for the purpose of uniting in one corporation all the match manufactories in the United States. Its object was to monopolize and control the business of making all the friction matches in the country, and establish the price thereof; and it became necessary to buy many plants which had become established in the business, or were preparing therefor, and all the property used in connection therewith, and to obtain promises from the owners and manufacturers that they would not engage in the business themselves, or indirectly, through others, for ten or more years thereafter; and, for the purpose of obtaining the control and good-will of such factories and their properties, large powers were given by the legislature to the Diamond Match Company when organized, and under the by-laws by which it was controlled. The extent to which it was allowed to go in this direction in the accomplishment of its purposes appears in the articles of incorporation, in which it is stated, among other things, that the business of the company is—

"To manufacture, buy, sell, and deal in friction matches of all kinds, and all articles entering into the composition and manufacture thereof; to manufacture, buy, sell, and deal in machines and machinery, whether applicable to the manufacture of friction matches or to other purposes; to purchase, own, and sell exclusive rights under letters patent relating to the manufacture of friction matches, and to machines and machinery, whether applicable to the manufacture of friction matches or to other purposes; to manufacture, buy, sell, and deal in animal pokes, tobacco pipes, curry combs, brushes,

shoe-blacking, and shoe-dressing, and all articles entering into the composition and manufacture thereof; to purchase, own, and sell exclusive rights under letters patent relating to the manufacture of all the articles herein enumerated, and to machines and machinery applicable to the manufacture thereof; to buy, sell, own, and deal in any real or personal property necessary or convenient to the prosecution of said business,—and generally to do all things incidental to said business, and the proper management thereof."

The Diamond Match Company, in carrying out its purposes, found it necessary, in many instances, to buy a large quantity of useless material, and to pay large and exorbitant prices for the property purchased, which they could not make available; and in many cases in no other way was it possible to purchase the inactivity of manufacturers, and those who intended to enter into the business, and who would otherwise become competitors of the company in the trade. For the purpose of showing upon the books of the company the amount it was obliged to pay for unnecessary and useless property, and the excess in prices for the property they could use, to silence and prevent all competition, the company opened two accounts, —one headed "Real Estate and Machinery," and the other "Purchase Account." The capital stock of the company consisted of $2,250,000, divided into $1,400,000 of common stock, and $850,000 of preferred stock. For five years the preferred stock was entitled to an annual dividend of 10 per cent. before any dividend was to be paid on the common stock.

All corporations and individuals in the country, engaged in the business of making friction matches, desiring or consenting to transfer their property to the Diamond Match Company, did so upon valuations agreed upon, and received their pay therefor in the stock of the Diamond Match Company at par, and gave a bond to the company of the tenor and effect of that given by the

Richardson Match Company when it entered the company, a copy of the condition of which reads as follows:

"And the Richardson Match Co. hereby covenant and agree to and with the said The Diamond Match Company, that it shall not and will not at any time or times, within twenty years from the date hereof, directly or indirectly engage in the manufacture or sale of friction matches, and that it will not aid, assist, or encourage any one else in said business, in the State of Michigan or anywhere else, where its doing so may conflict with the business and interests, or diminish the sales, or lessen the profits, of the Diamond Match Co.; and it is understood by it that the above covenant not to engage in the match business is a valuable and influencing consideration, without which the Diamond Match Company would not have purchased the above property; and for the true and faithful performance of said covenant it hereby binds itself, its successors and assigns, heirs, executors, and administrators, unto the said The Diamond Match Company in the sum of fifty thousand dollars, to be recovered and paid as and for liquidated damages."

Mr. Richardson's individual bond is in substantially the same form, in a penalty of $25,000.

Each proprietor subscribed for a certain amount of preferred stock, which he paid for by transferring to the company such matches and match materials as he or it had on hand when they entered the company, at an appraised value, and, if this was insufficient to pay for such stock, the balance was paid in cash; but common stock was paid for all real estate, machinery, patents, good-will, bonds to stay out of the business, and all other property transferred to the company at the valuation agreed upon when the proprietor or proprietors came into the company, except matches and match materials, for which preferred stock was issued. Under the arrangement by which any party sold and conveyed a match factory or other property to the company, he was to buy at its par value one-half as much preferred stock as he

had received in common stock for his property. This was intended as the working capital for the new company, and every person who conveyed property to the company was obliged to give to the company a bond, such as is hereinbefore mentioned. Under the policy above stated, through the energy of its officers and managers, the Diamond Match Company succeeded in securing control, substantially, of all the factories in the country, with their several properties, and the owners thereof were brought under its dictation, and the great monopoly became complete, and, as was expected by its proprietors, the gains realized by the company were enormous.

Schedule A of the testimony shows that among the match factories that passed into the control of the Diamond Match Company at the time of its organization was that of the Richardson Match Company of Detroit, and at that time the agreement of July 3, 1879, between Richardson and Buhl, hereinbefore referred to, was in full force, as was the bond to the United States, and the liability of defendants, as Richardson's indorsers, was also in existence. One was for $60,000, and the other about $30,000 or $35,000, and as security against the payment of which defendants held 1,800 shares of the Richardson Match Company's stock; and, as further security, the company had been re-organized, and its management and control placed under the direction of the defendants, as hereinbefore stated, and which was successful. Its earnings after its re-organization were $29,675.39, and no dividends were declared, and it is conceded the defendants are entitled to $14,837.69 of these earnings; and it further appears that the defendants have never been called upon to pay anything on account of their said liability for the complainant, or the Richardson Match Company. This was the situation of the Richardson Match Company, and Mr. Richardson, who had been in

its employ since its re-organization, as general manager, at the time the Diamond Match Company was formed. It was, however, necessary, in consequence of the uncanceled liabilities of the defendants, and the desire of Mr. Richardson to raise more money to take the position he wished to in the new company, that a different agreement should be made from that of July 3, 1879, and that it should be between the complainant and defendants, and consummated before the Richardson Match Company became finally merged in the Diamond Match Company; and for this purpose Mr. Richardson, on November 22, 1880, submitted to the defendants the following proposition:

"DETROIT, MICH., Nov. 22, 1880.

"MESSRS. BUHL & ALGER:

"Proposition to me is as follows, viz.:

"*First.* To terminate the existing contract on the first day of January next, and to divide the net earnings on the basis of an inventory to be taken at that time, and to receive the dividend therefor

"*Second.* To indorse my notes for the necessary amount to purchase $100,000 of the preferred stock of the proposed new company, or so much thereof as shall be equal to 50 per cent. of the value of the factory, after deducting my share of the net earnings, allowance to be made for the payment of my personal debts. Their interest in the earnings of said stock to cease on July 1, 1882, provided said notes shall have been paid from the dividends upon said stock, or otherwise, on or before said July 1, 1882; the dividends received upon said stock to be applied to the payment of said notes. Said Buhl and Alger to receive one-half the dividends on the common and preferred stock of said company up to said July 1, 1882, at the time of final settlement: Provided, however, that in the event that no inventory of the assets and debts of the proposed new company shall be made on July 1, 1882, then the basis of settlement shall be as follows: Said Buhl and Alger shall receive one-quarter of the dividends made for the year 1882, and one-half the dividends for 1881, after deducting therefrom the

amount paid for interest on the mortgage on the factory property, and upon the notes so indorsed. The common and preferred stock to be assigned to Mr. C. H. Buhl, except $30,000, which is to be assigned to said proposed new company as collateral security for the payment of the mortgages on the factory, and a further sum of $5,000 to be held by me.

"*Third.* In the event said notes shall not have been paid, and the debt duly liquidated, on or before July 1, 1882, said Buhl and Alger shall receive one-half the dividends for the full term of two years from January 1, 1881, to January 1, 1883, after deducting from the total dividends of said company the interest on said mortgages and said notes. Upon settlement being made under the second or the third proposition, as herein stated, [said stock] shall be reconveyed to me."

This proposition was accepted, with the following addition, made by Gen. Alger, and which was assented to by Mr. Richardson:

"If, upon the expiration of two years from January 1, 1881, said notes are not paid, then Buhl and Alger are authorized to sell the necessary amount of stock to pay for the same, unless some further arrangement for carrying them along is agreed upon between them and myself."

Mr. Richardson testifies that, upon the basis of the contract contained in the foregoing proposition, as modified by Gen. Alger's addition thereto, he attended the meeting for the organization of the Diamond Match Company, and put into the new company the factory of the Richardson Match Company, at the sum of $190,000, and subscribed for $95,000 of the preferred stock. The $190,000 for the factory was paid for in common stock. The defendants gave their indorsements to the amount of $35,000 to enable the complainant to pay for his preferred stock, which he paid into the Diamond Match Company. The contract, as modified by Gen. Alger, had not yet been signed by the parties. At the general's

suggestion, a meeting of the parties was had on December 27, 1880, in Detroit, at which Gen. Alger proposed that an additional clause should be made to the modified contract. Mr. Richardson objected to the proposed change, but to which, he claims, under the then situation and circumstances, he was finally compelled to yield his assent, and the contract, as finally concluded, reads as follows:

"Memorandum of agreement between David M. Richardson, of the first part, and Christian H. Buhl and Russel A. Alger, of the second part, all of Detroit, Michigan, witnesseth as follows:

"*Whereas*, it is deemed expedient to wind up the business of the Richardson Match Company, and to unite its interests with the other match manufacturing interests in the United States in one corporation, to be known as the 'Diamond Match Company,' organized under the laws of Connecticut; and—

"*Whereas*, said Richardson desires to furnish ninety-five thousand dollars toward the necessary working capital of said Diamond Match Company, and also to sell his factory, and the machinery connected with same, to said Diamond Match Company:

"Now, therefore, for the purpose of making such consolidation, the parties hereto consent that the lands, buildings, machinery, tools, and fixtures of the Richardson Match Company be sold and conveyed to the said Diamond Match Company for the sum of one hundred and ninety thousand dollars ($190,000), to be paid for in the common stock of said Diamond Match Company at its par value. And as it will be necessary for said Richardson to borrow the principal part of said ninety-five thousand dollars, for which he is to receive ninety-five thousand dollars of the preferred stock of said Diamond Match Company at its par value, the said second parties agree to indorse the said Richardson's notes for such sum as is required to make up said ninety-five thousand dollars ($95,000), after deducting the amount of the net earnings due said Richardson from the proceeds of the Richardson Match Company since July 1, 1879, and to raise the money on said notes.

"An inventory of all the matches and match materials of the said Richardson Match Company on hand January 1, 1881, shall be made, and such property sold. The inventory and valuation of said personal property, upon which the same is sold, shall be the basis of settlement between the parties in the division of the profits of the Richardson Match Company. The first party is to assume the payment of the principal and interest of a mortgage on the property of the Richardson Match Company for $28,200, held by the Connecticut Mutual Life Insurance Company, and is to deposit with said Diamond Match Company $40,000 of said common stock, at its par value, as security for such payment. All the remaining stock, both preferred and common, is to be taken in the name of the first party, and, with the exception of ten shares of said common stock, is to be immediately transferred by him to said C. H. Buhl, to be held by said Buhl as security for the indorsements as above stated, and any and all other indebtedness of said first party or said Richardson Match Company to said parties, or either of them, and also as security to said second parties for their interest in the profits upon the said stock of the Diamond Match Company.

"The debts due to the said Richardson Match Company are to be collected, and its indebtedness paid. A settlement is to be made between the parties hereto, and the profits divided, as provided in the agreement of July 3, 1879, except that the share of the profits belonging to said first party shall be applied to the payment of his debt to the Richardson Match Company, and in payment of any moneys due from him to either of said second parties; and what remains shall be contributed by him as a part of said $95,000, and on the sum contributed he shall receive interest from the dividends paid on said stock.

"The dividends on the stock of the Diamond Match Company, both common and preferred, including the $40,000 pledged as aforesaid, and the 10 shares retained by said Richardson, for one year and six months from January 1, 1881, shall be applied—*first*, to the payment of interest on said mortgage to the Connecticut Mutual Life Insurance Company; *second*, to the payment of interest on the notes so indorsed by said second parties; and *third*, to the payment of interest to each of the parties

hereto on the money advanced by them respectively in making up said sum of $95,000. Of what there remains, one-quarter shall be paid to each of the said second parties, and the other half applied to the payment of the principal of the notes so indorsed by said second parties, and of any advances that may be made by them

"The said second parties agree that they will advance to said first party the dividends belonging to them as aforesaid, to be used in taking up said notes indorsed by them, and take therefor the notes of said first party, payable on or before March 1, 1883, with interest at the rate of seven per cent. per annum, and hold said stock as security for the payment thereof. If all said notes indorsed by said second parties as aforesaid are not paid by September 1, 1882, then said second parties shall be entitled each to one-fourth of the dividends on all said stock for the whole of the year 1882. The notes to be given by said first party to said second parties for any cash that they may advance to make up said $95,000 shall bear interest at seven per cent. per annum, and be payable on or before September 1, 1882. If all of the notes indorsed by said second parties as aforesaid, and any notes given by said first party to said second parties, are not paid by March 1, 1883, the said second parties are hereby authorized to sell said stock at public auction after thirty days' published notice, and apply the proceeds, or so much thereof as may be required, to the payment of said notes, interest, and expenses; the above provisions to apply to all original notes and renewals thereof.

"*It is expressly understood that said second parties are to receive one-half (each one-quarter), after deducting the payments for interest as above stated, of the net earnings of said stock, and not merely one-half the dividends; and in settlement with said first party, he is to pay them, in addition to one-half the dividends declared, the one-half of any surplus or reserved fund which, if divided, would pertain to said stock; and on such settlement no loss that may be charged on account of the purchase and sale by said Diamond Match Company of other match factories shall be taken into account; and, if such settlement is made at the end of a half-year, the earnings of the whole year shall be averaged so that the said second parties shall receive the full half of the earnings of said stock for the whole year. Provided, that on such settlement the second parties shall estimate such earnings from the trial balance or books of said*

Diamond Match Company, and shall make such allowances as to them shall seem just and equitable for loss and shrinkage in values of said Diamond Match Company, and shall take into consideration improvements that have been made out of the earnings thereof.

"DAVID M. RICHARDSON.
"R. A. ALGER.
"C. H. BUHL.

"*Detroit, Dec.* 28 1880."

That portion of this contract printed in italics is the clause added at the suggestion of Gen. Alger, and objected to by Mr. Richardson. In other respects, the agreement is substantially the same as that agreed upon in Richardson's proposition, dated November 22, 1880.

A supplementary agreement was entered into November 22, 1881, extending the contract of December 28, 1880, so that it should cover the entire period of two years. It is as follows:

"It is also agreed that the earnings of the stock of the Diamond Match Company, both common and preferred, including the $40,000 pledged to the Diamond Match Company, and the ten shares held by said Richardson, for two years after the first day of January, 1881, shall be applied as stated in said agreement of December 28, 1880; it being the intention hereof to provide that said second parties shall each receive one-quarter of the earnings of said stock for two years from January 1, 1881,—that is, one-quarter of the full earnings of the stock for 1881 and 1882, instead of for one year and six months, as stated in said agreement. In all other respects, except providing security for additional loans, as hereinbefore stated, said agreement is to remain in force and unchanged."

It is conceded that the liability of the defendants for the complainant upon their indorsements did not exceed at any time $85,600, and that at the time of the commencement of this suit such liability of defendants, both upon such indorsements and upon the bond to the government, except a small note of $3,150, had been paid, and that said note has since been satisfied, and that said

defendants have never been obliged to pay a dollar on account of such liability.

The Richardson stock, held by Buhl, in the Richardson Match Company was exchanged for stock in the Diamond Match Company, which took the place of the other. The dividends received on the Richardson stock amounted to $114,000, and the Richardson Match Company, when its business was closed up, showed profits to be divided of $29,675.39, or an aggregate of profits of $143,675.39. The interest paid on the mortgage on the Richardson match factory and on the paper indorsed amounted to $9,609.29, showing a net profit to be divided of $134,066, and leaving $67,033 to go to Buhl and Alger, and the same amount to Richardson. At the time the bill was filed Buhl and Alger had received $68,400, and since that time have received $24,400, making an aggregate of $92,800, or $25,767 more than one-half of the amount to be divided, as claimed by complainant. It is this last amount, with interest thereon, making a total of $35,319.25, for which complainant claimed and obtained at the circuit a decree, and from which defendants appeal. Complainant alleges that—

"The said sum of $68,400, so received by the said defendants, comprises the full one-half of all the net earnings of said stock so held by the defendant Buhl during the years 1881 and 1882, together with the amounts received as aforesaid by them from the net earnings of the stock of the Richardson Match Company; not charging against said stock any loss on account of the purchase and sale by said Diamond Match Company of other match factories. And your orator, upon like information and belief, avers that, during the said two years, the said stock has earned no surplus, and that there is no reserve fund which, if divided, would pertain to said stock, and that the said defendants have now received all that is due them upon the said stock, under the terms of the three contracts above referred to."

The foregoing allegations are denied by the defendants, and they allege that the net earnings of the Richardson stock in the Diamond Match Company for 1881 were $81,099.31, and for 1882 are $139,757.92; and that there is still due them on their share thereof $52,061.38, less the dividend of $24,400, received by them since the bill was filed. Thus it will be discovered that the issue in the case is made upon the proper construction of the contract of December 28, 1880, assuming that said contract is in all respects a valid instrument.

When the Diamond Match Company opened the books containing the account of its transactions, as has been hereinbefore alluded to, all of its purchases were kept in two accounts. Under the head of "Purchase Account," were matches and match material, appraised at cash value; and it would appear that under the head of "Real Estate and Machinery Account," everything else purchased by the company as taken and appraised was included. This account was represented by the common stock of the company, with which it was purchased; the other by preferred stock, which was given for it. There seems to be a general understanding that the property contained in the purchase account, or very much of it, was taken by the company at a large overvaluation, in some instances many times its worth was given; and it is claimed in like manner was there an overvaluation made and listed under the head of "Real Estate and Machinery Account;" that this became necessary in order to make the desired purchases, and secure the complete monopoly intended, that is to say, to increase the value of the company's stock and its gains by destroying all competition, whether the result of individual enterprise or corporate action, and to secure the non-action of the proprietors of the factories taken in or purchased. The

parties to this suit were all benefited by such action in proportion to the amount of stock held by each, as all were stockholders. It is true the complainant's stock, or a large portion of it, was at the time held by defendants as security, but that does not change the rules or the results which govern and follow the action taken by the company.

There appear in the record, as returned to this Court, from the books of the Diamond Match Company, commencing with August 1, 1881, 19 trial balances, ending with August 1, 1883. That of December 31, 1881, shows a credit to the profit and loss account of $647,433.43, and a debit of $7,175.67, leaving a balance to the credit of that account of $640,257.76. The trial balance of December 30, 1882, shows a credit to the profit and loss account of $1,118,848.42, and a debit of $15,496.29, leaving a balance to the credit of that account of $1,103,352.13. The board of directors, on February 9, 1882, adopted the following preamble and resolutions:

"*Whereas*, the several ledgers and general balance sheets of the company, at date of December 31, 1881, show the aggregate net earnings of all the factories earning a profit to be the sum of $647,433.43, and the aggregate losses of the factories making losses to be $7,175.67, making total net earnings, $640,257.76; and—

"*Whereas*, there are standing on the several ledgers of the company various purchase accounts, which are debited with an aggregate sum of $173,733.89, which represent the cost of same up to December 31, 1881; and whereas, the actual value of said purchase accounts is $5,500; therefore—

"*Resolved*, that the difference of $168,233.89 between the actual value and the book value of these purchase accounts be charged to Dr. of net earnings of the company for 1881, and that the president be instructed to furnish the managers with the proper forms of entries to carry this resolution into effect.

"*Whereas*, many of the real-estate and machinery accounts of this company have a book value, or are

charged with a cost sum in excess of their actual value; therefore, *resolved*, that $247,023.87 of the sum described as net earnings be applied to the reductions of the book values of such real-estate and machinery accounts, and in such proportions as the executive committee may approve, and that the president be requested to furnish the managers with the proper entries to carry this resolution into effect on the several books of account and ledgers of the company."

At the same meeting of the board of directors, a 10 per cent. dividend was declared. Three 10 per cent. dividends were declared for 1882; the last one at a meeting of the board February 14, 1883. At the same meeting it was resolved—

"That the balance remaining as credit of profit and loss account, after providing for the dividend declared at this meeting, be applied to the reduction of the book values of the company's real-estate and machinery accounts, such reduction to be apportioned among the several properties by the executive committee; the amount so to be applied being $310,922.26."

Subsequently a reduction was made in the purchase account of $117,429.87. This fact is admitted by a stipulation of the parties, and by said stipulation the following is given as a tabulated statement of the action of the company's board of directors in disposing of the profit and loss account for the two years in question:

1881.		
To the credit of profit and loss account		$640,257 26
Dividends	$225,000 00	
Charged off purchase acct	168,233 89	
Charged off real estate and machinery acct	247,023 87	
		$640,257 76
1882.		
To the credit of profit and loss acct		$1,103,352 13
Dividends	$675,000 00	
Charged off purchase acct	117,429 87	
Charged off real estate and machinery account	310,922 26	
		$1,103,352 13

The defendants claim that they are entitled under their agreement to their share of the amounts charged off, the same as though these amounts had not been so disposed of upon the books. Complainant claims that defendants are entitled to one-half of the dividends paid, and no more; that dividends and net earnings mean the same thing, as used in the contract between the parties in this case; and that they have received the amount to which they are entitled.

It is undoubtedly true that—

"The function of a profit and loss account is to show earnings, or the lack of them; and that everything being credited which ought to be credited, and everything being charged which ought to be charged, the profit and loss account will show what the net earnings or net losses are;"—

And I am satisfied that the learned counsel for the complainant is correct when he says—

"That the first thing to be done by any manufacturer who would ascertain his net earnings during the preceding year, is to take a careful inventory of what he has left, including his plant and machinery, and then make just and full allowances for all losses and shrinkages of every kind that he has suffered in his property during the year, and for all expenses of every kind, ordinary or extraordinary, that have occurred during the year, and, having made such inventory, and deducted such losses and shrinkage of every kind, his net earnings will be the difference between all his investments in his business and all his expenses of every kind on the one hand, and this new inventory, with the reductions properly made, and all that he has received of every kind on the other hand; and if his books are properly kept, and proper deductions made, these net earnings will finally appear on the balance sheet to the credit of the profit and loss account."

There is no dispute as to what the items "charged off" in the account represented, and that they stood upon the books of the company, under the direction of

its managers, in the account as debited to the company. It represented the agreed valuation of the property purchased by the company, or taken into it at its organization, and for which common stock of the company was issued or given to the owner or owners, and included therein is the bond, required in each instance where a purchase was made, that the vendor would not prosecute the business for a series of years thereafter

The stock was taken at par, the amount of the valuation and the amount of the stock being equal, and the value of the stock was never less than when taken, and remained at par except when sold for more; and it is a little difficult to see why it should be said, so long as this was the case, that there was a loss to the company or a shrinkage in value. It is true the value of the chattel property and real estate conveyed to the company may have greatly depreciated; but at the same time the rights surrendered to the company by the owner under his bond might, in the mean time, have greatly appreciated. It seems quite certain that no means are shown, if any exist, by which such loss or depreciation could be made to appear to a board of directors or to any one else with any degree of certainty.

But in this case a different question arises. Alger and Buhl, as regards the complainant, and their rights under this contract, occupy the position of third parties, and their interests are not controlled by these relations to the company. The amount they were to receive for their indorsements in no way depended upon the discretionary power of the board of directors. The net profits of the company mentioned in the contract served only to fix the amount they were to receive for their indorsements of the complainant's commercial paper. He had their indorsements to the extent he desired, and greatly to his pecuniary advantage, as the record plainly shows.

Notwithstanding the success of the company's operations has given to the terms upon which he received the aid of defendants almost the appearance of extortionate requirements, however, the hazard of the venture very much modifies this appearance when it is considered that a failure of the enterprise might have resulted in great financial disaster to defendants.

No question is raised as to the validity of the contract between the parties, or upon its invalidity upon the ground of public policy, or for any other cause. It is treated by the parties on both sides as a valid instrument, to be construed and enforced by the Court as such, and no unwillingness is expressed by either side to abide the correct construction when ascertained; but it is claimed by complainant that, if the construction is to be given to it contended for by defendants' counsel, equity and good conscience will have been violated to an extent requiring the exercise of the restraining power of a court of chancery to prevent the injury and wrong, not intended by the defendants when the instrument was made, and which at that time was entirely unanticipated by complainant. But it must be recollected that the object to be accomplished by the re-organization of the enterprise was by all the parties the same; that the means to be resorted to in the accomplishment of the object desired, if successful, had no respect for the equitable or just rights of any person under other and different circumstances; and that the complainant, as well as the defendants, were active participants in the business of the company and its proceeds, seeking the accomplishment of the same object, and participated largely in adopting the means to be employed for that purpose; and if such object or means were reprehensible or inequitable, all the parties, the complainant as well as the defendants, are "under the same condemnation," and a court of equity will leave the parties,

when such is the case, where it finds them,—outside the rules of courts of justice, "*in pari delicto*,"—and they must settle their own grievances and unlawful transactions.

The fact in this case appears plainly that the amount promised the defendants, and for which defendants ask payment, was to enable the complainant to occupy a place in the company which would give him a better position to share in the profits of the monopoly equally with the defendants. If it were our duty to adjudicate the rights of these parties, we should, under the circumstances, give the same construction to the contract in question, and apply the same rules, we would to any other agreement where no equitable considerations are involved. There is nothing ambiguous in the language used, nor is the object intended obscure. It was to organize and put into operation one of the greatest monopolies of the age, or rather to aid in so doing.

This is not a case where the complainant, as a stockholder, is seeking to obtain profits or dividends wrongfully withheld from him, or applied by a board of directors to an improper purpose, and the same rules do not govern the question that would be raised upon such an issue; but the simple question in the case is, what should the parties be held to mean from the language they have used, and does the action taken by the board of directors in disposing of the earnings of the stock during the two years in question bind the defendants as to the amount they are entitled to receive under their contract. It is evident to me that it does not, but that the defendants, independent of such action, may go behind it if necessary, and show that there has been no shrinkage of values,—no losses sustained,—and just what the net earnings of the stock have been during the two years; except in case it becomes necessary to make esti-

mates of earnings of the stock, it must be made from the trial balances, as these appear upon the books of the company, and in which case the defendants are to make proper allowances for the loss and shrinkage of the company's property, and shall take into consideration improvements that have necessarily been made in the proper conduct of the business.

It is expressly stated in the agreement that the defendants were not to receive one-half of the dividends merely which might be declared, but one-half of the net earnings of the stock; and it is not stated in the contract how or by whom such net earnings are to be ascertained. That portion of the contract upon which the contest arises best speaks for itself, and I do not think there is any chance for two opinions upon the subject of its proper construction. It says:

"It is expressly understood that said second parties are to receive one-half (each one-quarter), after deducting the payments for interest as above stated, of the net earnings of said stock, and not merely one-half of the dividends; and in settlement with said first party he is to pay them, in addition to one-half the dividends declared, the one-half of any surplus or reserved fund which, if divided, would pertain to said stock; and on such settlement no loss that may be charged on account of the purchase and sale by said Diamond Match Company of other match factories shall be taken into account; and, if such settlement is made at the end of a half-year, the earnings of the whole year shall be averaged so that the said second parties shall receive the full half of the earnings of said stock for the whole year: Provided, that on such settlement the second parties shall estimate such earnings from the trial balance on books of said Diamond Match Company, and shall make such allowances as to them shall seem just and equitable for loss and shrinkage in values of said Diamond Match Company, and shall take into consideration improvements that have been made out of the earnings thereof."

A close inspection of this paragraph of the contract

very clearly discloses, I think, that in the settlement to be made between these parties it was expressly provided that in ascertaining the half of the net earnings of the stock, to which the defendants were entitled, no such "charging off" from such earnings was to be allowed; and I do not think, as is urged by complainant's counsel,—

"That, in the absence of bad faith or mistake, the action of the board of directors in reducing the amounts to the credit of the profit and loss accounts is conclusive upon the parties to this suit as to the amount of the earnings or profits to be divided between them;"—

And it is of no consequence whether their action in this regard can be impeached or not, if the defendants are not bound by the action of the board of directors. There is no doubt but that the Diamond Match Company in doing a legitimate business would have had the right to have the par value of its shares of stock maintained out of the profits or earnings of the company, and it was maintained; and for that purpose it was entirely unnecessary for its board of directors to direct any "charging off," as was done in this case. Its stock was not only at all times at par, but, as we have before said, largely above par, and has always been at a premium; and from its earnings the year after the agreement ended the complainant himself received a stock dividend amounting to $70,000.

If it were necessary, but little difficulty would be found, I think, in showing that the sums "charged off" were not properly expenses or losses in running the business of the company. I think the learned counsel for defendants was right in saying—

"It was an acquisition of the very property the company at the outset had determined to acquire, and was of more permanent value than if it had been invested in new

factories. The object of the company was to crush others, that it might be valuable. It did that, and expended out of its earnings for 1881 and 1882 $285,663.76, not as an expense of running the business, but for the purpose, and with the inevitable effect, of increasing its property. What was acquired with this money was none the less property because intangible. Every dollar thus expended added itself to the value of the business, and became a permanent part of it. Richardson owns $285,000 of the stock of this company (exclusive of $70,000 acquired by stock dividend from earnings of 1883), every dollar of which was permanently enhanched in value by these expenditures. * * * It was a permanent investment. The company had determined to monopolize the business, and therefore the more perfect the monopoly became the more valuable its property became. Every factory it bought and closed, every patent it acquired, every good-will it purchased, every man it bought up, added to the value of its stock not only the amount paid, but from the very necessity of the case, very much more."

Of course, when the agreement between these parties now before us for construction was entered into, no one could certainly tell that the defendants would ever realize a dollar of profits from their venture, while their liabilities assumed were very large. It could not be known that the dividends would ever be sufficient even to pay the interest on the notes indorsed, or the mortgage of $28,200 covering the property which was their only security, and which was to be first paid before they could realize any thing by way of profit. The success of the enterprise was not altogether free from doubt. Upon this point, Richardson himself says in his testimony he considered he was assuming a great risk in turning his factory into the Diamond Match Company. Such was the complexion of things at the time the contract was made, as viewed by him, and he had then had 25 years' experience in the business. If the parties could have known then what they know now, or could they have foreseen the

almost fabulous future pecuniary success of this company, the contract made would have been regarded as both unconscionable and oppressive. But in construing the instrument, if a valid one, the circumstances and surroundings under which it was made, should be taken into consideration. Neither mistake nor fraud is claimed to have been used by the parties, or either of them, at the time it was procured and entered into, and we are asked to treat it as valid and binding, and construe it accordingly; and in this respect, so far in the discussion, I have complied with counsels' request, and in so doing have been unable to take any view of the case which will sustain the decree made by the learned circuit judge.

But an examination of the record, and the character of the transactions out of which the contract grew, and the object intended to be accomplished by it, as I have found them, raise another, and far more important, question, and which it becomes the imperative duty of this Court to pass upon, whether raised by counsel or not.

When a contract is brought before us for construction and adjudication, its validity is necessarily involved, and it is usually the first point to which the attention of the Court is challenged by counsel; but in this case, when, upon the argument, attention was called to this feature of the case, it was allowed to pass by counsel upon both sides without discussion. I have therefore expressed my views of the case as presented by the parties, and will now pass to the question which it is not needful for counsel to present in order to secure the action of this Court in disposing of the same.

I think no one can read the contract in question, and fail to discover that considerations of public policy are largely involved. The intention of the agreement is to aid in securing the objects sought to be attained in the formation and organization of the Diamond Match Com-

pany. This object is openly and boldly avowed. Not only does this appear in its organization, and in the business it proposes to conduct, and in the modes and manner of carrying it on, but the testimony of Gen. Alger himself avers it, and settles its character beyond question. The organization is a manufacturing company. The business in which it is engaged is making friction matches. Its articles provide for the aggregation of an enormous amount of capital, sufficient to buy up and absorb all of that kind of business done in the United States and Canada, to prevent any other person or corporation from engaging in or carrying on the same, thereby preventing all competition in the sale of the article manufactured. This is the mode of conducting the business, and the manner of carrying it on.

The sole object of the corporation is to make money, by having it in its power to raise the price of the article, or diminish the quantity to be made and used, at its pleasure. Thus both the supply of the article and the price thereof are made to depend upon the action of a half dozen individuals, more or less, to satisfy their cupidity and avarice, who may happen to have the controlling interest in this corporation, an artificial person, governed by a single motive or purpose, which is to accumulate money regardless of the wants or necessities of over 60,000,000 of people. The article thus completely under their control, for the last 50 years has come to be regarded as one of necessity, not only in every household in the land, but one of daily use by almost every individual in the country. It is difficult to conceive of a monopoly which can affect a greater number of people, or one more extensive in its effect on the country, than that of the Diamond Match Company. It was to aid that company in its purposes, and in carrying out its object,

that the contract in this case was made between these parties, and which we are now asked to aid in enforcing. Monopoly in trade or in any kind of business in this country is odious to our form of government. It is sometimes permitted to aid the government in carrying on a great public enterprise, or public work under government control, in the interest of the public. Its tendency is, however, destructive of free institutions, and repugnant to the instincts of a free people, and contrary to the whole scope and spirit of the federal Constitution, and is not allowed to exist under express provision in several of our state constitutions.

Indeed, it is doubtful if free government can long exist in a country where such enormous amounts of money are allowed to be accumulated in the vaults of corporations, to be used at discretion in controlling the property and business of the country against the interest of the public and that of the people, for the personal gain and aggrandizement of a few individuals. It is always destructive of individual rights, and of that free competition which is the life of business, and it revives and perpetuates one of the great evils which it was the object of the framers of our form of government to eradicate and prevent. It is alike destructive to both individual enterprise and individual prosperity, whether conferred upon corporations or individuals, and therefore public policy is, and ought to be, as well as public sentiment, against it.

All combinations among persons or corporations for the purpose of raising or controlling the prices of merchandise, or any of the necessaries of life, are monopolies, and intolerable; and ought to receive the condemnation of all courts.

In my judgment, not only is the enterprise in which

the Diamond Match Company is engaged an unlawful one, but the contract in question in this case, being made to further its objects and purposes, is void upon the ground that it is against public policy.

The decree at the circuit should be reversed, and the complainant's bill dismissed, with costs.

CHAMPLIN, J. I concur with the Chief Justice in dismissing the bill of complaint, for reasons which render it unnecessary to discuss the merits of the controversy between the parties.

It appears from the testimony that the Diamond Match Company was organized for the purpose of controlling the manufacture and trade in matches in the United States and Canada. The object was to get all the manufacturers of matches in the United States to enter into a combination and agreement, by which the manufacture and output of all the match factories should be controlled by the Diamond Match Campany. Those manufacturers who would not enter into the scheme were to be bought out, those who proposed to engage in the business were to be bought off, and a strict watch was to be exercised to discover any person who proposed to engage in such business, that he might be prevented, if possible.

All who entered into the combination, and all who were bought off, were required to enter into bonds to the Diamond Match Company that they would not, directly or indirectly, engage in the manufacture or sale of friction matches, nor aid nor assist nor encourage any one else in said business, where, by doing so, it might conflict with the business interests, or diminish the sales, or lessen the profits, of the Diamond Match Company. These restrictions varied in individual cases as to the time it was to continue, from 10 to 20 years. Thirty-one manufacturers, being, substantially, all the factories where

matches were made in the United States, either went into the combination, or were purchased by the Diamond Match Company, and out of this number all were closed except about 13.

Gen. Alger was a witness in the case, and was asked by his counsel the following question:

"It appears that during the years 1881 and 1882 large sums of money were expended to keep men out of the match business, remove competition, buy machinery and patents, and in some instances purchase other match factories. I will ask you to state the reasons, if any there are, why those sums should not be treated as an expense of the business, and charged off from this account?"

To which he replied:

"Because the price of matches was kept up to correspond, so as to pay these expenses, and make large dividends above what could have been made had those factories been in the market to compete with the business."

It also appears from the testimony of Gen. Alger that the organization of the Diamond Match Company was in a measure due to his exertions. There is no doubt that all the parties to this suit were active participants in perfecting the combination called "The Diamond Match Company," and that the present dispute grows out of that transaction, and is the fruit of the scheme by which all competition in the manufacture of matches was stifled, opposition in the business crushed, and the whole business of the country in that line engrossed by the Diamond Match Company. Such a vast combination as has been entered into under the above name is a menace to the public. Its object and direct tendency is to prevent free and fair competition, and control prices throughout the national domain. It is no answer to say that this monopoly has in fact reduced the price of friction matches. That policy may have been necessary to crush competition. The fact exists that it rests in the discretion of

this company at any time to raise the price to an exorbitant degree. Such combinations have frequently been condemned by courts as unlawful, and against public policy. *Hooker v. Vandewater*, 4 Denio, 349; *Stanton v. Allen*, 5 Id. 434; *Coal Co. v. Coal Co.*, 68 Pa. St. 186; *Salt Co. v. Guthrie*, 35 Ohio St. 672; *Craft v. McConoughy*, 79 Ill. 346; *Hoffman v. Brooks*, 11 Week. Crim. Law Bul. 258; *Hannah v. Fife*, 27 Mich. 172; *Alger v. Thacher*, 19 Pick. 51.

It is also well settled that, if a contract be void as against public policy, the court will neither enforce it while executory, nor relieve a party from loss by having performed it in part. *Foote v. Emerson*, 10 Vt. 344; and see *Hanson v. Power*, 8 Dana, 91; *Pratt v. Adams*, 7 Paige, 616; *Piatt v. Oliver*, 1 McLean, 280, 2 Id. 277; *Stanton v. Allen*, 5 Denio, 434.

It is not necessary that the parties, or either of them, should rely upon the fact that the contract is one which it is against the policy of the law to enforce. Courts will take notice, of their own motion, of illegal contracts which come before them for adjudication, and will leave the parties where they have placed themselves.

CAMPBELL, J., concurred with CHAMPLIN, J.

LONG, J. I concur in the result reached by Mr. Justice SHERWOOD in this case. I am not, however, entirely satisfied with many of the reasons he gives for his conclusions.

It clearly appears that the defendants were never members of the Diamond Match Company, and never held a dollar of its stock, except by way of security for the loan of their credit to complainant. In 1879 D. M. Richardson was the head of a corporation, organized under the laws of this State, having a capital of $75,000, consisting of 3,000 shares at $25 each; but such was its financial

condition that for more than sixteen months prior to July 3, 1879, its doors were closed, and all operations suspended. In these straits complainant called upon defendant Buhl, and induced him, in conjunction with General Alger, on that date to indorse the commercial paper of the corporation to the amount of $50,000, and to become security on his government bond in the sum of $80,000. In order to be secured, defendants took 1,800 shares of the capital stock of the corporation, with a right to vote it at stockholders' meetings, to receive dividends thereon, paying one-sixth part of such dividends to complainant, and, at the expiration of three years, if all the obligations to defendants were paid, the whole of the stock held by defendants was to be transferred to complainant. Defendants, after this arrangement was made, gave their attention to the business, and it was carried on till December 24, 1880, under that arrangement. During this time, under the management of the defendants from July 3, 1879, to December 24, 1880, a period of a little over seventeen months, this corporation, whose doors had been closed for the prior sixteen months, had earned nearly $30,000.

On November 22, 1880, complainant made a written proposition to the defendants to modify and change, in a great measure, the agreement of July 3, 1879, which was agreed to by the defendants, after some additions were made at the instance of Gen. Alger. This proposition, and the amendment thereto, are set out in full in the opinion f Mr. Justice SHERWOOD, and need not be stated here. This new arrangement was not yet signed by the parties, and on December 27 1880, the parties met, and a contract was formulated, with certain other additions, which the parties finally all assented to and signed.

It appears that before this contract was finally agreed

upon and executed, and on December 3, 1880, the Diamond Match Company was organized under the laws of the state of Connecticut, and complainant desired to transfer the property and business of the Richardson Match Company to that, and to take its stock in payment therefor. In order to do this complainant was compelled to take one-half as much stock in the new company as his properties and business were placed at in the new company, and to pay cash therefor. The property and business were placed in the new company at $190,000, in shares of the new company's common stock, and complainant took $95,000 of the preferred shares. In order to raise this amount of money complainant again called upon the defendants to indorse notes to that amount, less the net earnings of the Richardson Match Company since July 3, 1879. The defendants agreed to advance to complainant the dividends belonging to them arising from the business of the Richardson Match Company, to be used in taking up the notes indorsed by them, and to take the notes of the complainant therefor, payable March 1, 1883, with interest at 7 per cent., and it was provided that all notes given to defendants by complainant to make up the $95,000 should draw interest at 7 per cent.

The Connecticut Mutual Life Insurance Company held a mortgage of $28,200 on the properties of the Richardson Match Company. It was provided in the contract that, upon a transfer of these properties over to the Diamond Match Company, complainant should deposit with it $40,000 of the common stock to secure the payment of this mortgage, and that complainant should take all the balance of the stock, both common and preferred, in his own name, and at once indorse it over to defendant Buhl, to secure the defendants upon their indorsements, and their interest in the profits of the Diamond

Match Company. The contract also provided that, if these notes were not paid by March 1, 1883, defendants might sell these shares of stock at public auction, after thirty days' published notice, to meet such payments, interest, and expenses.

The rights and interests of the parties were then fixed by the contract in the following terms:

"It is expressly understood that said second parties are to receive one-half (each one-quarter), after deducting the payments for interest as above stated, of the net earnings of said stock, and not merely one-half the dividends; and in settlement with said first party, he is to pay them, in addition to one-half the dividends declared, the one-half of any surplus or reserved fund which, if divided, would pertain to said stock; and on such settlement no loss that may be charged on account of the purchase and sale by said Diamond Match Company of other match factories shall be taken into account; and, if such settlement is made at the end of a half year, the earnings of the whole year shall be averaged so that the said second parties shall receive the full half of the earnings of said stock for the whole year: Provided, that on such settlement the second parties shall estimate such earnings from the trial balance or books of said Diamond Match Company, and shall make such allowances as to them shall seem just and equitable for loss and shrinkage in values of said Diamond Match Company, and shall take into consideration improvements that have been made out of the earnings thereof."

This contract was executed on December 28, 1880, and the Richardson Match Company's properties and business transferred to the Diamond Match Company, and the stock transferred to Mr. Buhl, as the contract provided.

It is conceded that since the making of this contract the notes signed by defendants have been paid from dividends received from the Diamond Match Company. The whole contention, therefore, arises upon the construction of this portion of the contract referring to net profits, and the interest of defendants thereunder.

It appears that in the organization of the Diamond Match Company the various parties put in their plants and good-will of the business at exorbitant prices,—much more than they were actually worth,—and also gave a bond not to engage in similar business, for which they were paid large amounts in stock of the company. Upon an inventory of the property the following year, the properties were put in at their actual worth. The accounts of the company were kept upon the ledger under two general heads,—one real estate and machinery account, and the other purchase account. Under the new inventory large deficits appeared in these two accounts, and, under a resolution of the board of directors, sufficient of the earnings of the company were taken out and applied to make up these balances, and these accounts were charged off. Complainant claims that the balance to be divided among the stockholders after these deductions, and deductions for expenses, represented the net profits; and that defendants, under their contract with him, must share in this loss.

Defendants claim that they are entitled, under the agreement, to their share of the amounts charged off the same as though these amounts were not so disposed of by the board of directors upon the books. I think the defendants are correct in their interpretation of the contract. The contract is not ambiguous. It was entered into by all the parties understandingly, and no fraud or mistake is charged. The contract expressly provided that—

"On such settlement no loss that may be charged on account of the purchase and sale by said Diamond Match Company of other match factories shall be taken into account," etc.

Whatever the rights of the parties may be as between the complainant and the Diamond Match Company to

charge these amounts off, and apply the earnings of the company to such purpose, certainly the defendants could in no manner be bound by the action of the board of directors in that regard. They were not members of that company, and held the stock directly from the complainant by way of security for their indorsements, and for the payment of their claims, which were certainly and definitely fixed by the contract. The net earnings of the company, as mentioned in the contract, served only to fix the amount they were to receive.

The complainant states in his bill that the net earnings of the stock of said company, so held as security by defendants, including these amounts charged off applicable thereto, amounted, in the year 1881, to the sum of $81,099.31, and for the year 1882 amounted to $139,757.93. While these amounts are large, yet complainant gets one-half, and the defendants each one-quarter, by the terms of the contract. As is well stated by Mr. Justice SHERWOOD:

"Of course, when the agreement between these parties now before us for construction was entered into, no one could certainly tell that the defendants would ever realize a dollar of profits from their venture, while their liabilities assumed were very large. It could not be known that the dividends would ever be sufficient even to pay the interest on the notes indorsed, or the mortgage of $28,200 covering the property which was their only security, and which was to be first paid before they could realize anything by way of profit. The success of the enterprise was not altogether free from doubt. Upon this point, Richardson himself says in his testimony he considered he was assuming a great risk in turning his factory into the Diamond Match Company."

He took this risk, and the defendants shared it with him therein by the indorsement of his notes to nearly $85,000. They were together to get one-half of the net earnings for a certain definite period, after the payment

of these notes and mortgage. Complainant was then entitled to the whole stock, freed and unincumbered from any claims of defendants whatever, and the stock was to be assigned to him. The stock has made fabulous earnings, more than complainant or defendants could ever have anticipated or hoped. Complainant, as appears from this record, has reaped the benefits of defendants' financial standing and business abilities. The defendants found him with a plant stocked at $75,000, and his shop closed. They opened the doors, and put the machinery in motion, which, according to complainant's statement, has an earning capacity of more than $100,000 annually, and made the complainant the owner and possessor of $190,000 of the common stock and $95,000 of the preferred shares fully paid for.

It would seem that one ought to be satisfied with such results, and be willing that those who have carried the burden, and upon whom the loss would fall if disaster overtook the enterprise, should share in the profits when crowned with success, especially when the rights, duties, and obligations of the parties are fixed with so much certainty as appears by this contract.

Complainant's bill is entirely devoid of equity, and there is nothing appearing in the record showing that defendants have not treated the complainant in the most honorable manner, and under the true interpretation of the contract.

Whether the organization of the Diamond Match Company is one against public policy, I do not propose to discuss. Defendants are not members of the company, nor have they ever been. They claim the right to sell and dispose of this stock so held by them as security, and to realize therefrom the amount then due under the contract. By the terms of the contract they have the right to pursue this course.

By the decree of the court below they were restrained from making this sale. I agree with Mr. Justice SHERWOOD that the decree of the court below be dismissed, with costs.

MORSE, J., did not sit.

REBECCA J. BARRETT v. HENRY R. LOWREY,

AND

REBECCA J. BARRETT v. CHARLES H. FRAIN.

[2 Cases.]

Equity—Fraudulent conveyances—Good-faith purchasers—Executions—Husband and wife.

These cases involve the question of an alleged fraudulent sale of land to the complainant, upon which executions were levied by her husband's creditors, and she brings these suits to remove the cloud thereby created upon her title, and a decree dismissing said bills is affirmed by a majority of the Court. The cases involve questions of fact purely.

Appeal from Clinton. (Smith, J.) Argued June 28, 1889. Decided November 15, 1889.

Bill to remove cloud from title. Complainant appeals from decree dismissing bill. Affirmed. The facts are stated in the opinion.

Fedewa & Lyon, for complainant, contended:

1. Fraud must be clearly proven by such evidence as is required to establish any other fact, and cannot be lightly presumed; citing *Darling v. Hurst,* 39 Mich. 765; *Pogodzinski v. Kruger,*

44 Id. 79; *Campau v. Lafferty*, 50 Id. 114; *Brown v. Dean*, 52 Id. 267; and the law presumes honesty; citing *Hopson v. Payne*, 7 Mich. 334; and see, also, *Miller v. Beadle*, 65 Id. 643.

Lyon & Hackleman, for defendants, contended:

1. Evidence that complainant purchased amounts to nothing unless accompanied with clear and full proof that she paid for the farm with her separate funds; and in the absence of such proof the presumption is violent that her husband furnished the means of payment; citing *Keeny v. Good*, 21 Penn. St. 349; *Bradford's Appeal*, 29 Id. 515.
2. The transaction was really between James and his wife, and William was only a convenient tool; citing *Breslauer v. Geilfuss*, 65 Wis. 377; *Bank v. Tyler*, 55 Mich. 297.
3. Actual participation in the fraudulent intent by one who takes a transfer from an embarrassed debtor is not necessary. Good faith is affected by any facts which would put an ordinarily prudent person on inquiry; citing *Hough v. Dickinson*, 58 Mich. 89; *Bedford v. Penny*, Id. 424.

MORSE, J. The testimony in these two cases is the same, except as to the date of the levies of execution, and therefore I shall treat them both together.

In 1885, James Barrett, the present husband of complainant, was living upon and the owner of a farm in Clinton county. This farm was subject to a life-lease executed to an old gentleman, Charles White, who had in 1867 conveyed the premises to Barrett. Barrett was considerably in debt in 1885, and there were mortgages upon the land amounting to about $3,600,—one executed to a brother, William Barrett, for $1,200, January 7, 1885, which was assigned by William to Anna Barrett, January 10, 1885; one to Thomas C. Pitkin, of Detroit, for $600; and one to James M. Soverhill, of Geneva, New York, for $1,800. August 3, 1885, James Barrett conveyed this farm to his brother, William Barrett, the consideration in the deed being $6,000. August 10, 1885, the defendant Charles H. Frain, who had a judgment against James Barrett, levied upon the premises as the property of said

James Barrett, and the same were sold at sheriff's sale, and bid in by said Frain, and the usual certificate executed and filed in the proper office.

On December 19, 1885, the complainant married James Barrett. July 21, 1886, William Barrett conveyed the farm to the complainant, for the consideration, expressed in the deed, of $6,200, with a clause in the deed conveying also the wheat sown on the premises. September 24, 1886, the defendant Lowrey, who had a judgment against James Barrett, levied upon the premises as his property. No steps were afterwards taken to further enforce this levy. In the deed from James to William Barrett the premises were warranted free from all incumbrances. Nothing was said about incumbrances in the deed from William to the complainant.

In April or March, 1888, the complainant filed separate bills of complaint in the circuit court for the county of Clinton, in chancery, against Frain and Lowrey, alleging that she was the owner of the premises; that she had been in sole possession of the same since July 21, 1886; and that the value of the same was $5,000. She avers the levies, and the sale under the Frain execution, and the failure to further enforce them; that she had demanded their removal and cancellation of the defendants, notifying each of them that she was the legal and lawful owner, in fee, of the whole premises, but that they had each refused and neglected to comply with her demand, and that they each maintain that they have a legal lien upon the land, and that said James Barrett has an interest in the premises.

The defendants admit the levies, and their claim of lien under them, and aver that the deeds from James to William and from William to complainant were without consideration, in fraud of, and void against, James Barrett's creditors. The court below, upon the pleadings

and proofs taken in open court, dismissed both bills.

The decree in each case is manifestly right. The testimony shows a barefaced attempt on the part of James Barrett to defraud his creditors, and that William Barrett and complainant were parties to it, and that the deeds were made in execution of the fraud. At the time the deed from James to William was made, William was living with James, who was then a widower. They went to Lansing to have the deed executed; and William, according to his testimony, had $3,000 in money, which at the time, and for some time before, he was carrying in his pocket. He did not pay James for the land at Lansing, when the deed was delivered, but waited until after they returned home, at night, when he paid James $2,400 in cash; that being the amount of the consideration over and above the mortgages. This payment rests on the oath of William alone; James not being sworn on behalf of complainant. No one has ever seen or heard of a dollar of this money since the pretended payment.

Where the money that William carried in his pocket came from is also a great mystery. He is not shown to have had it, except by his own testimony, which clearly shows he did not have it. He is a single man, and is now living where he was when this deed was executed, at the house of James Barrett. According to his testimony, he was in business 30 years in Franklin, Oakland county, where he had a varied experience; being arrested for various crimes and misdemeanors some 20 times, or more. He attributes his misfortunes in this respect to whisky, which he says he tried to destroy by drinking it for 15 years. Failing in this, he turned around, and attempted to prevent the sale of it. Then those who were in favor of liquor selling began to persecute him, procuring his arrest for various offenses, and also his conviction for some of them, larceny being one of the crimes of which

he was found guilty. He was in the dry-goods and grocery business at Franklin, and five years before the time he was testifying, owned a stock of goods inventoried at $5,000. He owned the store in which the goods were. He had no other property at that time, or when his store and goods were burned, about that time. He has done nothing to earn any money since, but has had plenty to live on. The insurance on the goods and store he has not yet collected.

He also testifies that at the time of the deed to him he knew of the mortgages on the land, but did not know that James owed any other debts. In almost the same breath, he swears that he does not know what James did with the money he paid him, but that James told him that he was going to work and pay up his debts with it, —little debts that he had around loose. He testifies that he bought the farm to get his pay upon the $1,200 mortgage he had upon it; but his own testimony shows that he had assigned the same to one Anna Barrett, his sister, over six months before, and received the money for it. After the execution of his deed, he still lived with James, and the farm was so managed and conducted by James that no one in the neighborhood knew or suspected that any transfer had been made to William.

October 30, 1885, James insured the house and barn on the premises against fire, and in his application for insurance stated that he owned the farm, and the buildings and personal property upon it. The deed from James to William was not put on record until July 21, 1886, the same day that William deeded to the complainant.

The statement of complainant in relation to the money she paid towards this land, and where she obtained it, is also very unsatisfactory. She claims to have paid William $1,000 the day the deed was executed to her, $800 of

which she borrowed of a relative, one Charles Haveland, who supports this claim by his testimony. Haveland is shown to have been at this time heavily in debt, with a large mortgage upon his farm, on which he was unable to pay the interest. The complainant's testimony was neither frank nor candid. On cross-examination she refused to answer many proper and reasonable questions. She was unwilling, and refused, to explain many things that needed explanation. In answer to different interrogatives, she said: "That is my own affair, mister," "I shan't answer," "I shan't tell, if I do know," and the like. If she could tell a plain, straightforward story as to her purchase of this land, she certainly did not do so on this hearing, or manifest any disposition to do so.

The payments she has made, since she received the deed of the farm, of interest on the mortgages and other debts have manifestly been made out of the proceeds of the farm, which she admits she has received, although to all outward appearances, James has run and managed it the same as he did before these conveyances were made. A very significant feature of these cases, as tried, is the failure of the complainant to call her husband, who is charged by the defense to have disposed of his land with intent to defraud his creditors. If the transaction was a fair and honest one, his testimony was material, and would have been of great advantage to complainant, and no good reason is shown for his remaining silent, as he was in the court-room during the trial, and testified, being called by the defense, as to some matters in the case.

It is suggested that the defendants have lost their right to enforce these levies because they have not moved sooner, and therefore the prayer of complainant's bill should be granted. It is said that one attacking a trans-

action as fraudulent must complain, by proper proceedings, promptly, or the remedy is waived. In the case of Frain, the levy was upon this land when the complainant pretends she purchased it, and was notice to her that fraud in the sale from James to William was complained of, and the levy of Lowrey was made very soon after she received her deed. The fraud was complained of speedily, and the initial steps taken to contest it. That is all the law requires. There has been no such delay since, in my opinion, as to waive or forfeit the rights of Frain and Lowrey to enforce their levies and prove the fraud complained of.

But, be this as it may, the complainant, coming into a court of equity, must show clean hands. When she comes in as she has here, and by her own testimony convinces the court that James Barrett made the conveyance to William to defraud his creditors, and that the subsequent deed from William to her was in furtherance of this fraud, she can hardly ask a court of chancery to relieve her against her fraud, and to judicially approve it, because Frain and Lowrey have not yet sought to enforce by further proceedings their claim of fraud against her. This will not do. By her own act, and out of her own mouth, she has established the fraud, and she must suffer the consequences of it.

The decree in both cases must be affirmed, with costs.

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

SHERWOOD, C. J., (*dissenting in Barrett v. Lowrey*). The bill in this case is filed by the complainant to remove a cloud upon the title to her farm, lying in the township of Victor, in the county of Clinton, consisting of 160 acres, upon which she has her home, and now resides. The cloud consists of an execution levy made

upon the property on September 24, 1886, under the directions of the defendant, by virtue of a judgment rendered in the circuit court in favor of said Lowrey and against James Barrett, upon an indebtedness occurring in part in 1879 and in part in 1882 for the sum of $150.85 damages, and $23.75 costs of suit. James Barrett is the husband of complainant. The property in question is claimed to be worth, by the complainant, $5,000, and, by the defendant, "at least $7,000."

No question is made but at the time of making the levy the legal title to the property of record, as well as the possession thereof, was, and ever since has been, in the complainant. Charles White owned the land in 1867. He had no wife or family. In May of that year he conveyed the property to James Barrett, the present husband of the complainant, and subsequently took back a life-lease, signed by the grantee and his then wife. James went into possession under his deed, and Mr. White lived with him. James' first wife died previous to August, 1885, and complainant's first husband died in 1884, and she married James Barrett, December 19, 1885. On August 3, 1885, it would appear that James was owing some moneys besides the mortgages that were upon the farm, which mortgages then amounted to the sum of about $3,600, one of which was given to William Barrett, an unmarried brother of James, for the sum of $1,200; and, though he transferred it to his sister, Anna Barrett, he still appears to have looked after it in some way. James had become somewhat inebriated and reckless in his habits, and it would appear his debts were becoming due, and his creditors wanted their money; that his dissolute habits and imprudent conduct were subjecting him to the usual embarrassments in such cases.

In this crisis of his affairs, and while William, his brother, was stopping with him a few weeks, he sold the

property, subject to the mortgages, to William for about $2,400. This money, so far as appears, was paid in cash by William; and James avowed his purpose at the time to take it and pay his debts with it, and William says he advised James so to do. William allowed James to remain upon the property, and Mr. White with him, after making the purchase, and worked the farm under his employment; and it was during this period that complainant went into the employment of William at the house on the farm, and subsequently married James. At that time she was almost entirely unacquainted with James' financial condition and circumstances, but, on learning them afterwards, she discovered his embarrassments and his worthless habits, and that he was not managing the farming matters properly for William, who became dissatisfied with James' management also, and on or about July 21, 1886, William offered to allow her to purchase the farm, and save what she could from it, and William did on that day, and at her request, sell the property to complainant for $6,200, including the crops. This, with the property she then had, and by the aid her friends could give, she was enabled to do. The complainant made the purchase, after looking up the amount of the mortgages, and examining an old abstract which James had formerly procured of the property, and agreed to pay therefor the mortgages upon the same, amounting to $3,600. Of the balance, she paid in cash $1,000, and had succeeded in paying the remainder at the time of filing her bill, into two or three hundred dollars. She immediately went into possession, and took control of the farm and farming, and has ever since directed all farming operations thereon. The complainant states that she knew nothing of the indebtedness of her husband to the defendant, or of any levy upon the land in favor of defendant, when she made her purchase, but made the

same in good faith, and for a good and valuable consideration, and because she wanted the property, and invested all her property therein. William Barrett, from whom she purchased, also states that he knew nothing of the defendant's levy when he sold to complainant, and acted in good faith in selling to her, and that he knew nothing of defendant's alleged claim.

There is no question about the validity of the judgment of defendant against James, but the right to subject the complainant's property to its payment is denied by her, and she asks that the decree below to that effect may be reversed, and her property relieved from the cloud the levy casts upon it. It is the claim of defendant that the deed to complainant and the deed to William are both fraudulent and void, as against his judgment and levy, and should be so held, and he be allowed to come in and make his claim. The circuit judge held with the defendant.

I have not been able to take that view of the case, nor do I think the decree of the circuit judge ought to be sustained. Complainant received her deed, as well as William, before any levy was made, and complainant's possession was notice to all, not only as to her interest in the property, but of the extent thereof, even if her deed was unrecorded. The testimony relied upon to make out the fraud is very indefinite, and largely of a negative character, and the other, so far as it is competent and proper, is quite as consistent with the good faith and innocence of complainant as it is with the views urged by defendant; and, where such is the case, fraud cannot be held to be proved, nor will it be lightly presumed in any case. *Pogodzinski v. Kruger*, 44 Mich. 79 (6 N. W. Rep. 116); *Darling v. Hurst*, 39 Id. 765; *Campau v. Lafferty*, 50 Id. 114 (15 N. W. Rep. 40); *Brown v. Dean*, 52 Id. 267 (17 N. W. Rep. 837). No

fraudulent purpose is shown on part of complainant. *Brown v. Vandermeulen*, 44 Mich. 522 (7 N. W. Rep. 238); *Hopson v. Payne*, 7 Id. 334; *Miller v. Beadle*, 65 Id. 643 (36 N. W. Rep. 165).

The facts, I think, present the case of a wife who has in good faith and with honest purposes invested all the property she has, reaching about $1,500, in her efforts to secure and save something from the wrecked estate of a worthless, drunken husband, who, by his habits of intoxication and folly, has nearly dissipated the same.

It is very evident, from what appears in the record, James received all that his interest in the property was worth from William when he sold, aside from the mortgages, and there is not a particle of evidence showing, or tending to show, that the complainant ever had a dollar of that money, or in any way or manner attempted to divert its application to the payment and satisfaction of James' debts, but she several times, in giving her testimony, mentioned the fact of her paying some of his debts, even from her own means, and it very clearly appears that she is meeting her obligations satisfactorily to her creditors; that she is managing the property in a manner that would do credit to the most thrifty farmer in the township. This is disputed by no one, and is found fault with only by those who would deprive her of her property, even including her homestead, for the purpose of satisfying a debt she never contracted or assumed to pay, and that no rule of justice or equity will ever require her to pay. It is unnecessary to bring into this opinion the testimony in the case. It is enough to say that the conclusions I have reached are justified, in my judgment, by the undisputed testimony; and, when the other testimony is read, it will be found mostly of the negative sort, or argumentative,—put in the case, evidently, for the purpose of inducing conclusions prejudicial to complainant's

rights, but which, upon a careful examination, will lead any fair-minded man, I think, to a different result.

There is no question but that the claimed lien is a cloud upon complainant's title to her land, and should be removed.

I think the decree at the circuit should be reversed, and the record should be remanded, with instructions to the circuit judge to set aside the decree entered in the case, and enter a decree for complainant, in accordance with the prayer of the bill, and with costs of both courts.

SHERWOOD, C. J., (*dissenting in Barrett v. Frain*). The complainant brings suit against defendant to remove a cloud from the title to her land, lying in the town of Victor, in the county of Clinton, created by the levy upon and sale thereof under an execution, the levy being made before complainant purchased.

The case depends upon nearly the same state of facts as those in the case of *Barrett v. Lowrey*, *ante*, the only difference being that the judgment was rendered in favor of a different party, and originated in justice's court, and was subsequently removed into the circuit court by transcript, and upon which the execution issued and the levy was made before complainant made her purchase; and, there being no other essential difference, and the decree having been against the complainant, it should be set aside, and, upon the record being remanded, the circuit judge will enter a new decree in accordance with the prayer of the bill, and the complainant will be allowed to recover her costs of defendant in both courts.

CAMPBELL, J., *(dissenting)*. I agree in the result arrived at by the Chief Justice. Such was my impression on the argument, and it has been confirmed by subsequent examination. It seems to me that the case of the

defendants has been made up out of a disregard of legal rules, and an assumption that is not proved. It is not disputed that the legal title is in complainant, and that it passed from James Barrett a long time ago. Defendants both claim whatever rights they have under levies which could only be enforced by selling the property as James Barrett's. If they desired to attack the validity of any transfers made by him, it could only be done by filing bills in aid of their execution levies. A sale under execution not so aided would only pass such legal or equitable title as he professed, and he had no such title.

These defendants did not elect to proceed against the holders of the title under James Barrett to have the transfers declared fraudulent. It is the well-settled rule in regard to fraud that, unless complained of by proper proceedings, very promptly, the remedy is waived, and lost. Fraudulent dealings are not void, but voidable; and delay in attacking them would itself be fraudulent against third persons, if it did not preclude redress. If the title of complainant can now be attacked, the defendants would reap the advantage of all of her outlays for taxes, and in reduction of the mortgages and other expenditures which they would have been compelled to look after if they had proceeded promptly, and succeeded in their action. It is the right of the legal owner to have clouds cleared off, and a person who pretends to have a claim to avoid that title, which may be waived, and will not enforce it, is entitled to no regard.

But I do not think fraud appears. Complainant is shown, beyond question, I think, to be a purchaser in good faith; and if so she cannot be disturbed in her title. But I cannot find any satisfactory reason for believing that James Barrett conveyed with any fraudulent purpose. He has fallen into bad habits, but it appears affirm-

atively that he had, within a short period before the sale, been able to borrow between three and four thousand dollars on investment mortgages, which are always made in reliance of prompt payment of interest, and which were made by men known to be sagacious and careful. It is not shown that any bad use was made of that money, neither does it appear that James Barrett was concealing property, or scheming against his creditors, or that he had any strong motive for fraud. It is only by assuming that several persons, without any apparent reason, combined to cover up this man's property, to cut off a couple of small claims, less than the annual outlay necessary for interest and taxes, that any case for defendants can be made out. It seems to me to be straining probabilities, and assuming very unusual conduct, for no adequate reason, to find any fraud at all. I think complainant had a right to complain of the dog in the manger policy of defendants, and should have relief.

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JOHN RALL v. PERCY T. COOK, ADMINISTRATOR OF THE ESTATE OF ADDISON P. COOK, DECEASED.

Mortgaged chattels—Bill of sale fraudulently obtained by mortgagee —Trover—Measure of damages—Tender.

1. A mortgagee who obtains a bill of sale of the mortgaged property by fraud, and under it, and before it is repudiated by the mortgagor, takes possession of the property, may, in an action of trover brought by the mortgagor, show the extent of his mortgage lien in reduction of damages. *Brink v. Freoff*, 40 Mich. 614, 615, 44 Id. 71, 72; *Daggett v. McClintock*, 56 Id. 53.
2. If in such a case a tender is necessary before bringing suit, the duty of the mortgagor to make it is unaffected by the fact

whether the mortgagee claims possession under the bill of sale or mortgage.

Error to Jackson. (Peck, J.) Argued July 11, 1889. Decided November 15, 1889.

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

Eugene Pringle (*G. T. Gridley*, of counsel), for appellant, contended for the doctrine stated in the opinion.

Blair, Wilson & Blair, for plaintiff, contended:

1. The defendant cannot justify his wrongful seizure of the property under a fraudulent and void bill of sale by showing that he might have made a lawful seizure under chattel mortgages; citing *Dalton v. Laudahn*, 27 Mich. 529.
2. If the defendant's chattel mortgages could be used at all as a defense in this action, they could only be used to mitigate the damages, and they could not avail for this purpose unless in some way assented to by the plaintiff; citing *Bringard v. Stellwagen*, 41 Mich. 54; *Vosburgh v. Welch*, 11 Johns. 175; *Kaley v. Shed*, 10 Metc. 317; 3 Suth. Dam. 531, 532 (notes).
3. When one person demands property which is in the hands of another, who refuses to deliver it up, he must state the true grounds for such refusal. So, if defendant claimed a lien, it was his duty to inform the plaintiff to that effect, otherwise he could not afterwards set up the lien to defeat the plaintiff's suit; citing Wells, Rep. §§ 380, 381; *Thatcher v. Harlan*, 2 Houst. (Del.) 194; *Holbrook v. Wight*, 24 Wend. 169.

CHAMPLIN, J. Plaintiff sued in trover to recover damages for the conversion of certain personal property which he claims defendant's intestate took possession of under a bill of sale which the plaintiff claimed was procured by fraud.

At the time the bill of sale was executed by plaintiff he was indebted to defendant's intestate in some considerable sums, to secure the payment of which indebtedness Rall had executed several chattel mortgages, covering the greater part, if not the entire, of the personal property

described in the bill of sale. These mortgages authorized Addison P. Cook, the mortgagee, to take possession of the mortgaged property, and, at the time of taking the property in his possession under the bill of sale, were valid liens.

The question raised by the record is whether a party who holds valid liens upon personal property by way of mortgage, and who afterwards obtains a bill of sale of the same property by fraud, and under it, and before it is repudiated by the party defrauded, takes possession of the property, can, in an action of trover brought by the party defrauded, show the extent of his mortgage liens in reduction of damages.

I think he can. The action of trover has been called an "equitable action." 3 Suth. Dam. 526, 528. The damages awarded in such action should only be such as the party is entitled to under the circumstances of the case. In this case the bill of sale was not absolutely void, but voidable at the will of the party defrauded. When he is advised of the facts which constitute the fraud, he may ratify the contract, and then it will be as binding upon both parties as if it had not been tainted with fraud. It was at least binding upon Cook until Rall repudiated it. And Rall, by repudiating the bill of sale, could not place Cook in a worse position than he would have occupied had the bill of sale not been made. Cook had not discharged his chattel mortgages, and the indebtness secured thereby had not been paid. To permit Rall to recover the full value of the property would deprive Cook of the lien voluntarily given by Rall upon the property. His lien cannot be destroyed because he took possession under the bill of sale which Rall afterwards refused to recognize as valid, because obtained from him by fraud. The question is settled by the authority of this Court in *Brink v. Freoff*, 40 Mich. 610, 44 Id.

69 (6 N. W. Rep. 94); *Daggett v. McClintock*, 56 Id. 51 (22 N. W. Rep. 105), where the rule, and reason of the rule, is laid down, which is to avoid circuity of action. If Rall is permitted to recover as damages the full value of the property, Cook may immediately sue Rall, and recover as damages the amount of the indebtedness secured by the mortgages. Circuity of action should be avoided, if possible, and is unnecessary when the rights of parties can be fully adjusted in one suit.

The learned circuit judge held that if Cook did not seize the property in the first instance by virtue of his mortgages, or if, when request was made by Rall that he return the property to him, he did not inform Rall that he claimed possession under his mortgages, he was not entitled to have the amount secured by the mortgages deducted from the total value of the property converted. He based this ruling upon the supposition that Rall's action would be affected by the fact whether Cook claimed the possession of the property under the bill of sale or under the mortgages, saying in one case he would be obliged to tender the amount due upon the mortgages before he could bring action, and in the other case he would not.

I do not think the duty of Rall depended at all upon the question as to whether Cook claimed under the bill of sale or under the chattel mortgages. Rall repudiated the bill of sale as fraudulent and void as to him. He knew then that the bill of sale afforded no protection to Cook, but he also knew that Cook had valid liens upon the property, placed thereon by his own act, and that Cook had the right to retain possession under them; and it was as much his duty to make a tender in one case as in the other. But I think the tender would be unimportant, as is pointed out in *Brink v. Freoff*, *supra*.

I am of opinion that the judgment should be reversed, and a new trial granted.

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

SHERWOOD, C. J., *(dissenting).* It is alleged by the plaintiff in this case that Addison P. Cook in his life-time converted of the property of the plaintiff 3 horses, 2 cows, 1 lumber wagon, 1 side-spring buggy, 1 single harness, 2 sets double harness, 1 reaper, 1 mower, 1 spring drag, 1 steel cultivator, 2 hand cultivators, 1 horse rake, 1 plow, 1 fanning-mill, 12 acres of corn, unhusked, 18 tons of hay, 30 acres of wheat on the ground, 60 bushels of wheat, 200 bushels of potatoes, 1 buffalo robe, 1 lap blanket, 1 hand-saw, 1 hammer wrench, 2 sets whiffle-trees, and one stump chain. The defendant lived in the town of Brooklyn, in the county of Jackson, and the plaintiff in the township of Liberty, same county. The plaintiff claims this property was converted by Cook under the following circumstances:

"On September 22, 1883, plaintiff was confined in the common jail of Jackson county, on a charge of having obtained a mowing-machine by means of false pretenses, and was required by the justice who issued the warrant to give bail in the sum of $300 to answer said charge. Plaintiff sent for defendant to visit him in jail, for the purpose of procuring such bail. Defendant, accompanied by his attorney, did visit plaintiff at the jail, and agreed to become surety for him, provided plaintiff would give him security on his personal property, to which proposition plaintiff assented. Defendant and his attorney retired, and after a time returned with a written instrument, which defendant informed plaintiff was simply a security on his personal property to secure him against loss for going on his bail-bond, and that when plaintiff was discharged it should be returned to him. Plaintiff could neither read nor write, except merely to sign his own name, and did not understand the instrument; and, with the express understanding that defendant would be bail for him, and return the instrument on his dis-

charge, the plaintiff signed the bill of sale hereafter referred to.

"Defendant neglected to become surety as agreed, but went at once, with men and teams, to plaintiff's residence, and seized and removed all of plaintiff's personal property to his own residence, in Brooklyn, in the same county. Within two or three days, plaintiff employed another person to become his surety, and on his discharge returned home, and went to Brooklyn, and demanded of defendant return of the property; he refused to return it, and claimed to hold it as his own by virtue of an absolute bill of sale which plaintiff had signed while in jail. Plaintiff, being thus deprived of all his property, was compelled to seek employment elsewhere, that he might obtain subsistence for himself and family; and, being ordered by defendant, removed from the farm, and, as soon thereafter as his enforced poverty would permit, commenced this action."

Such was the claim and theory on the part of the plaintiff urged upon the trial, and the testimony tended to support his claim and theory.

The bill of sale reads as follows:

"For and in consideration of the sum of sixteen hundred and sixteen dollars to me in hand paid, I hereby sell and assign, transfer, and deliver to Addison P. Cook, of Columbia, Jackson county, Michigan, all my right and title and interest in the following described property, to wit: One bay mare, seven years old; one sorrel chestnut mare, eight years old; one cherry red cow, nine years old; one chestnut gelding, fifteen years old; one light top carriage, one double harness, one lumber wagon, one hundred and fifty bushels of wheat, one hundred and fifty bushels of oats, all corn now growing and in shock on Liberty farm, occupied by John Rall and owned by said Cook; all hay now in barn, and otherwise on said farm; one Perry Royce reaping-machine, bought of Tucker Bros., at Concord, Jackson county, Michigan; one red and white cow, ten years old; one double harness, now at said farm; one wire-tooth sulky hay-rake; two plows, one spring-tooth harrow; one two-horse Gale cultivator; two two-teeth corn cultivators. Now, it is understood by this bill of sale that the same is absolute and complete, and for a

valuable consideration to party, John Rall, in hand paid, and that this bill of sale is the result of a final settlement between the parties; that said settlement includes all connections of every description pertaining to a certain contract made and executed by and between Addison P. Cook, of Brooklyn, Jackson county, Michigan, of the first part, and one John Rall, formerly of Clarendon, Calhoun county, Michigan, of second part, wherein said Cook did agree to sell, and said Rall to buy, a certain piece of land and buildings in Liberty, Jackson county, Michigan, known as the north-west fractional quarter of section nineteen, town four south, one west, except six acres from south-east part thereof. Said contract bearing date April 1, A. D. 1880.

"It is further agreed, and by this instrument understood, that said contract is at end, and that said duplicate of said contract now in hands of Rall shall be by him redelivered to said Cook.

"And it is further understood hereby that said Cook (is by virtue of the sale and delivery of the property above specified) and does acknowledge payment in full from said Rall for all matters between them, and likewise does Rall, and that this bill of sale and receipt is, and shall be, final evidence of the same. Said Rall is to deliver up the possession of said premises at such a time as said Cook shall demand the same, but possession of personal property to pass immediately, but to remain on farm until said Cook shall choose to remove it."

On the part of the defendant, his claim was that this bill of sale was given upon a settlement of all matters between the parties thereto, including the plaintiff's interest in the farm upon which he lived, and which he at the time held under a contract of purchase from Cook, and that the same was absolute and valid; that Mr. Cook never agreed to become bail for the plaintiff under his criminal arrest; that the plaintiff was owing Cook, at the time the bill of sale was made, over $1,600; and that by that instrument he became free and discharged from all liabilities for the same, and left him owning the buggy and mower mentioned in the bill of sale, and some other property not mentioned in that instrument.

It was also the claim of the defendant, Cook, that, independent of the bill of sale, and unless bound by its acceptance, the defendant had the right, under certain chattel mortgages he held against the plaintiff, securing about the sum of $800, to seize and hold all the property described in the bill of sale, except the hay, and also the mortgaged property, which was omitted in the bill of sale. Evidence was offered tending to prove the claim made by the defendant upon his theory of the case. The cause was tried before Judge Peck, with a jury, in the Jackson circuit. The jury found a verdict for the plaintiff for $1,081.82. Defendant brings error. The verdict has settled all the contested facts in favor of the plaintiff.

The assignments of error all relate to the charge of the court, or to the refusals to charge. The plaintiff claimed that the bill of sale was fraudulently obtained, and was without consideration, and the verdict of the jury must be regarded to the same effect. It must therefore be held void, so far as our discussion is concerned, unless some misdirection was given in the charge.

It is claimed the court erred in refusing to give the following requests:

"2. That in the case it shall be found that the defendant has converted property, without a legal sale, to his own use, he must, in thus taking upon himself the responsibility for the full value of the property, be held to account to the plaintiff for the excess of the value beyond the amount of the lien; but if there is no excess, then the plaintiff is not entitled to any recovery against him.

"That in case there was at the commencement of this suit any of the property taken in the possession of the defendant, and if at that time the plaintiff had not made a tender of the amount due on the mortgage, and also demanded the restoration of that particular property, then, if there had been no bill of sale, as to the property so remaining in the possession of the mortgagee,

there is no evidence of a conversion, unless he has been paid or tendered the amount of his lien in full, by the application of the value of the other property actually converted, by being placed beyond the control of the mortgagee, or in some other manner fully paid or tendered the amount of his lien."

"6. That it is competent at any time for parties sustaining the relation of mortgagor and mortgagee, by agreement, to make the sale of the property absolute, and this may be done by a bill of sale; and it will be no objection if other matters are settled by the same agreement. If for any reason the instrument executed shall prove to be invalid, then the parties will be left in the same situation as if the instrument had not been executed; but in case there was, under the bill of sale, or other instrument expressing the sale, possession of the property taken by the mortgagee, he will then be in the same situation as though he had taken the property into his possession under the mortgage, and, under a misapprehension of his rights, had made a mortgage sale in an unauthorized way. He would, under such circumstances, be bound to account for the full value of the property, but only to return or pay for such portion of the property as might not be needed to pay his mortgage liens."

It was the claim of the plaintiff on the trial, and the verdict of the jury is to the same effect, that the property was taken and converted by A. P. Cook upon a void bill of sale. The first two requests above referred to assume the taking was under the chattel mortgages. That is not the case with which the court had to deal, as the verdict of the jury now shows; neither was it the case presented by the pleadings. Cook claimed the mortgage was extinguished by the bill of sale, and that he took the property by virtue of his purchase under the bill of sale. The defense of the defendant was not made under the chattel mortgages, and, while the rule contended for in these two requests states the law correctly in the case defendant's counsel attempt to make in this Court, it was not the case made in the court below,

and has no application to the facts in this record; and the court was not in error in refusing to give them.

The first clause of the last of these three requests states a correct legal proposition, and I am not prepared to say that the second clause would not be correct in a case where the parties, in good faith and for honest purposes, had made the bill of sale upon a settlement had between them, but upon a better understanding of the facts it had been ascertained that a mistake had been made, by which the sale had become invalid; but, again, we say no honest presumptions or intentions can be assumed in this case, because of the fraudulent transactions of Cook in procuring the bill of sale; and, again, the rule contended for cannot be applied, and the court was correct in so holding.

It this case the demand for the property by the plaintiff was all the rescission necessary in this case. The plaintiff had nothing to return or surrender back to Cook, so far as the testimony shows.

It is further claimed by the defendant that the subsequent acts of the plaintiff had the effect to ratify the contract contained in the bill of sale, and should estop the plaintiff from making any claim to the contrary. These acts are claimed to be the demand for the property, without in terms demanding a rescission, and at the same time Cook requesting plaintiff to leave the farm, and Rall making no objection to leaving, the request being one contemplated by the terms of the bill of sale; abandoning his claim as purchaser of the farm by so leaving it, as requested; abandoning the wheat on the ground and the unhusked corn, and which he might have sold and given a good title to, but for the bill of sale; abandoning several hundred dollars' worth of hay, which Cook had no title to, except under the bill of sale. The

question of ratification was submitted to the jury by the court in the charge, at the request of defendant's counsel, and their verdict is against the defendant; and, further, we do not think it can be very well claimed that action taken by the plaintiff under stress of circumstances, or by reason of, or compelled by, the fraud of Cook, should estop the plaintiff from showing what were the true facts in the case, and that no such thing as a ratification was intended or thought of.

It is further claimed that the trial judge misstated the rule of damage in his charge to the jury. The court said upon this subject:

"The question of damages in trover is a simple one. It is the value of the property unlawfully converted at the time it was converted, with interest thereon at the date of the verdict."

We think the court stated the rule correctly. He had already said to the jury:

"In case you find that the property taken by the defendant into his possession was such as he had a valid lien upon, aside from the bill of sale; and also find that he was, as a matter of fact, proceeding upon that lien, to wit, the mortgages, and that he has neglected to take such legal steps to sell the property as the law contemplates,—such neglect would not deprive him of the full benefit of his mortgages, or subject him to any damages which the plaintiff would not have suffered, if, at a legal sale, the property had been sold at its full value.

"And, also, in that same connection, that in case the jury shall find that Cook was, as a matter of fact, proceeding under his mortgages, and if you find it to be true, as a matter of fact, that Rall applied to him in Brooklyn for information with reference to it, asking him about the return of the property, and Mr. Cook then let him know, or informed him in any way, that he was standing upon his bill of sale, and maintaining his rights upon his mortgages as well as upon his bill of sale; and shall also find that Cook converted the property described in any of these papers, without a legal

sale, to his own use,—he must, in thus taking upon himself the responsibility for the full value of the property, be held to account to the plaintiff for the excess of that value beyond the amount of the lien. But if there is no such excess, then Mr. Rall is not entitled to any recovery against him."

We find nothing in the charge upon the subject of damages of which the defendant can justly complain.

It is further said by defendant's counsel that trover is an equitable action, and that the court may investigate the justice and equity of each particular case. This is true, certainly, so far as relates to the principles upon which damages are to be given; but we are not entirely satisfied upon such investigation that any injustice has been done by the verdict in this case. Cook received the land back which was held by plaintiff under the contract of purchase; and, if the testimony of the plaintiff is to be believed, there was no interest remaining due upon the contract, aside from the claim for this interest. Less than $500 was claimed by Cook as owing to him by plaintiff, and he claims $400 worth of hay was left in the barn. Cook also received all the personal property mentioned in the mortgages, which the testimony tends to show was worth considerably over $1,000.

On the plaintiff's theory and proofs it is difficult to say that defendant has lost any equitable right or interest by the verdict. But this Court is not called upon to decide that question.

I find no error in the record, and the judgment should be affirmed.

CAMPBELL, J., did not sit.

HIRAM C. MORSE v. JAMES E. DENTON.

Sale to creditor—Attachment in defiance of—Replevin—Intent—Question for jury.

This case involves the alleged fraudulent sale of property to pay a debt, and is held to have been fairly submitted to the jury. No evidence was given on the part of the defendant disputing the fact of the indebtedness of the vendor to the plaintiff, the only contention being that this fact was open to suspicion from the testimony of the plaintiff himself, and because a note was not given up, or canceled, at the time of the sale, which it is held were proper matters for the jury to pass upon.

Error to Alpena. (Kelley, J.) Argued October 8, 1889. Decided November 15, 1889.

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

C. E. Williams and *J. D. Turnbull,* for appellant.

Shields & McNamara (*McGarry & Ford,* of counsel), for plaintiff.

LONG, J. This an action of replevin of a stock of goods which plaintiff claims to have purchased from one Martin A. Rodman. On the trial in the circuit court of Alpena county the plaintiff had verdict and judgment. Defendant brings the case here by writ of error.

The claim of the plaintiff on the trial was that Rodman was indebted to him in the sum of about $1,500, and turned the stock over to him, to pay and discharge the debt. It appears that in the latter part of 1886, Rodman removed from Ionia to Alpena, and opened a jewelry store. He was at that time indebted to Chandler & Shader, wholesale jewelers of Chicago, in the sum of

about $300, for merchandise. The plaintiff resided at Ionia, and is the step-father of Rodman. On April 11 or 12, 1887, the plaintiff visited Alpena, and found Rodman at the police station, suffering from excessive drink. At noon on April 12, Morse and Rodman having returned to Rodman's house, Morse demanded the payment of his claim. It is claimed by plaintiff that here an arrangement was made by him with Rodman by which he purchased the entire stock of goods then in the store at Alpena in payment of his claim; that the stock was of the value of about $1,190; that he, at 4 o'clock in the afternoon of that day, took possession of the stock, taking possession of the keys of the store, and commenced to pack up the goods, preparatory to shipping them to Ionia.

About 6:30 in the afternoon of the 12th of April, Chandler & Shader caused an attachment to be issued against Rodman, and placed the same in the hands of the defendant in this cause, who is sheriff of Alpena county, and who seized and took possession of all the goods under the writ, and caused the same to be appraised. After the appraisal the plaintiff brought suit in replevin, and took all the goods back into his possession.

The claim on the trial by the defendant was that the sale to plaintiff was not made in good faith, but as a cover to defraud the creditors of Rodman. At the close of the testimony the defendant asked the court to charge the jury:

"1. That from all the evidence the defendant must recover."

This request the court refused, and upon this defendant assigns error.

Counsel argue in their brief, at some length, that there were certain suspicious circumstances surrounding the

claimed sale of the goods by Rodman to the plaintiff; that a bill of sale was made and filed subsequent to the time of the pretended sale, and two other bills of sale subsequently made; that Rodman appeared before the sheriff after the appraisal, and had $250 in value of the goods set off as exempt under the statute, and that the plaintiff, by his testimony, did not show that any price was agreed upon between himself and Rodman for the goods; that, while the plaintiff claimed to hold the note of Rodman, which he claimed to have purchased from one Mr. Webber, yet the note was not surrendered to Rodman; from which circumstances it must be held that the plaintiff was not the owner of the goods at the time of the levy. Some claim is also made that if plaintiff had any claims upon the goods, it was in the nature of a security, and that he could not be said to be the general owner. These were, however, questions of fact which were in dispute upon the trial, and, under the charge of the court, we think, fairly submitted to the jury. The court charged the jury, among other things:

"You have a right to consider what Rodman did, and what Mr. Morse (the plaintiff) did, in reference to this property, and immediately before and after the hour or time that it is assumed and claimed this sale was consummated, in determining whether, in fact, it was a sale and transfer of this property."

Again, the court stated to the jury:

"If you are satisfied, when you come to consider all this evidence, that it was a mere cover, intended in fraud of his creditors, then it would be no sale, and it would form the basis of no right to recover in this action by the plaintiff. But you must arrive at your conclusions in reference to the fraudulent intention of these parties from the evidence in this case, and from what the parties did, and from what they said; from the manner in which they treated this property afterwards, and all

the surrounding circumstances that have been brought forward here in the evidence. * * * Should you arrive at the conclusion that it was not a *bona fide* sale, but that it was a fraud upon the creditors, then the plaintiff would not be entitled to your verdict."

It was thus left to the jury, under a very fair charge, to determine the whole case, from all the evidence and surrounding circumstances,—just what the rights of the parties were. There certainly was no error in this. It is not pretended that any evidence was given on the part of the defendant disputing the fact of the indebtedness of Rodman to the plaintiff; the only contention being that this fact was open to suspicion from the testimony of the plaintiff himself, and the fact that the Webber note was not given up, or canceled, at the time of the purchase, and other circumstances heretofore referred to. But this was a matter for the jury.

One or two of the requests to charge are directed to the question of whether the transaction was a security or an absolute sale, and asking the court to direct the jury that if it was a mere security the plaintiff could not recover. There was no claim made on the trial by the plaintiff that he took the goods as a mere security; but his whole testimony is that he purchased them, and went into possession of them, and was so in possession at the time of the levy of the writ of attachment. Some talk, apparently, was had between plaintiff and Rodman about their affairs, and what could be done for Rodman; but, under the testimony, there was no error in refusing the instructions asked.

Some errors are assigned, also, upon the ruling of the trial court in admitting certain testimony under defendant's objection. We have read the record with some care, and find no error in these rulings, and need not go over

the questions specifically. We are satisfied the case was very fairly tried and very fairly submitted to the jury, under the charge given, and find no errors in the record.

The judgment must be affirmed, with costs.

SHERWOOD, C. J., CHAMPLIN and CAMPBELL, JJ., 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.

ABDUCTION.

How. Stat. § 9099, does not cover a case where the person charged to have been *abducted* (a girl about fourteen years of age), went from this State to Chicago, freely, and out of her natural love for her mother, she having been adopted under the law of Michigan some six years before, since which she had lived with her foster parents; it not appearing that any fraud or duress was used, nor any flattery, allurements, or promises, even, employed, to get the girl away from them, beyond the mere asking if she wanted to go. 351 (2).

ACQUIESCENCE—See ESTOPPEL.

ACTION—See IN PARI DELICTO.

ADOPTION—See CONSTITUTIONAL LAW (5).

ADVANCES—See CHATTEL MORTGAGE (8).

ADVERSE POSSESSION.

1. The extent of the possession which secures a title under such statutes is a fact to be established upon the trial, and it is always competent to establish it by any testimony relevant for that purpose. It is not necessary in all cases that the possession should be enclosed by a fence, or if a fence is required that it should be any particular kind of a fence, or

ADVERSE POSSESSION—Continued.

what is known as a *lawful* fence, but any kind will answer, when required, which shows an intention to make the possession exclusive; and, when title is claimed under a deed, the deed is the best evidence of the extent of the possession, and when applied for that purpose the same rules of evidence apply in a case of adverse possession as in any other case, and no more than a preponderance of evidence is ever required to establish such a possession. 168 (2).

2. When the possession is by actual occupation of the possessor, or by his tenants, under claim of title, his possession is visible, open, notorious, and distinct, and will be presumed to be hostile. *Id.* (3).

See WATERS AND WATER-COURSES (1, 3-6).

AFFIDAVIT—See LOG-LIEN SUIT (4, 7, 8).

AFFIDAVIT OF RENEWAL—See CHATTEL MORTGAGE (2).

AFFIRMANCE—See SALE.

AFTER-ACQUIRED TITLE.

In *Clark v. Daniels*, 26, it is held that an after-acquired title conveyed to a mortgagor by quitclaim deed, inured to the benefit of the mortgagee although the mortgage contained no covenants of warranty. 26 (1).

See CHATTEL MORTGAGE (2).

AGREEMENT FOR A LEASE—See FORFEITURE (1, 3).

ALIENATION—See WILL (3, 4).

ALIENS—See NATURALIZATION.

ALIMONY—See DIVORCE (2, 3).

AMENDMENT—See STATUTE OF AMENDMENTS.

APPEAL.

An order appointing a receiver is appealable when it takes from a party a possession to which he is entitled of right. 159 (1).

See EQUITY PRACTICE (2).

APPEAL BOND.

In this case judgment was rendered at the circuit against an appellant from justice's court, and his surety, for $25.01 damages, with costs to be taxed, which were taxed at $50.35. The penalty of the appeal bond was $50.00, and the judg-

APPEAL BOND—Continued.

ment, being otherwise upheld in the Supreme Court, is reversed as to the surety, and one entered limiting the recovery against him to $50.00, and with this modification the judgment is affirmed. 480.

APPEARANCE OF DEFENDANT—See JUSTICE'S COURTS (1, 2).

ASSIGNMENT—See CHATTEL MORTGAGE (3).

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. The assignee, under our voluntary assignment law, gets no better or greater title to the property coming into his hands by virtue of the assignment than the assignor had before the assignment was made; and a receiver has no better or greater rights in the property than the assignee would have had if he had qualified under the trust to him in the assignment. 76 (1).

2. Where a corporation purchased land subject to the payment of a mortgage, which payment was a condition precedent to the vesting of title under said purchase, after which it conveyed the land by warranty deed, subject to said mortgage, which the grantee agreed to pay as a part of the purchase price, and to that end gave a note to the grantor for the amount of the mortgage debt, and received an agreement for its payment by the grantor, which note was sold by the president of the grantor and the proceeds used in the business, but the mortgage was not paid, after which the grantor made an assignment for the benefit of its creditors, and on failure of the assignee to qualify a receiver was appointed, the proper equity court will order the payment of said mortgage by the receiver on the petition of the grantee, of whom such payment has been demanded. *Id.* (2).

See CHATTEL MORTGAGE (4).

ATTACHMENT—See CHATTEL MORTGAGE (6, 7); LOG-LIEN SUIT (5, 6).

ATTORNEY FEE.

Act No. 147, Laws of 1887, which provides for the taxation of a $5 attorney fee in favor of the plaintiff in a suit to recover for personal services is unconstitutional, but its taxation will not invalidate the judgment except in so far it may be reduced in amount. 105 (3, 4).

AUDITING CLAIMS AGAINST THE STATE.

1. The auditing of claims against the State is not, and never has been, a proceeding in the nature of a suit. It is an administrative function, performed by the persons to whom the law has entrusted it; and the State imposes such duties where it is supposed they will be properly attended to. 563 *(e)*.
2. It is to be taken for granted that the Legislature can protect the State by all necessary safeguards; and neither any State officer nor this Court has been given any power to substitute his or our judgment for that of the auditing authority, acting on matters legally referred to that person or body. *Id. (d)*.

AUDITOR GENERAL.

1. Under the Constitution, none of the powers of the Auditor General are defined as an auditing officer, and under the Constitution he is only empowered to examine and liquidate claims in cases provided for by law. 563 *(a)*.
2. The Auditor General is given no appellate power over other auditing bodies; and his duty in regard to allowances lawfully made by the proper bodies or persons is the ministerial duty of issuing the proper warrant. *Id. (b)*.

See BURIAL OF DEAD BODY OF STRANGER (1).

BEASTS—See REPLEVIN (4, 5).

BENEFIT ASSOCIATIONS—See CO-OPERATIVE SAVINGS ASSOCIATIONS.

BILL OF SALE—See CHATTEL MORTGAGE (9).

BILLS AND NOTES.

1. Where, in a suit upon a note delivered to the secretary of an insurance company as security for a loan made by him, the question of fact to be determined by the jury is whether the money loaned belonged to the secretary or to the company, they can determine such issue without any special instructions as to the law of ownership, or as to what would constitute an ownership of the note either in the secretary or in the insurance company. 391 (1).
2. While the unexplained possession of a note, indorsed in blank, is presumptive evidence of ownership and sufficient to warrant a recovery in a suit by the holder thereon, the

BILLS AND NOTES—Continued.

introduction of evidence tending to show that the note belongs to an insurance company of which the holder is the secretary and treasurer, and *ex officio* the proper custodian of the note if it belongs to the company, will destroy such presumption, and cast the burden upon the holder to show his ownership. *Id.* (2).

3. When in a suit upon a promissory note, by an alleged innocent holder, the defendant gives evidence, which is not disputed, that the note was given in an illegal transaction, *void* as between the original parties on the ground of public policy, it is not error for the court to instruct the jury that the evidence shows a fraudulent transaction as to the original consideration, and that the burden of proof is upon the plaintiff to show by a preponderance of evidence that he is a purchaser in good faith. 486 (1).

4. The rule is well settled that when there is nothing upon the face of a note to cast suspicion upon its character 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 circumstances surrounding each particular transaction, however, may be taken into consideration in determining this question, and, frequently, direct and positive proof may not be obtainable to show such bad faith. *Id.* (2).

5. In a suit upon a so-called "Red Lyon Wheat" note, the defendant may introduce in evidence the bond received by him as a part of the transaction in which the note was given, the two papers being construed together as showing the true nature of the contract. *Id.* (3).

See BOHEMIAN OAT NOTE.

BILL OF EXCEPTIONS.

1. Only so much of the testimony should be incorporated into a bill of exceptions as is necessary to fairly present the questions of law upon which a review is desired; which may be usually given in narrative form, and thereby save much expense to litigants. 619 (1).

2. The party making the bill is under no obligation to secure a copy of the stenographer's minutes of any more of the testimony than he may deem necessary for this purpose; for

BILL OF EXCEPTIONS—Continued.

which amount, when certified to by the circuit judge, he may tax as a part of his costs. 620 (2).

3. If the opposite party needs a copy of further testimony to enable him to propose desired amendments, he must procure it himself; nor can the appellant be required to pay for such testimony except as a part of the appellee's costs, in case he prevails and the necessity for the same is certified to by the circuit judge. *Id.* (3).

4. Amendments must contain a copy of whatever additional testimony, or exhibits, or other matter the party proposing same desires to have inserted; and copies thereof must be served on the opposite party before the time noticed for the settlement of the bill of exceptions. *Id.* (4).

5. If, when the bill and amendments are properly brought before the court for settlement, further testimony is desired by the court, to enable him to properly settle a true bill, he should direct the stenographer to transcribe the same from his minutes, and file such transcript, free of charge; and no costs should be taxed by either party therefor, the stenographer being an officer of the court for such purpose, and subject to his order and direction; at least, to that extent. *Id.* (5).

6. It is the duty of the court to see that all bills of exceptions are made in accordance with the rules of the court, and the statutes relating thereto. *Id.* (6).

BOARD OF SUPERVISORS—See CONSTITUTIONAL LAW (3, 4); JUSTICES OF THE PEACE.

BOHEMIAN OAT NOTE.

1. It is a fact of which courts may take knowledge that notes known as "Bohemian Oat Notes" are all obtained and given upon a similar scheme or arrangement, and are void, as against public policy, between the maker and payee, or any other person having knowledge or information of the scheme upon which they are based, and by which they are procured. 328 (1).

2. Where the testimony in a suit by an alleged *bona fide* holder of a "Bohemian Oat Note" tended to show that the plaintiff had knowledge of the true character of the paper, *before* its purchase, he may be cross-examined touching his knowledge,

BOHEMIAN OAT NOTE—Continued.

before or at the time of such purchase, of Bohemian oat notes in general, or as to his information or knowledge specially in regard to any such note which had come into his hands or to his attention. *Id.* (2).

3. Where, in a suit upon a Bohemian oat note purchased by a firm composed of five members, only two of the partners were shown to have taken any part in such purchase, or to have known anything about it until after it was made, the presumption is that the remaining members were ignorant of the consideration of the note. *Id.* (3).

4. A Bohemian oat note is void as to all parties acquainted with its character (*McNamara v. Gargett*, 68 Mich. 454), and no new liability can be created upon it; not even a contract of indorsement between the payee and one acquainted with its fraudulent character. *Id.* (4).

5. Where the purchaser of a Bohemian oat note testified that he had read of this Bohemian oat note scheme, and knew that some farmers were getting into it, in the absence of a denial on his part that said scheme was a fraudulent one, the jury and court have the right to presume that it was the same old fraud with which the whole State is now familiar, and in such a case the jury should be instructed that if they found that the plaintiff knew that the note was given for Bohemian oats, or was so informed before its purchase, he could not recover. *Id.* (5).

BOND—See APPEAL BOND; PAYMENT.

BOND OF INDEMNITY—See PRINCIPAL AND AGENT (1).

BURDEN OF PROOF—See BILLS AND NOTES (3).

BURIAL OF DEAD BODY OF STRANGER.

1. The Auditor General has no control over the action of the circuit court in allowing the account of a justice of the peace for expenses incurred under How. Stat. § 9593, authorizing such officer to hold an inquest upon the view of the dead body of a stranger, etc., and *mandamus* lies to compel him to draw his warrant upon the State treasury for the account as allowed. 563 (1).

2. The statute not only authorizes, but requires, a decent burial, and does not require the dead body of a stranger to be treated with neglect, or buried like a dog, without ceremony. *Id. (f).*

CATTLE—See REPLEVIN (4, 5).

CHARGE TO JURY.

1. An instruction to a jury in a case involving questions of law and fact that there is no law involved in the case that amounts to any thing is erroneous. 518 (5).

2. An instruction that the jury should find which side is in the right is too general, as it allows them to enter the domain of morals, and measure the liability of the parties by the individual notions of the jurors as to whether the conduct of the parties was right or wrong. *Id.* (6).

3. An instruction which leaves the jury judges of the law as well as of the facts, and allows them to render a verdict based upon their abstract notions of what is right between man and man, is erroneous. *Id.* (7).

See CRIMINAL LAW (15).

CHARTER—See CONSTITUTIONAL LAW (6).

CHATTEL MORTGAGE.

1. A mortgagee of chattels may maintain trover against any person wrongfully interfering with his right to their possession, even before condition broken. 221 (1).

2. An affidavit of renewal of a chattel mortgage upon a stock of lumber and other material kept for sale in connection therewith, including all other lumber, stock, or material of every kind which the mortgagors might thereafter add to said business, which states that the mortgagee's interest in the chattels described in the mortgage remains unchanged, and is hereby renewed for the amount claimed to be due upon the mortgage, is sufficient to continue the mortgage in force as to such *after-acquired* property. 242 (1).

3. Where a chattel mortgage has been assigned as collateral security, but was surrendered by the assignee to the mortgagee before he brought suit for an alleged illegal attachment of the property, said assignee assenting to such suit and accepting other securities in lieu of the mortgage, but not formally re-assigning the same, the defendant cannot complain that his interests, if he has any, were affected by such assignment. 243 (2).

4. A general assignment for the benefit of creditors, covering

CHATTEL MORTGAGE—Continued.

enrolled and licensed vessels belonging to the assignor, which is not recorded in the office of the collector of customs where such vessels are registered or enrolled, gives the assignee no right to the vessels as against a mortgagee whose mortgage is thus recorded. 474 (1).

5. The act of Congress (Rev. Stat. § 4192) in reference to the recording of mortgages upon enrolled and licensed vessels supersedes the statute of this State providing for the recording of mortgages in the office of the township or city clerk, and no presumption of fraud, which would arise under the State law because of the failure to so record them, can prevail against their validity. *Id.* (2).

6. A provision in a chattel mortgage allowing the mortgagor to retain possession until the debt is due is for his benefit, and may be waived by him at any time. 517 (2).

7. The waiver by a mortgagor of his right to the possession of the property until the maturity of the mortgage debt, and his consent that the mortgagee may take immediate possession, cannot affect the rights of an attaching creditor, who, if he regards the mortgage as valid, should levy subject to the rights of the mortgagee, and if he claims it void as to creditors, and succeeds in showing such fact, the agreement as to possession will not affect that question. 518 (3).

8. A mortgage given in good faith to secure future advances agreed to be made by the mortgagee, as well as present indebtedness, is valid. *Id.* (4).

9. A mortgagee who obtains a bill of sale of the mortgaged property by fraud, and under it, and before it is repudiated by the mortgagor, takes possession of the property, may, in an action of trover brought by the mortgagor, show the extent of his mortgage lien in reduction of damages. 681 (1).

10. If in such a case a tender is necessary before bringing suit, the duty of the mortgagor to make it is unaffected by the fact whether the mortgagee claims possession under the bill of sale or mortgage. *Id.* (2).

CLAIMS—See AUDITING CLAIMS AGAINST THE STATE.

COLLECTOR OF CUSTOMS—See CHATTEL MORTGAGE (4, 5).

COMBINATIONS TO CONTROL PRICES—See PUBLIC POLICY (4).

COMMON COUNTS—See PLEADING (10).

CONSTITUTIONAL LAW.

1. Act No. 147, Laws of 1887, which provides for the taxation of a $5 attorney fee in favor of the plaintiff in a suit to recover for personal services, as a part of his costs, is unconstitutional and void. 105 (3).

2. The mechanics' lien law (Act No. 270, Laws of 1887) strikes at the foundation of property in land, and is unconstitutional, and all its parts must fall together, leaving the law of the State where it was before the passage of said act. 199.

3. Act No. 342, Local Acts of 1889, entitled "An Act to amend section three of Act No. 331 of the Local Acts of 1875, entitled 'An Act to re-incorporate the village of Reed City,'" and which makes the president of said village *ex officio* a member of the board of supervisors of Osceola county, is constitutional. 202 (1).

4. The following propositions are summarized from the opinion of Mr. Justice CAMPBELL:

a—It was decided in *Attorney General v. Preston*, 56 Mich. 177, that it was competent for the Legislature to make the president of a village an *ex officio* member of the board of supervisors of his county, and it is purely a matter of legislative policy when and where such power shall be exercised.

b—Most of the great changes in our city organizations have come in under laws which did no more than to indicate by their titles a purpose to incorporate, or re-incorporate, or revise the corporate charter of the municipality dealt with. Anything which is meant to form a permanent element in municipal arrangements is pertinent to the incorporation.

c—It is undoubtedly competent to introduce by amendment anything which might have been introduced in the original act. 203 (2).

5. Act No. 26, Laws of 1861 (being chapter 242 of Howell's Statutes), which provides for the adoption of minor children, is plainly in violation of the constitutional provision that the object of an act shall be expressed in its title. 351 (1).

6. An ordinance requiring all persons owning or occupying any real estate in a city to keep and maintain good and sufficient sidewalks along all streets and avenues in front of or adjacent to such real estate, and imposing a fine or imprisonment for a failure to do so, is unconstitutional and void.

CONSTITUTIONAL LAW—Continued.

as is a charter provision authorizing such an ordinance. 414 (1).

CONSTRUCTION AND TERMS OF PAYMENT—See PAYMENT.

CONSTRUCTION OF WILL—See WILL.

CONTRACT—See LOGS AND LOGGING; PUBLIC POLICY.

CO-OPERATIVE SAVINGS ASSOCIATIONS.

1. A member of a co-operative savings association organized under chapter 119, How. Stat., may *sell* his shares to the corporation, or to any member, or to any other person who may be approved, in such manner and upon such terms as the by-laws may prescribe, but after a sale to the corporation in liquidation of his shares he cannot again sell the same shares to another person, nor is there any way provided by which he can again become the holder or owner of the liquidated shares. 1 (1).

2. The opinion discusses and construes the statute under which co-operative savings associations are organized, holding that they are creatures of the statute, and that the rights, duties, and obligations of members are such as it prescribes. *Id.* (2).

CORPORATION.

Service upon the president of a corporation of an attachment in a log-lien suit (the corporation being the owner of the logs) is sufficient notice to the corporation. 105 (9).

See JURISDICTION; RETURN.

CORPUS DELICTI—See CRIMINAL LAW (10).

COSTS—See JUSTICES OF THE PEACE.

CRIMINAL LAW.

1. Leaving a *forged* discharge of a mortgage collateral to notes, which it secures, in the proper office for record, is an uttering and publishing of an acquittance and discharge for *money*. 53 (1).

2. How. Stat. § 5685, making the record of conveyances, and other instruments authorized to be recorded, *prima facie* evidence, does not apply when the question of the forgery of the original instrument is in issue either in a criminal or civil suit. *Id.* (2).

3. On the trial of a respondent for the alleged forgery of a

CRIMINAL LAW—Continued.

discharge of a mortgage, the original instrument is the best evidence, and ought, if possible, to be produced. *Id.* (3).

4. When an alleged forged instrument is last shown in the hands of the person accused of forging or uttering it, secondary evidence may be given of its contents without notice to the accused to produce it. *Id.* (4).

5. It is the duty of the prosecuting attorney to furnish all the evidence within his power bearing upon the issue of guilt or innocence, in relation to the main issue, or to give some good excuse for not doing so. *Id.* (5).

6. The record of a mortgage, admitted to be genuine, for the forgery of a discharge of which a respondent is on trial, is admissible as evidence of the mortgage. *Id.* (6).

7. The fact that a person arrested for a crime may of his own accord tell the truth or a lie to screen himself or gain favor with the officers of the law does not prevent such statements from being used against him. *Id.* (7).

8. It is only where statements are drawn from a prisoner by some artifice, promise, or threat which induces the hope of benefit, or acts upon his fears, or are made under compulsion, that the law precludes their being used as admissions. If they are free and voluntary, then the motive or intent of the accused in making such statements is not material, as regards their admission in evidence. *Id.* (8).

9. On the trial of a respondent for uttering a forged discharge of a mortgage, evidence of the execution of a mortgage upon part of the mortgaged premises a year after the date of the discharge, and of the presentation to the mortgagee of an abstract of title showing the discharge of the first mortgage, is competent as presenting a motive for the commission of the crime charged, and, also tending to prove that the respondent knowingly uttered the forged discharge. 54 (9).

10. Where the *corpus delicti* depends entirely for its existence upon the acts and intent of the respondent, such acts and his admissions, if admissible at all, are admissible at any stage of the proceedings upon the trial. *Id.* (10)

11. In this case a statement made by the prosecuting attorney in his argument to the jury, entirely outside of the record, is held to have been erroneous, and, there being no means

CRIMINAL LAW—Continued.

by which the Court can ascertain whether the error was cured by the instruction to the jury to disregard the statement, the conviction is set aside and a new trial granted. 348.

12. The testimony of the owner, in a prosecution for the larceny of a cow, that he paid $50 for her a short time before she was stolen, and of a man then employed by the respondent, and who assisted him in trying to make a sale of the cow, that respondent told him to ask $30 or $40 for her, is sufficient to go to the jury upon the question of the value of the animal, and that it was in excess of $25. 568 (1).

13. An instruction in a larceny case, which in substance informs the jury that the respondent is charged with feloniously stealing, taking, and carrying away a cow, the property of another, and from his possession, of the value of $50, sufficiently describes and defines the charge made in the information, and states what acts are necessary to be done, and with what intent, to constitute the crime of larceny. *Id.* (2).

14. Where on the trial of a larceny case there is no testimony tending to show that the property is worth less than $30, it is unnecessary to instruct the jury that stealing property worth less than $25 will not constitute the offense charged. *Id.* (3).

15. A statement in a charge in a larceny case, made after the court had impressed upon the jury the gravity of the offense, and the care they should exercise in their deliberations, that the judge might take it upon himself to discharge the respondent, with which, however, the jury had nothing to do, is an unfortunate one, and is liable to provoke indifference in a proper discharge of the duty of the jury, prejudicial to respondent, and, as the court cannot certainly know but that such was the result, a new trial should be granted. *Id.* (4).

16. A statement by the prosecuting attorney, in opening the trial of a criminal case, that one reason why he was more prejudiced against the respondent is because he has committed perjury in another court, for the purpose of assisting one of his fellow prisoners, and its indorsement by the court's statement, in answer to an objection by respondent's counsel,

CRIMINAL LAW—Continued.

that "I must say that considerable of that has come under my own notice," are too plainly illegal to need comment, and entitle the respondent to a new trial. 571.

17. In this case it is held that the facts stated in the opinion show the offense of burglary at the common law; that it cannot be said that the store room was *not* adjoining to, or connected with, a dwelling-house, and, had the offense been charged under How. Stat. § 9134, the respondent must have been acquitted under *Pitcher v. People*, 16 Mich. 142; *People v. Nolan*, 22 Id. 229; *Moore v. People*, 47 Id. 639; *People v. Calderwood*, 66 Id. 92. 585 (1).

18. Felonious intent is a question for the jury, to be inferred by them from all the facts and circumstances disclosed by the testimony. *Id.* (2).

19. In considering a statement made by the respondent, the whole statement must be received; but the credit due to it, and to each part of it, is for the jury, who may believe one portion and disbelieve another, and may give it such credit as they deem it worthy of. *Id.* (3).

20. Our practice has allowed indictments to contain various counts, charging the same transaction in different ways, so as to meet the testimony as it is given on the trial; and some liberality has been used in applying a general verdict when all of the counts can be harmonized. But we find no authority for sustaining a sentence under a general verdict upon inconsistent charges, and covering them all. 615 (1).

21. How. Stat. § 9546, which provides that an indictment [information] for larceny may contain a count for obtaining property by false pretenses, or for embezzlement, or for receiving, having in possession, or aiding in concealing the same property, knowing it to have been stolen, and that the jury may convict of either offense, clearly requires the verdict to point out the crime of which the defendants are found guilty, and will not bear the construction that a conviction can be had on all the charges at once by a *general* verdict. *Id.* (2).

22. A sentence to imprisonment for more than five years, upon a general verdict of guilty under an information for horse stealing contrary to How. Stat. § 9180, and for the larceny of the same horse under the general statute, and for receiv-

CRIMINAL LAW—Continued.

ing, and aiding in concealing, the stolen property, is void for the excess. *Id.* (3).

23. How. Stat. § 9180 (Act No. 102, Laws of 1877), if valid, is aimed at preventing such horse stealing as should be done in this State, and disturb its peace, while the general statutes punish the receiver of property stolen beyond the State as well as any other. *Id.* (4).

24. It needs no discussion to show that under our statutes concerning receivers of stolen property it is not contemplated that the same person can be both thief and receiver. 616 (5).

See ABDUCTION; JUSTICES OF THE PEACE.

CUSTOM—See EVIDENCE (3).

DAMAGE-FEASANT—See REPLEVIN (4, 5).

DAMAGES.

In this case the Court discuss the testimony as to damages, and find that a fair basis for their measurement would be the market value of the rags in Detroit, determined by their value in Chicago and Milwaukee, less the freight from Detroit to those cities. It is also suggested that an ascertainment of damages will be less liable to be erroneous if the jury are instructed to find the market price of the rags at the date, or as nearly so as possible, of each time of delivery under the contract, and find the damages for each breach, instead of "lumping" the whole together, as was done on the first trial. 185 (2).

See EVIDENCE (7, 11); EXECUTORS AND TRUSTEES.

DECLARATION OF INTENTION—See NATURALIZATION.

DECREE FOR DEFICIENCY—See MORTGAGE (2, 3).

DEED.

1. In this case a quitclaim deed from a husband purporting to convey to his wife, and to her heirs and assigns, forever, the farm on which they resided, but which was declared to be upon certain express conditions and reservations following the *habendum* clause, namely:

a—That the grantee should not convey or mortgage the land during the life-time of the grantor, without his written assent, or his joining in the conveyance; and,—

DEED—Continued.

b—That, in case of the death of the grantee prior to the grantor's decease, the land should revert to him and to his assigns,—

Is *held* not to convey the land to the grantee in fee-simple absolute, but that the effect of the arrangement entered into was that the title should, in the event of the death of *either* of the parties, pass to the *survivor*. 338 (1).

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

a—The proposition that a condition, reservation, or exception which restricts a grant of a fee-simple absolute title to land, being repugnant to the granting part of the deed, is void, can only be true in those cases where the repugnancy is such that the intention of the parties cannot be ascertained from the whole instrument, or, if ascertained, cannot be carried into effect in accordance with established principles of law.

b—Every deed or contract is supposed to express the intention of the parties executing it, and when the object or purpose of such instrument is called in question in a court of justice the first inquiry is, what is the intention of the parties, as expressed therein, and it is the duty of the court to so construe said instrument as to carry out such intent, if no legal obstacle lies in the way.

c—In *Williams v. Bentley*, 27 Penn. St. 294, it was held that the strongest words of conveyance in the present tense will not pass an estate, if from other parts of the instrument a contrary intention appears. 339 (2).

See ADVERSE POSSESSION; EQUITY (2); ESTATES OF DECEASED PERSONS (2).

DEMURRER—See EQUITY PRACTICE (2, 3).

DEFICIENCY ON FORECLOSURE—See MORTGAGE (2, 3).

DEPOSITIONS.

The provision of How. Stat. § 7463, that where the distance exceeds 240 miles 20 days' notice shall be sufficient of the taking of depositions, was not meant to enlarge the time, in any case, beyond the period of one week-day for each 20 miles, but to fix a maximum which should suffice for distances beyond 240 miles. 265 (1).

DIRECTING VERDICT—See MASTER AND SERVANT.

DISCHARGE OF MORTGAGE—See CRIMINAL LAW (1, 3, 6, 9).

DISTRAINING CATTLE—See REPLEVIN (4, 5).

DIVORCE.

1. The dismissal of a bill for divorce on the ground of the *illegality* of the marriage sought to be dissolved cannot affect the right of the complainant to file a second bill for the dissolution of a later, *legal*, marriage. 469 (1).
2. Pending a decision as to the sufficiency of a plea of a prior adjudication, filed by a husband to a bill for divorce, the court has jurisdiction of the matter of the allowance of temporary alimony, and on an appeal from an order adjudging the defendant in contempt for failure to pay such alimony, the appellate court will not pass upon the issue raised by said plea, which was not replied to, but was noticed for hearing by the complainant. *Id.* (2).
3. Where a bill for divorce alleges a marriage out of the State, and acts of cruelty immediately following such marriage, without locating the place of their infliction or giving their dates, and is filed subject to the provisions of Act No. 137, Laws of 1887, which requires a residence of two years in this State where the cause for divorce occurred out of the State, and alleges but one year's residence, which bill is not demurred to but stands for hearing upon a plea of a former adjudication, the court has a right, while the case is being disposed of, upon a proper showing, to grant temporary alimony, and to enforce its order for payment of the same. *Id.* (3).

DOCKET—See JUSTICE'S COURTS (3).

EJECTMENT.

1. In ejectment, where the trial is by jury, no judgment against their verdict can be entered in the Supreme Court. 275 *(g)*.
2. It is the first duty of the plaintiff in ejectment to prove a title, and identify the land sought to be recovered. 322 (2).
3. Where two brothers and their wives occupied a lot of land within the constitutional requirements necessary to constitute a homestead, *all* of said persons are necessary parties to an action of ejectment to recover said premises. *Id.* (3)

See WATERS AND WATER-COURSES.

ELECTIONS.

The election of an assessor of a school-district on an informal ballot, coupled with a vote of the meeting declaring such election, is sustained. 195 (3).

EQUAL GUILT—See IN PARI DELICTO.

EQUITY.

1. The facts that a vendee of shingle logs, the title to which, as also to the shingles manufactured therefrom, is retained by the vendor until certain notes given for the purchase price are paid, has sold the shingles in violation of the contract, and in fraud of the vendor, and that the purchasers threaten to remove the shingles out of the jurisdiction of the court, it not being claimed that they are pecuniarily irresponsible, do not create an equity entitling the vendor to maintain a bill in equity to enforce his alleged lien on the shingles, and for an accounting with said purchasers for shingles sold. 159 (2).

2. In this case complainant seeks to cancel a deed of his farm, executed to the defendant, the real consideration for which was the maintenance and support of the complainant upon the farm during his natural life, by the defendant, which agreement the Court find has not been performed by the defendant, nor can it now be kept for reasons stated in the opinion; and that complainant's grievance can only be redressed by a reconveyance of the farm, which is decreed. 256.

See ASSIGNMENT FOR BENEFIT OF CREDITORS (2); FRAUDULENT CONVEYANCES.

EQUITY JURISDICTION.

A bill by one partner setting out a substantial fraud practiced on him by his copartners in the purchase of his interest in the firm assets and business, and a right to an accounting for a fund reserved by them to abide the result of threatened litigation, states recognized grounds of equitable jurisdiction, and a general demurrer is properly overruled. 436 (3).

See FORFEITURE.

EQUITY PRACTICE.

1. In this case a rehearing is held properly denied, and that

EQUITY PRACTICE—Continued.

no relief can be granted now which would not be practically allowing two applications for a rehearing,—one granted and not acted on, and another a substantial repetition of it,—without a willingness to comply with the practice, and after a longer delay than would support an appeal. 299.

2. On appeal from an order overruling a general and special demurrer, *held* that the statute authorizing such appeal only allows a consideration of the questions raised by the *general* demurrer. 436 (1).

3. A general demurrer cannot be sustained if the bill makes out any cause whatever for equitable relief. *Id.* (2).

4. Where one of two beneficiaries under a trust in their favor in a will refuses to join as a complainant in a bill to enforce the trust, such beneficiary is properly and necessarily made a party defendant. 588 (1).

See APPEAL

ESTATES OF DECEASED PERSONS.

1. Property rights cannot be litigated in proceedings to appoint an administrator. 500 (1).

2. It is no legal objection to the appointment of an administrator that the object of the petitioner is to file a bill in equity to set aside a deed, executed by the deceased, upon the ground that it is fraudulent and void as to the petitioner, —a judgment creditor. The statute expressly confers this right in certain contingencies (How. Stat. § 5884); and, unless an administrator is appointed, the remedy is lost to the creditors of the intestate. *Id.* (2).

See TRUSTS AND TRUSTEES.

ESTOPPEL.

A man cannot be permitted to erect a building upon his lot by the side of telegraph and telephone poles and wires maintained in a private alley, appurtenant to said lot, without any objection against their standing there, when they are on his own land, and go on for years, without finding any fault whatever, and allowing a tenant to use one of the wires for business purposes in said building, and then, when a fire arises, and the wires are found to hinder the firemen in their work of extinguishing it, charge up to the corporation maintaining them the loss occasioned by such fire. 625.

See FIRE INSURANCE (3); SALE.

EVIDENCE.

1. In *Clark v. Daniels*, 26, parol testimony is held admissible to prove a verbal agreement for the sale of land, and the payment therefor. 26 (2).

2. In such a case testimony to show that the voyage was injurious to the vessel is rightly excluded. There was an express bargain for the towage, or there was no claim at all, and there could be no method of getting at the proper measure of risks on the towage of a water-logged vessel and cargo, so long as towed and delivered as agreed. 31 (2).

3. We have had occasion, in several instances, to point out that a surveyor cannot be allowed, under any circumstances, to fix private rights or lines by any theory of his own. Before his evidence can be received at all, it must be connected with the starting points and other places or lines called for by the grants under which the parties claim. His duty is neither more nor less than to measure geometrically in accordance with those *data*, and his science goes no further. It is not his business to decide questions of law, or to pass upon facts that belong to the tribunal dealing with the decision of facts. His testimony, as a man of science, is never receivable except in connection with the *data* from which he surveys, and if he runs lines they are of no value unless the *data* are established from which they are run, and those must be distinctly proven, or there is nothing to enable any one to judge what is the proper result. 37 *(e)*.

4. Evidence of the existence of a custom as to what part of a scaler's charges should be paid by a contractor with the owner for hauling saw-logs is admissible, as also proof of what the custom is, the contract being silent upon the subject. 45 (3).

5. In an action for false imprisonment and malicious prosecution, it is competent for the justice of the peace who issued the warrant to state fully what took place when the parties first appeared before him, and what proceedings were had; and he may be asked, on cross-examination by the defendant, "what conduct before him in the proceedings, or in his presence or hearing, on the part of the defendant, disclosed to him any maliciousness or over anxiety to prosecute the criminal case, if any." 96 (1).

6. In such a case a letter from the prosecuting attorney, authorizing the commencement of the prosecution, is admiss-

EVIDENCE—Continued.

ible as tending to show motive, and probable cause that an offense had been committed, and that the usual course was taken in such cases. 97 (2).

7. Where in a false imprisonment case the plaintiff is allowed, in proving damages, to show that he had subpœnaed witnesses, and the amount he had paid them, he may be asked on cross-examination to state the *specific* amount paid a given witness. *Id.* (3).

8. In a suit for false imprisonment and malicious prosecution the plaintiff may show exhibition of feeling on the part of the defendant after the suit was brought, as having some tendency to show motive, if connected with the matter in controversy. *Id.* (4).

9. While it is true that every kind of ill feeling is not necessarily indicative of malice, yet malice may be proved by evidence of defendant's conduct and declarations; and if such conduct resulted in a wrong done to plaintiff, statements indicating ill feeling towards the plaintiff may be introduced in evidence, as bearing upon the intent with which the wrongful act was committed. Malice may be inferred by the jury from all the facts and circumstances given in evidence, and expressions of ill feeling are circumstances which are proper to be submitted to the jury. Mere expressions of dislike or ill will by one towards another, unaccompanied by acts, do not constitute malice in the legal sense. But where an act has been done,—such as instituting a prosecution,—then such expressions become relevant upon the question of malice. *Id.* (5).

10. Defendant's requests to charge were properly refused, for the reason that two important elements were omitted necessary to be shown in an action for malicious prosecution for commencing a criminal suit, namely, that defendant made a full and fair statement of all the facts known to him to the prosecuting attorney, who authorized the issuance of the warrant, and to his private attorney, who advised him in the premises, and that he acted upon such advice in good faith. *Id.* (6).

11. In a suit to recover damages for the refusal of a vendee to receive rags under a contract providing that they should be as good or better in quality than those furnished by the

EVIDENCE—Continued.

vendor the previous year, the burden is upon the plaintiff to establish this fact, and a charge that the burden of proof was upon the defendant to show that the rags delivered under the contract were of an inferior quality to those delivered the previous year is erroneous. 185 (1).

12. Where one or more letters, purporting to come from a certain person, are recognized by him in subsequent transactions, that may, in some cases, be admissible on questions of handwriting. But the mere receipt of letters purporting to be from a person never seen, and with whom no subsequent relations existed which were based on them as genuine, has no value as means of knowledge. 265 (4).

13. Where there is no direct knowledge of handwriting, there must be something which assures the recipient of letters, in a responsible way, of their genuineness, before he can swear to their writer, or use them as comparisons of handwriting. *Id.* (5).

14. The precise character of the powers granted by the will to executors and trustees cannot be shown by parol. 325 (3).

15. An action cannot be made out against executors and trustees, as such, for damages arising by reason of alleged leakage from the roof of a store leased by them to the plaintiff, without proof of the precise character of the powers granted to them by the will of the testator. *Id.* (4).

16. The general rule is that parol contemporaneous agreements cannot be admitted to contradict or to vary the terms of a written instrument. 401 (1).

17. Upon the trial of issues involving fraud, a pretty large latitude of inquiry is permitted; and all facts and circumstances tending to throw light upon the transaction between the parties alleged to have been implicated are allowed to be given in evidence. 517 (1).

See ADVERSE POSSESSION; CRIMINAL LAW (2-10, 12, 14, 17, 19); LIBEL AND SLANDER (2); NEW ORLEANS EXPOSITION (6).

EXECUTION—See CHATTEL MORTGAGE (6, 7); JUSTICE'S COURTS (3); LIQUOR TRAFFIC.

EXECUTORS AND ADMINISTRATORS—See ESTATES OF DECEASED PERSONS; EVIDENCE (14, 15).

EXECUTORS AND TRUSTEES.

There is no legal theory on which either executors or trustees can *presumably* bind their estate by a five-years' lease, or by verbal representations concerning the condition of the estate, resulting in unliquidated damages to a large amount. 325 (2).

EXPERTS—See EVIDENCE (3).

EXPOSITION—See NEW ORLEANS EXPOSITION.

FALSE IMPRISONMENT—See EVIDENCE (5-10).

FEES—See BURIAL OF DEAD BODY OF STRANGER (1); JUSTICES OF THE PEACE.

FENCE—See ADVERSE POSSESSION.

FIRE—See ESTOPPEL.

FIRE INSURANCE.

1. Upon the undisputed facts in this case it is held that the plaintiff had no insurable interest in the insured property at the time it was destroyed by fire, and that a verdict should have been directed for the defendant. 340 (1).

2. A clause in a contract between a grantor and grantee made at the time of the execution of the deed, by which the grantee agrees that whenever he sells the granted premises, —which he agrees to do whenever a fair price can be obtained therefor,—he will pay the grantor $2,000 from the proceeds, if there shall be enough remaining after paying certain incumbrances upon the property, and, if not, that he will pay over to the grantor the residue of said proceeds, creates no more than a personal obligation on his part, in a certain contingency, to pay to the grantor an amount of money which can only be determined in the future, and depending entirely upon the amount he may receive in case of a sale of the property, and is not made a charge upon the land, nor does it create an insurable interest therein in favor of the grantor. *Id.* (2).

3. Where an insurance agent who had authority to make and deliver policies of insurance without referring the application to the company, prior to such delivery, agreed with an applicant that she might incumber the property in a given amount, and that he would indorse such agreement upon the application, and there is nothing in the policy limiting

FIRE INSURANCE—Continued.

the power of the agent to make such an agreement, the company is estopped from claiming any forfeiture by reason of such additional incumbrance. 554.

FORECLOSURE—See MORTGAGE (4).

FORFEITURE.

1. The principles enunciated in *Pendill v. Mining Co.*, 64 Mich. 172, are held to be applicable to this case; and a decree, declaring that the defendants were in default for not making the payments required by their contract for the purchase of certain timber of the complainant, and requiring such payment by a given date, in which case their rights under the contract should be in full force, but in default thereof forfeiting and annulling all of defendants' rights thereunder not already secured, and restraining their after assertion, except the right to cut and remove the timber already selected and paid for under the terms of the contract, which right is expressly maintained for their benefit, is held more favorable to the defendants than they were entitled to, and is affirmed. 359.

2. This suit, if all that complainants seek should be admitted, is neither more nor less than in a court of equity to enforce a forfeiture, and to do it in favor of a party out of possession against one in possession. Such a case has never hitherto been heard of, and is not within the jurisdiction of equity. The parties in possession have all the rights that the holders of the legal title could give them, and a plainer case of an attempt to enforce a forfeiture could not be presented, and it involves the still greater anomly of such an attempt by a person who has no title at all. 369 (1).

3. Even if the complainants had acquired the right, which it is difficult to see how they could acquire, to enforce a forfeiture, if a cause of forfeiture existed, this is not a proceeding in which it can be done. There are different objections to it. In the first place, the only method of forfeiture mentioned in the lease is a re-entry, and at law there could be no completed forfeiture without it. An agreement to give a lease in future is certainly no transfer of title, and could not authorize complainants to enter for that or any other purpose. Until they get their lease, if they have any inter-

FORFEITURE—Continued.

est in the land itself, which is, at least, doubtful, it is only such an interest as could be recognized in a court of equity. *Id.* (2).

4. A forfeiture is a strict legal right and can never be enforced except by the holder of the legal title. 370 (4).

FORGERY—See CRIMINAL LAW (1-6, 9); LIBEL AND SLANDER.

FRAUD—See EQUITY JURISDICTION; EVIDENCE (17); PUBLIC POLICY; SALE TO PAY DEBT.

FRAUDULENT CONVEYANCES.

These cases involve the question of an alleged fraudulent sale of land to the complainant, upon which executions were levied by her husband's creditors, and she brings these suits to remove the cloud thereby created upon her title, and a decree dismissing said bills is affirmed by a majority of the Court. 668.

FUTURE ADVANCES—See CHATTEL MORTGAGE (8).

HANDWRITING—See EVIDENCE (12, 13).

HIGHWAYS.

1. Where a roadway is built at such a height between hills, and so narrow, as to require barriers or railings to make it reasonably safe and fit for public travel, it becomes the duty of the proper township to erect them, and failing so to do it must be held liable for injuries resulting from a neglect of such duty. 448 (1).

2. It is a question for the jury to determine whether, under the circumstances of a given case, a highway is reasonably safe and fit for public travel, and whether a particular vehicle was unsuitable, and not road-worthy, as being unwieldy and unmanageable. *Id.* (2).

3. The statute itself imposes upon a township the duty of keeping its highways in repair, and it cannot be heard to say that because some other municipality has failed in a corresponding duty it can be excused from liability arising from its own neglect. 449 (4).

4. The statute requiring townships to keep their highways in repair cannot be so construed as to relieve from liability by saying that the township had adopted a method of construction, and had built according to the plan. *Id.* (5).

HIGHWAYS—Continued.

5. A municipality cannot construct a dangerous and unsafe road,—one not safe and convenient for public travel,—and shield itself behind its legislative power to adopt a plan and method of building and constructing in accordance therewith. *Id.* (6).

See NEGLIGENCE (2).

HIGHWAY COMMISSIONER.

A justice of the peace has no jurisdiction of a suit against a highway commissioner, unless conferred by Act No. 312, Laws of 1887. 228 (2).

See MANDAMUS (2).

HOMESTEAD—See EJECTMENT (3).

HORSE STEALING—See CRIMINAL LAW (22, 23).

HUSBAND AND WIFE.

Where a husband and wife desire that real estate, owned by the husband, shall in the event of the death of either go to the survivor, a simple way to accomplish this object is to unite in a deed to a third party, and have him reconvey to them jointly, and the survivor under the statute will succeed to the whole title and estate. 339 *(d)*.

See DEED (1); FRAUDULENT CONVEYANCES.

IGNORANCE OF LAW—See KNOWLEDGE OF THE LAW.

IMPOUNDING CATTLE—See REPLEVIN (4, 5).

INCONSISTENT CAUSES OF ACTION—See PLEADING (11).

INCUMBRANCE—See FIRE INSURANCE (3).

INFORMATION—See CRIMINAL LAW (20-22).

INJUNCTION—See MANDAMUS (1).

IN PARI DELICTO.

The only rigid rule forbidding relief is where parties are in equal guilt. While the law does not draw fine distinctions in ascertaining equality of wrong, it recognizes the fact that one party to such an arrangement is not necessarily an equal party in guilt, or consciously guilty at all, and will not deny relief to an injured party against the one who is really the deceiver, and who commits fraud by means of his persuasive or other influence over his victim. 598 (3).

INQUEST.

It is not unlawful, which is all we can consider; and it is not, so far as we can judge, usually improper to have thorough medical examination upon an inquest. Its object at common law was to discover whether any occasion existed for criminal proceedings, or whether there is reason to suppose death was not by natural causes. 563 *(e)*.

INSURABLE INTEREST—See FIRE INSURANCE (1, 2).

INSURANCE—See FIRE INSURANCE.

JUDGMENT—See MISNOMER.

JURISDICTION.

The commissioner of highways is treated by chapter 283, How. Stat., as a [municipal] corporation, and a justice of the peace has no jurisdiction of a suit against such officer, unless conferred by Act No. 312, Laws of 1887. 228 (2).

JURY—See CHARGE TO JURY.

JURISDICTION—See JUSTICE'S COURTS (1, 2); MANDAMUS (2).

JUSTICE'S COURTS.

1. It was not decided in *Mudge v. Yaples*, 58 Mich. 307, *Post v. Harper*, 61 Id. 434, *Noyes v. Hillier*, 65 Id. 636, or *Wedel v. Green*, 70 Id. 642, that the failure of a justice of the peace to wait one hour after the return-hour of process for the appearance of the defendant would void a judgment in favor of the plaintiff where sufficient service had been made or notice given, and the docket showed due appearance by the plaintiff. 105 (6).

2. In *Bossence v. Jones*, 46 Mich. 492, which was a *direct* proceeding to review a judgment, it was held that a justice of the peace must wait one hour for the appearance of the defendant after the time fixed for hearing, in all cases in which the plaintiff was allowed that time by statute. But it had been held in *Smith v. Brown*, 34 Mich. 455, that, as there was no statutory requirement for such waiting, a failure to do so was at most but an *irregularity*, and not open to collateral attack. *Id.* (7).

3. We are not prepared to hold that the failure of a justice of the peace to note on his docket the time of issuing an execution, and to whom delivered, or the fact that it was issued,

JUSTICE'S COURTS—Continued.

will vitiate an execution actually and properly issued by the justice, and delivered to the sheriff. 106 (12).

4. A justice of the peace has no jurisdiction of a suit against a highway commissioner, unless conferred by Act No. 312, Laws of 1887. 228 (2).

See APPEAL BOND.

JUSTICES OF THE PEACE.

There is no statute forbidding action by a justice of the peace without the consent of the prosecuting attorney, when he takes security for costs, and the board of supervisors have no right to assume to criticise his action within his lawful jurisdiction, or to be governed by the prosecuting attorney's views of policy, nor can they refuse to audit the legal fees of the justice for services so rendered. 245.

See JUSTICE'S COURTS.

KNOWLEDGE OF THE LAW.

While a man is, for public reasons, held responsible for his conduct, although ignorant of law, there is no conclusive presumption that he actually knows the law. 598 (1).

LABOR—See LOG-LIEN LAW; LOG-LIEN SUIT.

LAKE—See WATERS AND WATER-COURSES (2)

LARCENY—See CRIMINAL LAW (12–15).

LEASE—See EVIDENCE (15); EXECUTORS AND TRUSTEES; FORFEITURE (1–3); SPECIFIC PERFORMANCE.

LETTERS—See EVIDENCE (6, 12, 13).

LEVY—See CHATTEL MORTGAGE (6, 7).

LIBEL AND SLANDER.

1. Charging a son with having forged his mother's name to a note, means a note susceptible of forgery, and the words are actionable *per se*. 181 (1).

2. Proof of the repetition of the same slander charged in a declaration is admissible for the purpose of showing malice upon the part of the defendant in the original utterance. *Id.* (2).

LIEN—See EQUITY (1); LOG-LIEN SUIT; VENDOR'S LIEN.

LIEN-LAW—See CONSTITUTIONAL LAW (2).

LIQUOR-TRAFFIC.

A sheriff, in making a sale of intoxicating liquors under an execution, is not "engaged in the business of selling intoxicating liquors" within either the letter or the spirit of the liquor law of this State. 483.

LOG-LIEN LAW.

The log-lien law (Act No. 229) of 1887 does not apply to the case of a contractor for hauling saw-logs who performs no *personal* labor under the contract. 45 (1).

LOG-LIEN SUIT.

1. Where a contractor takes proceedings under the log-lien law of 1887 against the log-owner, with whom he claims to have made a contract for their hauling, and recovers a verdict for the amount claimed to be due on said contract, the fact that his non-performance of the labor in person deprives him of a lien under said statute will not affect said verdict; and if the verdict and judgment are in the usual form in *assumpsit*, and are silent as to such lien, it will be presumed that the jury failed to find a lien, especially where the record shows that their attention was called to the fact that if a lien was found it should be entered as a part of their verdict. 45 (2).

2. Where a purchaser of standing timber, the title to which was retained by the land-owner until the purchase price was paid, sold the logs to a corporation, which acquired all of his interest in the same before the logs were attached at the suit of his workmen under the log-lien law, and notice was served on the corporation, but not upon the land-owner, who had not *then* been paid for the timber, and, after making such payment, the corporation replevied the logs from the sheriff, the failure to serve notice upon the land-owner will not defeat such lien proceedings in the replevin suit. 104 (1).

3. The illegal taxation of an attorney fee in a log-lien suit, under Act No 147, Laws of 1887, will not invalidate the judgment, nor interfere with the lien, except in so far as the illegal excess of costs may reduce it in amount. 105 (4).

4. An affidavit for an attachment under the log-lien law (Act No. 229) of 1887 need not state who is the owner of the logs upon which a lien is claimed. *Id.* (5).

LOG-LIEN SUIT—Continued.

5. Where due service of attachments in 19 log-lien suits against the same debtor and logs was made upon the debtor, who appeared at the return-hour,—which was the same in each case,—and joined issue in each suit, and the log-owner did not appear, although duly served with notice of such attachments, the failure of the justice to wait one hour after the return-hour before proceeding in said suits will not invalidate the judgments rendered therein, in a replevin suit by the log-owner against the sheriff who had levied upon the logs under executions issued on said judgments. 105 (8).

6. An attachment issued by a justice of the peace in a "log-lien suit" brought under Act No. 229, Laws of 1887, may be served by the sheriff of the county where the attachment is issued upon the log-owner in any county in the State, and where such log-owner is a corporation, service upon its president is sufficient notice to the corporation. *Id.* (9).

7. An affidavit under the "log-lien law" of 1887 which alleges that the labor was performed in "cutting, skidding, hauling, *chopping*, sawing, *swamping*, *loading*, and falling the logs (timber) upon which a lien is claimed, is sufficient; "chopping" being included in "cutting," and "loading" being a necessary part of "hauling," and "swamping" belonging to the work of "skidding" said logs. *Id.* (10).

8. An affidavit in a "log-lien suit" under Act No. 229, Laws of 1887, which fails to state by whom the labor was performed for which the recovery is sought, is defective; but such defect will not invalidate a judgment for the return of the logs in favor of the sheriff, who had also levied upon them under executions issued upon judgments in favor of several other lien-holders, whose affidavits were not so defective, but it will reduce the amount of his lien in the amount of the judgment in the case where the affidavit is so defective. 106 (11).

9. After the levy of an execution issued upon a judgment in a log-lien suit brought under Act No. 229, Laws of 1887, upon the logs, and the posting of notices of sale, the officer holds the property under such levy, and not under the prior attachment. *Id.* (13).

10. An execution issued under the log-lien law of 1887, and delivered to the same officer who served the writ of attach-

LOG-LIEN SUIT—Continued.

ment, which recites the fact of the rendition of the judgment, and that it is for work and labor performed upon "a certain lot of red and white oak saw-logs, as mentioned in plaintiff's declaration," and commanding the officer to levy the damages, etc., of the goods and chattels of the *debtor*, naming him, "namely, the above described logs," sufficiently points out to the officer the logs held under the attachment levy. *Id.* (14).

11. Where in *such* a case the officer levied said execution upon the identical logs he had attached in said log-lien suit, and was proceeding to a sale to satisfy said judgment when the owner of the logs replevied them, the omission from the execution of a command to make such sale is an irregularity which cannot be taken advantage of in said replevin suit. *Id.* (15).

LOGS AND LOGGING.

One of several log-owners, having logs to be driven out of a creek into the Muskegon river, was placed in charge of the drive by said owners, as agent, under a written contract giving him power to make assessments on the several owners, as required, to pay the cost of such driving, upon an agreed basis as to mileage and amount of logs. Said contract recited that said log-owners were desirous of having their logs driven into the main Muskegon river before the main spring drive on said river of the *present* year passed said creek, but contained no definite agreement on the part of said agent to drive the logs out by that time, which he failed to do, and certain of said log-owners notified him not to drive any more logs for them, after which he completed the said drive, and made further assessments, which they refused to pay, and he brought suit therefor.

Held, that the time when the logs should be driven out of the creek is plainly limited, namely, *before* the main spring drive on the Muskegon river in the year the contract was made passed said creek, and that, whether the plaintiff was at fault or not for failing to so drive them out, the defendants had a right to say to him, as their agent, that they did not wish him to drive their logs out of the creek after that time, and that it would require a new contract to authorize him to do so. An examination of the opinion is essential to a full understanding of the case. 16.

See EVIDENCE (4); LOG-LIEN LAW; LOG-LIEN SUIT.

MAINTENANCE AND SUPPORT—See EQUITY (2); MORTGAGE (1).

MALICE—See EVIDENCE (9).

MALICIOUS PROSECUTION—See EVIDENCE (5-10).

MANDAMUS.

1. Relator applied for a *mandamus* to compel the respondent to set aside an injunction, and the Court, while finding that the proceedings below were not regular, not being convinced that there is any imperative necessity for summary interference, deny the writ, but without prejudice, etc. 210.
2. In *mandamus* proceedings against a supervisor to compel the assessment of taxes to pay a judgment rendered against the commissioner of highways, properly certified to him, and which has not been appealed from, vacated, or discharged, the only inquiry that arises is, did the court have jurisdiction? 228 (1).

See JUSTICES OF THE PEACE.

MASTER AND SERVANT.

In this case the direction of a verdict for the defendant on the ground that it appeared from the evidence that, whatever risks there were in regard to the employment, they were not concealed, but were open and visible, and known to the deceased, who must be deemed to have accepted and continued in the employment with reference to the same, is held fully justified. 546.

MECHANICS' LIEN LAW OF 1887—See CONSTITUTIONAL LAW (2).

MICHIGAN CASES CONSTRUED.

The Court does not depart from *Fox v. Norton*, 9 Mich. 207, but distinguishes that case from the one at bar in that in that case the execution of the bond by Gilbert & Co., as *sureties*, was not within the scope of their business, and to bind the partner who did not execute the instrument, in the absence of authority under seal, some previous assent or subsequent ratification as the act or obligation of the firm was requisite to be shown. 305 (2).

See PLEADING (5. 6).

MISNOMER.

Where the correct name of a defendant is given in the summons, and in the judgment rendered on default, after personal service, the judgment cannot be reversed, impaired, or

MISNOMER—Continued.

in any way affected by reason of defendant's name having been incorrectly stated in the declaration. 239 (3).

See PLEADING (9).

MONOPOLIES.

The following propositions are summarized from the opinion of Chief Justice SHERWOOD:

a—Monopoly in trade or in any kind of business in this country is odious to our form of government. It is sometimes permitted to aid the government in carrying on a great public enterprise, or public work under governmental control, in the interest of the public. Its tendency is, however, destructive of free institutions, and repugnant to the instincts of a free people, and contrary to the whole scope and spirit of the federal Constitution, and is not allowed to exist under express provision in several of our state constitutions.

b—It is doubtful if free government can long exist in a country where enormous amounts of money are allowed to be accumulated in the vaults of corporations, to be used at discretion in controlling the property and business of the country against the interest of the public and that of the people, for the personal gain and aggrandizement of a few individuals. It is always destructive of individual rights, and of that free competition which is the life of business, and it revives and perpetuates one of the great evils which it was the object of the framers of our form of government to eradicate and prevent. It is alike destructive to both individual enterprise and individual prosperity, whether conferred upon corporations or individuals, and therefore public policy is, and ought to be, as well as public sentiment, against it.

c—All combinations among persons or corporations for the purpose of raising or controlling the prices of merchandise, or any of the necessaries of life, are monopolies, and intolerable, and ought to receive the condemnation of all courts. 632 (4).

See PUBLIC POLICY (4).

MORTGAGE.

1. This case involves the construction of a bond and mortgage given for the purchase price of a farm, and it is held that

MORTGAGE—Continued.

the whole context of the papers in the case, and all circumstances surrounding the sale of the farm, and the situation of the parties when it was made, show that the grantors and mortgagees never contemplated parting with the title to their property, except upon the understanding upon their part that a good, comfortable living and maintenance was to be provided for them so long as they should both live, and, if such was not the understanding on the part of the mortgagor, then the minds of the parties never met, and no valid agreement between them was ever made. 64.

2. In order to authorize a decree for the payment of the deficiency on a foreclosure sale against a third party, under How. Stat. § 6704, the obligation or evidence of debt of such party must be one upon which he can be sued at law to recover the mortgage debt. 215 (1).

3. A creditor attached lands subject to a mortgage, which mortgage he afterwards agreed to *purchase*, and on appeal from a decree holding him liable for any deficiency on foreclosure sale, it is *held* that in order to hold him his contract must have been to *pay* the mortgage debt, and that if there was a valid contract to sell him the mortgage his liability thereon could only extend to the damages the complainant would sustain by a failure to perform such agreement, which could not be litigated in the foreclosure suit. *Id.* (2).

4. The owner of 160 acres of land in Huron county, Michigan, before his patent was issued, conveyed the land to one Beeson, and to his heirs and assigns, describing him as trustee, and, after reciting the grantor's indebtedness upon a note, authorized the trustee, in case it was not paid, on the application of the payee, or bearer, to enter upon the land and as the attorney of the grantor, or in his own name, to sell and dispose of the land, in whole or in part, at public auction, for the best price it would bring in cash, ten days' public notice having been given of the time and place of such sale, by advertisement in one of the public newspapers printed in the city of Detroit. Provision was made for the payment of the note and expenses of the proceedings, and for payment of the balance realized on such sale to the grantor, his heirs, etc. The trustee was to convey without personal covenants, so as to be a perpetual bar in law and equity, and on payment of the note was to reconvey to the

MORTGAGE—Continued.

grantor, who was to pay taxes. The land was wild and unoccupied until 1876, when the trustee conveyed 80 acres to one Grimley, by full warranty deed, who went into possession under it. In 1880 the grantee, purporting to act as trustee, executed a deed to one Van Dyke of the 160 acres, reciting the trust-deed and that he had caused the sheriff of Wayne county to expose the land for sale at auction, who struck it off to Van Dyke for a stated sum, as the highest bidder, and that, as such trustee, he conveyed to Van Dyke the property which the grantor had in the land at date of said trust-deed. The deed to Van Dyke contained no recitals of the time or place of sale, was not signed by the sheriff, and was absolute in form, with no period of redemption. Van Dyke afterwards conveyed to Grimley. An action of ejectment was brought by some of the heirs of the grantor against Grimley, and, in reversing a judgment in his favor, the Court hold:

a—The instrument given to Jacob Beeson was a mortgage, and its power of sale, which did not conform to our statutes, could not authorize the equity of redemption to be cut off by anything short of a sale in equity, or one in all respects conforming to the statutes. *Comstock v. Howard*, Walk. Ch. 111.

b—There is nothing in this mortgage repugnant to the foreclosure statute, except as *permissive*, and it would by its terms allow a proper advertisement in Huron county, with the additional advertisement in Wayne county, as no place of sale is made *imperative*.

c—When Grimley bought of Beeson, in 1876, this instrument was on record, and was Beeson's only source of title, if he had any. It only allowed him to enter, not merely on default, but on demand of the owner of the note. It gave him no personal interest, and no power to convey without demand of the creditor to foreclose, and foreclosure. His warranty deed was *void*, as against said grantor and his heirs, and conveyed no legal title whatever.

d—The only color of title Grimley has was derived under Van Dyke's deed, whose title amounts to nothing. As a foreclosure, it is on its face imperfect, because it does not purport to be made under the statute. It therefore did not cut

MORTGAGE—Continued.

off the redemption, and, under our statutes, gave no right of entry. How. Stat. § 7847.

e—Beeson was not interested in his own right. No power was given to him to do any act under the mortgage except when requested by the owner of the note, which was outlawed in 1865, and there was no testimony indicating where it is, or that it exists at all. The attempted foreclosure in 1880 was more than 20 years after the note became due, and does not purport, and is not shown, to have been called for by the holder of the note, which by that lapse of time is beyond the presumable, if not the possible, faculty of aiding or justifying resort to the mortgage.

f—As Beeson never was a trustee to receive payment of the note, but only held title to the mortgage subject to the holder's order, a sale by him, not authorized by the creditor, could not pass the mortgage to Grimley, even if he held all the land mortgaged. But the mortgage sale of the 160 acres was made in one parcel, for one sum, and Grimley purchased only 80 acres. It would be impossible to hold him an assignee of the mortgage, had Beeson purported to act in accordance with the terms of the trust.

g—There is nothing in the defense which in any way interferes with plaintiff's right to recover. What rights Grimley may have in the improvements are not involved in the present record. 273 (1).

5. The following general propositions are summarized from the opinion of Mr. Justice CAMPBELL:

a—Our statutes may, perhaps, authorize a power of sale in a mortgage, although in some respects variant, to be carried into effect by such notices and proceedings, and subject to such conditions, as are required by law.

b—The introduction of powers of sale into mortgages was, as is well known, a device to escape redemption; but in this country, from the beginning, the legislatures have stepped in, and so regulated the sales as to give them proper publicity, and usually made them subject to some reasonable redemption.

c—As in all other cases of remedy by act of the party, it has been held that every essential provision of law shall be complied with in executing a mortgage power of sale, and so appear. Parties may add to these conditions, but cannot

MORTGAGE—Continued.

dispense with them, and the case of a trust may add to, but it cannot take away from, them.

d—Even under the old law a right of entry by a mortgagee must be exercised within 20 years.

e—A mortgagee's possession not obtained by license of the mortgagor is tortious, and he may be ejected. 275 (2).

See ASSIGNMENT FOR BENEFIT OF CREDITORS (2); PRINCIPAL AND AGENT (2, 3).

MOTIVE—See EVIDENCE (8).

MUNICIPAL CORPORATIONS.

Where, by the provisions of a city charter, before a person can be required to build a sidewalk, the council must pass an ordinance prescribing the kind of walk to be built, its dimensions, and the material to be used therein, as well as the time within which it must be constructed, the enactment of such ordinance is a condition precedent to any liability for failing to build said sidewalk. 414 (2).

See CONSTITUTIONAL LAW (3, 4, 6); JURISDICTION.

MUSKEGON LAKE—See WATERS AND WATER-COURSES.

NATURALIZATION.

1. Declarations of intention are not required to be made before the clerk of a court in his office or in open court. 85 (1).
2. The following propositions are summarized from the opinion of Mr. Justice CAMPBELL:

a—The fact that this or any other state may extend privileges to aliens, who have merely declared their intention to become citizens, can have no weight in determining how such declarations are to be made.

b—A declaration on oath of an intention to become a citizen in no way differs in its nature from any other oath or affidavit, and in the very many cases of such oaths, whether before judges, justices, notaries, commissioners, or clerks, the only inquiry recognized is whether the oath is administered within the officer's jurisdiction, and not in what particular building or place it may be administered; and, unless there is some statutory intimation to the contrary, there is no reason why this case should form an exception.

c—The history and construction of the naturalization laws show that this declaration confers no privileges, and fixes no

NATURALIZATION—Continued.

rights, and is not jurisdictional, but is in several cases dispensed with. The United States Supreme Court has repeatedly held that no inquiry can be made in any controversy to attack the sufficiency of the final admission to citizenship, by showing a want of conformity to the previous requirements of the statutes.

d—If the declaration of intention was a proceeding on which witnesses were sworn or inquiries made, there would be, perhaps, some reason for formality. But it is a purely *ex parte* oath, which in no way dispenses with the inquiry made on final admission, and which Congress has not made of any particular value. The final application is not required to be made to the same court, or within the same jurisdiction, where the original declaration is made; and the inquiries made at the time of admission need not, and generally cannot, go into the *minutiæ* or circumstances of such declaration of intention, and are complete in themselves.

e—The fact that our laws give more force to these declarations than Congress has done cannot have any weight in construing congressional action, which must speak for itself, and lay down its own conditions. *Id.* (2).

NAVIGABLE WATERS—See WATERS AND WATER-COURSES.

NEGLIGENCE.

1. In determining the question of contributory negligence the same degree of caution is not required of an infant as of an adult; and, when such negligence is sought to be charged against a lad of less than 15 years of age, this rule clearly applies, and the charge of the court is erroneously defective which fails to state said rule, and challenge the attention of the jury to it, in applying the law to the facts and circumstances disclosed by the evidence in the case. 123.
2. Where by reason of the failure of a township to keep a highway in repair travelers upon it are placed in a perilous position, no negligence can be imputed to a party in charge, if, acting upon the occasion, as it appeared to him to be, for the safety of himself and those in his charge, he did not take the precaution which upon consideration a more prudent man might have taken. 448 (3).

NEW ORLEANS EXPOSITION.

The defendant was appointed by the Governor of Michigan a

NEW ORLEANS EXPOSITION—Continued.

member of a commission to represent the State at the New Orleans exposition, and to collect materials to be represented there as an exhibit on the part of the State; and as such member received from the Governor a draft for $5,000 sent by the managers of the exposition to be used in furnishing said exhibit, which draft defendant indorsed over to the treasurer of the commission, and $1,000 of said sum was turned over to defendant for the purpose of securing an exhibit from the Upper Peninsula. This $5,000 being deemed insufficient, an additional $10,000 was raised on bonds issued by the commission, the payment of which bonds was provided for by Act No. 33, Laws of 1885, which authorized the Board of State Auditors to audit and allow to the commission said sum, or so much thereof as should be necessary to pay the expenses of said commission, which were to be paid by the Auditor General upon presentation of the proper voucher, and of the said $10,000 in bonds for cancellation. Under this act the treasurer of the commission was allowed for the expenses of the commission $8,934.67. The State, claiming that the defendant had only paid $250 of the $1,000 received from the commission to secure said Upper Peninsula exhibit, demanded the payment of the balance of the money, and on the refusal of the defendant to comply with said demand brought an action of *assumpsit* against him, and recovered a judgment for said $750 and interest, in affirming which the Court hold:

1. The defendant accepted a place on the commission, and acted with it, and cannot now be heard to say that the funds which came into his hands from the commission were not State funds.
2. It is not material whether the $1,000 received by defendant was a part of the $5,000 received from the exposition managers, or of the proceeds of the bonds issued by the commission. It was a part of a general fund belonging to the State, to be used and expended under the direction of a commission appointed by the Governor, and whose acts were afterwards recognized as valid by an act of the Legislature.
3. While it may be true that the Governor had no power or authority to appoint such a commission, the defendant, having accepted the appointment, and acted under it, is estopped

NEW ORLEANS EXPOSITION—Continued.
from making any such claim, at least after the Legislature has recognized such action, and authorized the payment of the balance of the expenses incurred by the commission.

4. The $5,000 was a gift to the State, to aid it in preparing its exhibits, which the Governor had authority to accept and apply to the purposes for which it was intended; and the legislative act is evidence that the Legislature approved the action of the Governor in the premises.

5. Even if How. Stat. § 309, providing for a settlement with disbursing officers or agents of the State, can be applied to this case, it sufficiently appears that the defendant refused to recognize the State as interested in this fund, and, on joining issue in the case, denied all indebtedness to the State.

6. It appearing that the only person living at the time of the trial who had any knowledge or information as to whether the defendant expended the balance of the $1,000 was the defendant himself, and the declaration charging him with retaining it, and he failing to adduce the requisite counter-proof, the trial court was not in error in directing a verdict against him under the general rule that where the means of proving a negative are not within the power of the party alleging it, but all of the proof on the subject is within the control of the opposite party, who, if it is not true, can at once disprove it, the law presumes the truth of such negative averment, from the fact that such party withholds, or does not produce, the required proof. 573, 574.

NOTARY PUBLIC

The presumption, according to the general custom, is that a notary public can administer oaths. 265.

NUISANCE—See ESTOPPEL.

OCCUPATION OF LAND—See ADVERSE POSSESSION.

ORDER APPOINTING RECEIVER—See APPEAL.

ORDINANCE—See CONSTITUTIONAL LAW (6).

OWNERSHIP—See BILLS AND NOTES (1, 2).

PARTNERSHIP.

A sale to a partnership has become a legally recognized method of sale to all persons interested, whether named or not. If

PARTNERSHIP—Continued.

it is a trust, it is, by long recognition, not such a trust as is forbidden by the statute of uses and trusts. 603.

See EQUITY JURISDICTION.

PARTIES—See EQUITY PRACTICE (4).

PAYMENT.

Where a bond is conditioned for the payment of a sum of money "in five years" from date, the natural acceptation is that it *may* be paid *inside* of the five years and *must* be paid at the expiration thereof, but this will not warrant payment in installments without the consent of the obligee. 310 (1).

PERSONAL LABOR—See LOG-LIEN LAW.

PLEADING.

1. The law has never lost sight of the difference between *trespass*, where the act is presumptively wrong, until justified, and *case*, where the liability springs from the facts of the case as stated, and where a charge of what is a mere result from facts, and not itself a statement of facts, cannot be held good pleading. The court must be able to draw but one inference from the facts, as stated, and not from the pleader's inferences. 137 *(c)*.

2. There are many simple cases where, when certain facts are shown, a general allegation of negligence or want of care gives all the information needed; and in such cases the whole, taken together, makes a good declaration. But a naked charge that a person negligently hurt another, with nothing more, cannot be sufficient. *Id. (d)*.

3. This Court has several times expressed disapproval of the general propriety of leaving questions that may be better raised by demurrer to be passed on at the trial or hearing; but it has not held that such an omission was in all cases a waiver, or made a bad declaration good without amendment, so as to make a good cause of action where none is alleged. *Id. (e)*.

4. The decisions of this Court have been uniform that no proof of negligence can be received, beyond what is alleged, and that allegations of the wrong are necessary. 138 *(g)*.

5. In *Batterson v. Railway Co.*, 49 Mich. 185, it was held that no proof could be a ground of recovery, not within what

PLEADING—Continued.

was alleged with reasonable certainty, and the same rule was laid down in *Henry v. Railway Co.*, 49 Id. 495, and in *Railroad Co. v. Marcott*, 41 Id. 433. *Id. (h).*

6. In *Ives v. Williams*, 53 Mich. 636, it was held a failure to demur would not allow the scope of a declaration to be enlarged beyond what it would have been if properly framed on the same allegations, and the same principal was laid down fully in *Parker v. Armstrong*, 55 Id. 176, holding that a declaration bad intrinsically, for want of needful averments, could not be made good by not demurring. *Id. (i).*

7. Unless something definite is averred, there is nothing to enable it to be known what is pertinent to the issue. A person suing for a single cause of action is bound to know beforehand what wrong he complains of, and wherein the wrong consists. It is not competent to go before a jury on uncertain or conflicting claims. Neither is it competent for a court to allow a mass of testimony to go before a jury, and leave them to decide, each for himself, what is legal negligence and what is not. *Id. (j).*

8. If the fact that a defendant knows that a declaration contains a false charge or description precludes him from relying on or showing its falsity, there is not much use in rules of pleading. A misdescription is frequently as important as any other false statement, and it has been held, in our own decisions, that a serious misdescription is fatal to recovery in cases like the present. *Id. (k).*

9. Where, in a suit in justice's court, the defendant, a corporation, was correctly named in the summons as "The Sands & Maxwell Lumber Company," and the plaintiff declared orally "against the *defendant*, a corporation doing business under the name of the 'Pentwater Lumber Company,'" and, in default of defendant's appearance,—the summons having been personally served,—a judgment was rendered against it in its *corporate* name, the record will be given such construction as will support the judgment, by construing the language in the declaration as stating that the *defendant* was doing business under the name of the Pentwater Lumber Company. 239 (1).

10. No recovery can be had upon the common counts in *assumpsit* for property received by an agent, without

PLEADING—Continued.

authority, in payment of the amount due the principal upon a mortgage, the principal not having ratified such unauthorized act of the agent, nor released the mortgagor from his obligation in reliance upon the agent's liability or obligation to pay to the principal the avails or value of said property. 504 (3).

11. A declaration in a suit by a principal against an agent averring the duty of the agent to pay to the principal certain moneys and property received by him upon a mortgage belonging to the principal, and sufficient in amount to pay the same in full, and also counting upon the promise of the agent that, if the principal would make a sale of the mortgaged premises under a decree before then taken on a foreclosure of the mortgage, he would pay him any deficiency arising on such sale, sets forth two inconsistent causes of action. *Id.* (4).

See PRINCIPAL AND AGENT (3); STATUTE OF AMENDMENTS.

POSSESSION—See BILLS AND NOTES (2); CHATTEL MORTGAGE (1, 6, 7, 9, 10).

POSSESSION BY MORTGAGEE—See MORTGAGE (5*f*).

POSSESSION OF LAND—See ADVERSE POSSESSION.

POWER OF SALE—See MORTGAGE (4, 5).

PRACTICE IN CIRCUIT COURT—See BILL OF EXCEPTIONS; CHARGE TO JURY.

PRACTICE IN SUPREME COURT.

Where it appears from an examination of the record that there are no material *disputed* facts to be settled in the case, but that the whole issue turns upon the construction of a will, and is a matter of law, the case is open to review on a general exception to the judgment and its entry. 247 (1).

PRESUMPTION—See BILLS AND NOTES (2); NOTARY PUBLIC.

PRICES—See PUBLIC POLICY (4).

PRINCIPAL AND AGENT.

1. The execution by a traveling salesman of a non-resident firm of a bond of idemnity, under seal, in the name of the firm, in an attachment suit brought to collect a debt due the firm and contracted in the ordinary course of their business, although without express authority under seal, may be rati-

PRINCIPAL AND AGENT—Continued.

fied by parol, which ratification may be shown by facts and circumstances; and the question of such ratification is for the jury, when there is testimony tending to show it, and inferences to be drawn from such testimony. 305 (1).

2. In this case it is *held* that if a father, who bore the same christian name as his son, was the real owner of a mortgage taken by his son in the *common* name, without any distinguishing affix thereto, the conduct of the son in reference to this and all other loans made, and securities taken, and the consent and acquiescence of the father in such conduct, were sufficient to authorize a subsequent purchaser of the mortgaged premises to treat the son as the owner of the mortgage, and to deal with him and his agent on the supposition of such ownership, it appearing that the son managed all loans for his father, and that the mortgagor, and the said subsequent purchaser, supposed that the son was the owner of the mortgage in question. 310 (2).

3. Where, in *such* a case, the subsequent purchaser filed a bill to enjoin a statutory foreclosure of said mortgage, and interpleaded his grantor, alleging payment in full of the mortgage debt to the son and his said agent, and an answer was filed in the name of the mortgagee, in which the agency was denied, and the grantor also answered admitting such agency, and claiming that such payments had been made as charged in the bill, and further answered claiming the benefits of a cross-bill, under the rules, and set up affirmatively such agency and payments, and his rights in the land, and, upon the hearing of the case, the son testified that his father was the owner of the mortgage, and that he had died since the filing of said bill, whereupon the suit was revived on the petition of the complainant against the father's personal representatives, who filed an answer, previous to which there was nothing in the proceedings to indicate whether the father or son owned the mortgage, after which the said grantor filed a supplemental bill in the nature of a bill of revivor against the son, and said administrators, and said subsequent purchaser, alleging that the son had always held himself out as the owner of the mortgage until said hearing, to whom and his agent the payments aforesaid had been made in reliance upon such ownership, the bill in other respects making the same case as was made in the answer

PRINCIPAL AND AGENT—Continued.

of said grantor, to which supplemental bill the administrators filed a plea setting up the first suit by the subsequent purchaser as a bar to the new suit by said grantor, coupled with a disclaimer on the part of the son, said plea and disclaimer are properly overruled, the right to file said supplemental bill under the circumstances being undoubted. And it is further *held* that said subsequent purchaser had a right, under the circumstances, to deal with said agent in the relation in which the son held him out to the public, to wit, as a general agent, authorized to receive principal and interest at any time upon the mortgage. *Id.* (3).

4. An agreement by which a party is to loan out to borrowers money furnished by another party, at an agreed rate of interest, he to collect and account for all over one per cent., which he is to retain as his compensation, constitutes him an agent coupled with an interest, and he is bound to discharge his duties with fidelity and good faith towards his principal. 504 (1).

5. An agreement by an agent to stand as security for all loss the principal might sustain on loans made by the agent, by reason of insufficient security or defect of title, is held not to apply to prior loans, nor is evidence of such an agreement admissible in a suit against the agent unless specially counted upon. *Id.* (2).

See LOGS AND LOGGING; STATUTE OF FRAUDS (2).

PROSECUTING ATTORNEY—See CRIMINAL LAW (5, 11, 16); EVIDENCE (6); JUSTICES OF THE PEACE.

PROCESS—See RETURN.

PUBLIC POLICY.

1. Where a man is defrauded, as often happens, by the misrepresentation of some one who assumes knowledge, and where, under the circumstances, he is actually deceived, and not consciously wrong, the fact that the transaction is against public policy in law will not necessarily compel the victim to submit to the fraud of the actual villain. 598 (2).

2. Courts will take notice, of their own motion, of illegal contracts which come before them for adjudication, and will leave the parties where they have placed themselves. 632 (1).

PUBLIC POLICY—Continued.

3. If a contract is void as against public policy, the court will neither enforce it while executory, nor relieve a party from loss by having performed it in part. *Id.* (2).

4. A corporation organized for the purpose of controlling the manufacture and sale of matches, and by means of which scheme all competiton is stifled, and opposition crushed, and the whole business of the country in that line engrossed by said corporation, is a menace to the public; its object and direct tendency being to prevent free and fair competition, and control prices throughout the national domain. It is no answer to say that this monopoly has in fact reduced the price of friction matches. That policy may have been necessary to crush competition. The fact exists that it rests in the discretion of the corporation at any time to raise the price to an exorbitant degree. Such combinations have frequently been condemned by courts as unlawful, and against public policy. *Id.* (3).

See BILLS AND NOTES (3); BOHEMIAN OAT NOTE; KNOWLEDGE OF THE LAW.

QUESTIONS TO JURY.

Only inquiry as to facts material to the issue should be submitted to the jury, and questions which merely inquire whether a witness testified to certain things are irrelevant. 366 (2).

RAILROAD COMPANIES.

1. While there are some courts which seem to have assumed that any damage done, or any collision between a train and things on the track, is presumably a trespass, so that an allegation of it amounts to an allegation of wrong which requires a defense by way of justification, that is not the general doctrine, and it has been positively denied by this Court; citing *Mitchell v. Railway Co.*, 51 Mich. 236, citing other cases. 137 *(a)*.

2. Under our decisions, a railroad is entitled to the use of its track, subject to such conditions as the law lays down, and the use of it is at all times lawful unless these conditions are broken. A collision may be due to pure accident, or to the wrong of the person injured, just as well as to the fault of the company. No fault is presumed, and none can be relied

RAILROAD COMPANIES—Continued.

on, until alleged and proved. It is the violation of duty which is the cause of action, and it must be such that if the duty had been performed there would have been no harm done. The duty is to do no willful wrong, and to use such methods as the law has required as likely to prevent them. *Id. (b).*

3. In *Batterson v. Railway Co.*, 49 Mich. 184, it was held that for obvious reasons a difference existed between a main track and a side track, as to conditions of maintenance in order. In *Klanowski v. Railway Co.*, 64 Id. 279, an accident alleged at one road crossing, when it occurred at another, was held badly alleged; and in *Ives v. Williams*, 53 Id. 636, a similar difficulty existed in regard to interference with a tenant's enjoyment. In *all* of these cases, it was known to both parties *where* the facts occurred. 138 (*l*).

RATIFICATION.

Where the captain of a vessel, laden with lumber, made an *unauthorized* contract for towage, the vessel having been beached and being in a water-logged condition, which contract was carried out and the cargo delivered to the consignee, who was required to pay one-half of the contract price for towage, in addition to the freight, which the owner of the vessel received in addition to said freight, with full knowledge of the terms of the towage contract, he thereby ratifies said contract. 31 (1).

RECEIVER—See APPEAL.

RED LYON WHEAT—See BILLS AND NOTES (5).

REED CITY—See CONSTITUTIONAL LAW (3).

REHEARING—See EQUITY PRACTICE (1).

REMOVAL OF PROPERTY BEYOND JURISDICTION OF THE COURT—See EQUITY (1).

RENEWAL—See CHATTEL MORTGAGE (2).

REPLEVIN.

1. The action of replevin in this State is a possessory one, and a stranger to the property is not concerned with the title of one in actual and peaceable possession. 247 (2).

2. Unless the defendants in a replevin suit by a judgment debtor for property seized on an execution against him, and

REPLEVIN—Continued.

of which he was in the peaceable possession, can show that it was his property, at the time of such seizure, they will fail to establish their right to interfere with such possession; and they cannot preclude his recovery by showing ownership in third persons not joined with him as plaintiffs. *Id.* (3).

3. Where, in a replevin suit by a father for wheat belonging to his five children as tenants in common, which had been levied upon by *his* creditors, he showed himself in the peaceable and actual possession of the property, as the legal custodian of *three* of his children, the defendant cannot question his right to the possession of the wheat belonging to the other *two* children, or demand that the suit to recover the *whole* property should be brought by *all* of the children. *Id.* (4).

4. No person has a right to distrain cattle lawfully upon adjoining land which have escaped therefrom in consequence of his own neglect to maintain his part of the division fences; and the owner of such cattle, if distrained, may replevy them under the *general* statute. 494 (1).

5. How. Stat. chapter 289, relative to distraining and replevying beasts, was intended to provide a summary remedy for any person injured in land by certain enumerated beasts *trespassing* thereon; and when a party has in *good faith* taken cattle *damage-feasant*, thereunder, and the owner desires to bring replevin to test the legality of such taking, he must proceed under the *special* provisions of said chapter. *Id.* (2).

RESTRAINT OF ALIENATION—See WILL (3, 4).

RETURN.

A return of service of process upon "Charles C. Comstock, as president of the Grand Rapids Chair Company [a corporation], *who* is the owner of said goods and chattels described in within writ," sufficiently shows a service upon the corporation, to which the word "who" may be treated as relating, and not to Comstock. 104 (2).

RETURN DAY OF PROCESS—See JUSTICE'S COURTS (1, 2).

REVOCABLE LEASES—See SPECIFIC PERFORMANCE.

RIPARIAN RIGHTS—See WATERS AND WATER-COURSES.

RIVER—See WATERS AND WATER-COURSES (2).

SALE.

1. No doubt, when goods are bought as corresponding to samples, and so appear, a reasonable delay in examining is proper; but, when it is once ascertained that they are not supposed to conform to the sample, great promptness is required both in examining and in rescinding with as little delay as the usual methods of business will permit. 550 (1).

2. It is the duty of a merchant buying goods by sample to ascertain without any unreasonable delay their quality, and if complaints are made by purchasers to at once investigate them, and make up his mind what he will do, and notify the vendor of such decision. What he may have sold before being led to suspicion will not affirm the purchase for the remainder; but he has no right to thereafter offer the goods for sale, and at the same time repudiate the contract of purchase. *Id.* (2).

See PARTNERSHIP

SALE TO PAY DEBT.

This case involves the alleged fraudulent sale of property to pay a debt, and is held to have been fairly submitted to the jury. No evidence was given on the part of the defendant disputing the fact of the indebtedness of the vendor to the plaintiff, the only contention being that this fact was open to suspicion from the testimony of the plaintiff himself, and because a note was not given up, or canceled, at the time of the sale, which it is held were proper matters for the jury to pass upon. 693.

SAMPLE—See SALE.

SAVINGS ASSOCIATIONS—See CO-OPERATIVE SAVINGS ASSOCIATIONS.

SCALING—See EVIDENCE.

SCHOOLS AND SCHOOL-DISTRICTS.

1. Duly elected school officers cannot be deprived of their offices by being prevented from filing their acceptances, and otherwise qualifying, by a conspiracy between the old officers of the school-district. 194 (1).

2. Technicalities will not be permitted to defeat the will of the electors, fairly and honestly expressed at the annual school

SCHOOLS AND SCHOOL-DISTRICTS—Continued.

meeting, in the choice of district officers; and public policy and the best interest of the schools require that controversies as to who are the legal officers of a school-district shall be settled as speedily as possible. 195 (2).

3. The election of an assessor of a school-district on an informal ballot, coupled with a vote of the meeting declaring such election, is sustained in this case. *Id.* (3).

4. Proceedings under chapter 295, How. Stat., to secure the possession of books and papers in the hands of an illegally appointed school director are held more appropriate than by *quo warranto*, being more speedy and simple. *Id.* (4).

5. A boy ten years old, or even older, cannot be expelled or suspended from the public schools for a careless act, no matter how negligent, if it is not willful or malicious. 605 (1).

6. The term "misdemeanor," as used in How. Stat. § 5069, authorizing the suspension or expulsion from school of any pupil guilty of gross misdemeanor or persistent disobedience, means gross misbehavior or misconduct. 606 (2).

7. Before a pupil can be suspended or expelled from the public schools, under How. Stat. § 5069, he must be guilty of some willful or malicious act of detriment to the school, and the misconduct must be gross,—something more than a petty or trivial offense against the rules,—or he must be persistent in his disobedience of the proper and reasonable rules and regulations of the school; but it is not necessary that he should be guilty of a criminal act. *Id.* (3).

8. Where a teacher, holding a certificate from the county board of examiners having one month to run, contracted verbally to teach a five months' term of school, and, about the time of the expiration of his certificate, was refused a new one by the board, and a month later was again examined and met with a second refusal, but continued to teach the school for three weeks thereafter, when the school was closed by the secretary of the board, the teacher having received payment for his services up to the date of such second rejection, he cannot collect pay for the three weeks' teaching, nor can the school officers continue him in school, and bind the district to pay for such services, after such rejection;

SCHOOLS AND SCHOOL-DISTRICTS—Continued.

there being no difficulty in obtaining qualified teachers in the vicinity. 610.

SEAL—See PRINCIPAL AND AGENT (1).

SECURITY FOR COSTS—See JUSTICES OF THE PEACE.

SENTENCE—See CRIMINAL LAW (22).

SERVICE—See LOG-LIEN SUIT (6); RETURN.

SHIPS AND SHIPPING—See CHATTEL MORTGAGE (4, 5).

SIDEWALK—See MUNICIPAL CORPORATIONS.

SIDEWALK ORDINANCE—See CONSTITUTIONAL LAW (6).

SLANDER—See LIBEL AND SLANDER.

SPECIAL PAYEE.

It is certainly legal and proper for a person to appoint a special payee of funds in his own interest, and there may be contract or other relations calling for it. 265 (3).

SPECIFIC PERFORMANCE.

Act No. 73, Laws of 1883, allowing specific performance of agreements to give revocable leases, does not undertake to otherwise enlarge the jurisdiction, and was adopted to remove the difficulty exemplified in *Rust v. Conrad*, 47 Mich. 499, in which it was held that equity would not enforce the execution of a lease which could at any time be terminated at the will of a party. But said act does not authorize the compulsory performance of an agreement with no valuable consideration, and with nothing done under it to put the complainants in the condition of losing the equivalent of solid values; but it is based on the idea that complainants have had some valuable thing to do and have done it so as to earn the performance. 370 (3).

STATE—See AUDITING CLAIMS AGAINST THE STATE.

STATUTE OF AMENDMENTS.

1. The statute of amendments is the basis of all the modern relaxation of rules of practice; and its manifest object is to give parties who are met with such objections on a trial the right of amendment on reasonable terms, and to make a

STATUTE OF AMENDMENTS—Continued.

verdict, where no point has been previously made at all, valid to rectify all defects that are not so radical as to leave nothing to amend, and to treat the record as if it had been actually amended. If there is a possibility of making such amendments as will present a good case, they will be permitted, when the declaration is objected to, on the most favorable terms; and, in a majority of cases, with no need of any, or of any long, delay. It is only where the record itself shows what the amendment should be that it need not actually be made. An imperfect statement cannot be enlarged beyond what it means or fairly implies. But no statement is good that does not indicate the nature, at least, of the wrong complained of. 137 *(f)*.

2. An amendment of a declaration in a slander suit, by changing the date of the speaking of the alleged slanderous words from November 1, 1887, to February 1, 1888, is clearly within the discretion of the trial court, under How. Stat. § 7631, the exercise of which discretion will not be reviewed. 181 (3).

3. A declaration in the usual form upon an insurance policy cannot be amended so as to claim damages for the failure of the defendant to deliver a policy of insurance in conformity to an alleged *verbal* agreement, the *causes* of action being independent and distinct. 231 (1).

4. A declaration upon an insurance policy which contains a guarantee on the part of the insured "that there shall be a clear space of 200 feet between staves and heading and mill," cannot be amended so as to eliminate said clause from the policy, under an allegation that the same was inserted either through mistake or fraud, and was never assented to by the insured. *Id.* (2).

5. A variation in a declaration from the summons in stating the name of the defendant is not a jurisdictional defect, and may be amended by the court under How. Stat. § 7623; and where it is not, the amendment will be treated as made after judgment has been rendered in the cause. 239 (2).

6. An amendment of the served copy of a declaration in ejectment which made it correspond as to description with the original on file, and which could not have misled the defendants, is held properly allowed on the trial. 322 (1).

STATUTE OF AMENDMENTS—Continued.

7. It may well be doubted whether a declaration in a suit against executors and trustees in their official character, for damages arising by reason of alleged leakage from the roof of a store leased by them to plaintiff, can be amended on the trial by striking out the word "executors," and leaving the defendants charged as trustees. 325 (1).

STATUTE OF FRAUDS.

1. In *Clark v. Daniels*, 26, evidence of a verbal agreement for the sale of land, and the payment therefor, is held competent. 26 (2).
2. A verbal promise by an agent to pay the principal any deficiency which might arise upon a sale under a foreclosure decree, if the principal would make such sale, is void under the statute of frauds, the principal being the owner of the decree, and the agent being under no prior legal obligation to pay the mortgage debt. 504 (5).
3. "In many cases the test whether a promise is or is not within the statute of frauds is to be found in the fact that the original debtor does or does not remain liable on his undertaking. If he is discharged by a new arrangement, made on a sufficient consideration, with a third party, this third party may be held on his promise, though not in writing; but if the original debtor remains liable, and the promise of the third party is only collateral to his, it will, in strictness, be nothing more than a promise to answer for the other's debt. But where the third party is himself to receive the benefit for which his promise is exchanged, it is not usually material whether the original debtor remains liable or not." *Calkins v. Chandler*, 36 Mich. 324. The principle, applied to this case, shows very clearly that the defendant is not liable under his promise to pay the deficiency on the foreclosure sale. *Id.* (6).

STATUTE OF LIMITATIONS.

Statutes limiting the right to bring actions for the recovery of land are for the purpose of preventing litigation, quieting title, and securing peace among citizens. They are statutes of repose, and have come to be regarded with favor by courts and juries, rather than, as formerly, with disfavor. 168 (1).

See ADVERSE POSSESSION.

STATUTES CONSTRUED.

1. Chapter 119, How. Stat., providing for the organization of co-operative savings associations, is construed in *Michigan Building & Savings Association v. McDevitt*, 1.

2. The log-lien law of 1887 (Act No. 229) does not apply to the case of a contractor who performs no personal labor under the contract. 45 (1).

3. How. Stat. § 5685, making the record of conveyances, and other instruments authorized to be recorded, *prima facie* evidence, does not apply when the question of the forgery of the original instrument is in issue either in a criminal or civil suit. 53 (2).

4. How. Stat. § 7504, providing that certified transcripts of papers filed or recorded in a public office shall be evidence in like manner as the originals would be if produced, does not apply in any case where such originals would not prove themselves. 69 Mich. 156 (1).

5. An affidavit for an attachment under the log-lien law of 1887 (Act No. 229) need not state who is the owner of the logs upon which a lien is claimed. 105 (5).

6. A justice's attachment issued under said act may be served by the sheriff of the county where issued upon the log-owner in any county in this State, and where such log-owner is a corporation, service upon its president is sufficient notice to the corporation. *Id.* (9).

7. An affidavit under the log-lien law of 1887 which alleges that the labor was performed in "cutting, skidding, hauling, *chopping*, sawing, *swamping*, *loading*, and falling the logs" (timber) upon which a lien is claimed, is sufficient; "chopping" being included in "cutting," and "loading" being a necessary part of "hauling," and "swamping" belonging to the work of "skidding" the logs. *Id.* (10).

8. In order to authorize a decree for the payment of the deficiency on a foreclosure sale against a third party, under How. Stat. § 6704, the obligation or evidence of debt of such party must be one upon which he can be sued at law to recover the mortgage debt. 215 (1).

9. Chapter 283, How. Stat., treats a commissioner of highways as a municipal corporation. 228 (2).

10. The provision of How. Stat. § 7463, that where the distance

STATUTES CONSTRUED—Continued.

exceeds 240 miles 20 days' notice of the taking of depositions shall be sufficient, was not intended to enlarge the time, in any case, beyond the period of one week-day for each 20 miles, but to fix a maximum which should suffice for distances beyond 240 miles. 265 (1).

11. How. Stat. § 9099, does not cover a case where the person charged to have been abducted (a girl about fourteen years old), went from this State to Chicago, freely, and out of her natural love for her mother, etc. 351 (2).

12. Act No. 73, Laws of 1883, allowing specific performance of agreements to give revocable leases, does not undertake to otherwise enlarge the jurisdiction, and was adopted to remove the difficulties exemplified in *Rust v. Conrad*, 47 Mich. 449, in which it was held that equity would not enforce the execution of a lease determinable at the will of a party. But said act does not authorize the compulsory performance of an agreement with no valuable consideration, and with nothing done under it to put the complainants in the condition of losing the equivalent of solid values; but it is based on the idea that the complainants have had some valuable thing to do and have done it so as to earn the performance. 370 (3).

13. Act No. 58, Laws of 1883, authorizing an appeal from an order overruling a general demurrer, only allows a consideration of the questions raised by such general demurrer. 436 (1).

14. Chapter 289, How. Stat., was intended to provide a summary remedy for any person injured in land by certain enumerated beasts trespassing thereon; and when a party has in *good faith* taken cattle *damage-feasant*, thereunder, and the owner desires to bring replevin to test the legality of such taking, he must proceed under the special provisions of said chapter. 494 (2).

15. How. Stat. § 6188, requiring representations in writing to sustain an action upon favorable assurances concerning the character, conduct, ability, trade, or dealings of another person, is intended to reach cases where the plaintiff has dealt with and given credit to the person favorably mentioned, and done so on the faith of the assurances. Nor can the statute

STATUTES CONSTRUED—Continued.

apply to conspiracies or frauds, where the representation is made to enable the party making it to profit by it. 599 (4).

16. The term "misdemeanor," as used in How. Stat. § 5069, authorizing the suspension or expulsion from school of any pupil guilty of gross misdemeanor or persistent disobedience, means gross misbehavior or misconduct. 606 (2).

17. Before a pupil can be so expelled or suspended he must be guilty of some willful or malicious act of detriment to the school, and the misconduct must be gross,—something more than a petty or trivial offense against the rules,—or he must be persistent in his disobedience of the proper and reasonable rules and regulations of the school; but it is not necessary that he should be guilty of a criminal act. *Id.* (3).

18. How. Stat. § 9546, which provides that an indictment [information] for larceny may contain a count for obtaining property by false pretenses, or for embezzlement, or for receiving, having in possession, or aiding in concealing the same property, knowing it to have been stolen, and that the jury may convict of *either* offense, clearly requires the verdict to point out the crime of which the defendants are found guilty, and will not bear the construction that a conviction can be had on all the charges at once by *general* verdict. 615 (2).

19. How. Stat. § 9180 (Act No. 102, Laws of 1877), if valid, is aimed at preventing such horse stealing as should be done in this State, and disturb its peace, while the general statutes punish the receiver of stolen property beyond the State as well as any other. *Id.* (4).

20. How. Stat. § 9180, providing a special punishment for horse stealing, was held constitutional in *People v. Morris*, 45 N. W. Rep. 591. 615 (*foot-note*).

STATUTE OF USES AND TRUSTS—See PARTNERSHIP.

STRANGER—See BURIAL OF DEAD BODY OF STRANGER.

SUPERVISOR—See MANDAMUS (2).

SURETY—See APPEAL BOND.

SURVEYOR AS A WITNESS—See EVIDENCE (3).

SURVIVORSHIP—See HUSBAND AND WIFE.

SWINEFORD CASE—See NEW ORLEANS EXPOSITION.

TAXES.

1. Where a purchaser of lands at a tax sale for the year 1885 bid off certain descriptions for the tax of 1883, and paid the amount of his bids to the county treasurer, who afterwards declined to deliver the certificates unless the purchaser also paid the tax of 1882 on the lands so purchased, which he refused to do, and the treasurer selected from said bids enough to amount to the money so paid, including the amount due for the taxes of 1882, and so applied said money, canceling the remaining bids, such action was illegal, and the purchaser may recover his money of said treasurer after demand therefor, and refusal to acquiesce in such application. 173.
2. The *intentional* omission from the assessment roll of taxable personal property, the owners of which are known to the assessing officer, will entitle an individual tax-payer to relief from the excessive amount of his tax. 365 (1).
3. Where the illegalties in a tax assessment are such that it is impossible to ferret out the legal from the illegal taxes which the tax-payer should pay, the general rule, requiring him to show the excess of taxes over those which he would have been obliged to pay had he been legally and properly assessed, does not apply. 366 (3)

TELEPHONE POLES—See ESTOPPEL.

TENDER—See CHATTEL MORTGAGE (10).

TITLE TO LAND—See ADVERSE POSSESSION.

TOWAGE OF VESSEL—See EVIDENCE (2); RATIFICATION.

TROVER—See CHATTEL MORTGAGE (1, 9, 10).

TRUST DEED.

Where the trust appears on the face of a deed, it is notice to every one of the trustee's character and duties; and it is declared by statute that every deed in violation of such a trust shall be held absolutely void. 275 (*d*).

TRUSTS AND TRUSTEES.

1. Where the only living beneficiaries of a trust are of full age, and capable of settling with the trustee, or among themselves, without the intervention of the probate court, a bill to close said trust, and compel a conveyance by the trustee to the beneficiaries of the land devised to him in trust for

TRUSTS AND TRUSTEES—Continued.

them, filed seventeen years after the death of the testatrix, need not show that her estate has been settled in the probate court. 588 (2).

2. This case is supplemental to *Weaver v. Van Akin*, 71 Mich. 69; the bill being filed to enforce a trust in favor of the complainant and defendant Van Akin, and for an accounting by the trustee, Hadley; and the Court hold that the bill makes a case for equitable relief, and affirm the decree below overruling the demurrer of the defendant. *Id.* (3).

See MORTGAGE (4).

USES AND TRUSTS—See PARTNERSHIP.

VENDOR'S LIEN.

A vendor's lien is always in the nature of a mortgage, and must be for some certain amount, known to exist at the time the lien is created. 540 (3).

VESSELS—See CHATTEL MORTGAGE (4, 5).

WAIVER OF POSSESSION—See CHATTEL MORTGAGE (6, 7).

WATERS AND WATER-COURSES.

1. Plaintiff brought ejectment to recover part of a lot in the city of Muskegon, running to Muskegon lake, the real controversy being over part of a wharf in the lake entirely outside of the shore. Judgment passed for plaintiff below, and in reviewing the case it is held that there is an entire absence of legal proof of what plaintiff owns, in fact or in theory; that the maps and other testimony give no such means of adjustment as would authorize the Court to deal with the abstract questions presented, nor would it be desirable to do so at all, in view of the clear proof, not in any way controverted, that, as a matter of fact, the possession of defendant has been under an actual, defined occupancy very much longer than would cut off any theoretical rights to the contrary if they existed. This testimony was to the effect that, between 20 and 30 years before suit, a line of piles was driven for the purpose of fixing boundaries, which would exclude from plaintiff's occupancy all of the disputed territory, which act is held to have been the most unequivocal assertion that could well be made, when followed up by the use of the line as a boundary, of such active and business possession as can be had of land under water. 35 (1).

WATERS AND WATER-COURSES—Continued.

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

a—No occupancy, in hindrance of free navigation, of the waters of a deep, navigable lake, can be lawfully enjoyed.

b—There is no rule of law which will authorize a body of water, merely because it is a theoretical expansion of a river, to be treated as anything but a navigable lake (if so in fact), which would not put the expansions of the St. Lawrence on a similar footing.

c—A river is characterized by its confining channel banks, which give it a substantially single course throughout. A lake occupies a basin of greater or less depth, and may or may not have a single prevailing direction.

d—If this body of water (Muskegon lake) were not navigable, and if all its waters could in any way be apportioned among the riparian proprietors for any lawful purpose, it must be done by some rule of proportion, which probably could only be got at by some partition proceeding, inasmuch as such waters are common for all ordinary uses, unless placed in a different position by the public surveys, as has been done in many instances of small so-called "lakes," not navigable; citing *Clute v. Fisher*, 65 Mich. 48, and cases cited. But, as this lake is navigable and large, the riparian rights (which, for all available purposes of a possessory nature, must be confined with reference to the paramount rights of navigation) depend on those principles which apply where immediate dependence on the *filum aquae* or middle thread is impracticable; citing *Rice v. Ruddiman*, 10 Mich. 125; *Lincoln v. Davis*, 53 Id. 375; the chief value of which rights must refer to the access to navigation and use with reference to it of the space near the shore, and not to the area of deep water which cannot be appropriated, as was indicated in those cases and others elsewhere. 36 (2).

3. The exclusive enjoyment of water in a particular way for 20 years, without interruption, becomes an adverse enjoyment sufficient to raise a presumption of title against a right in any other person which might have been, but was not, asserted. 420 (1).

4. One who has taken the water from the original channel, and has continued to divert and enjoy it for a period beyond the statute of limitation as to real actions, cannot afterwards

WATERS AND WATER-COURSES—Continued.

be permitted to restore it to its original state when it will have the effect to destroy or materially injure the property of those through or by which it formerly flowed. 421 (2).

5. An inchoate right of protection from the overflow of lands by water passes by a sale, and the successive owners are in privity with each other. *Id.* (3).

6. While rights in a stream of water may not be lost by mere non-user, they may be by long-continued adverse enjoyment by others. *Id.* (4).

WILL.

1. A will devising the testator's estate to her son, and to five grandchildren, naming them, to be divided as follows: One third to the son, and two thirds to the said grandchildren, is construed as giving to each grandchild one fifth of the two thirds so devised to them. 129.

2. The will set forth in the opinion in this case is construed as vesting the title to the devised land in plaintiff's children, and it is held that the clause in the will giving plaintiff his support and living out of the estate of the children does not give him a life-estate therein, nor does the fact that he has appropriated all the income of the estate to his own use since the death of the testator, or that he has leased the farm in his own name, change the rights of the children. 248 (5).

3. In this case it is held that the complainant is the only person interested in the land devised to her in the will sought to be construed, and that the condition in said will in restraint of alienation is void. 526 (1).

4. The following propositions are summarized from the opinion of Mr. Justice LONG, in which MORSE, J., concurred:

a—A clause in a will stating that the testatrix desires a sale of the realty devised if the executors named therein shall at any time find such a sale necessary, or for the best interest of the estate, implies a personal confidence and trust in the judgment and honesty of the parties named as executors, and she cannot be said to have intended to confer such discretionary power upon any one whom the probate court might appoint, should the persons named fail to qualify, or refuse the trust.

WILL—Continued.

b—An administrator *de bonis non* with the will annexed does not exclude the powers and duties which lie outside the ordinary scope of an executor's functions, unless, by the terms of the will, such authority is clearly granted. Schouler, Ex'rs, § 413; Redf. Wills, pt. 2, 90, 222; *Ingle v. Jones*, 9 Wall. 486.

c—The powers conferred upon an administrator with the will annexed by How. Stat. § 5844, are only such as can be exercised by the executor as such, and a personal power or trust which might be exercised or performed by an executor independently of his office will not pass by devolution to the administrator. *Conklin v. Egerton*, 21 Wend. 430; *Ross v. Barclay*, 18 Penn. St. 179; *Evans v. Chew*, 71 Id. 47.

d—When a bare power of sale is given to executors merely to sell lands for the purpose of paying over the proceeds to devisees whose right under the will thereto is absolute and vested, such devisees may collectively, before the exercise of the power of sale, elect to take the land instead of such proceeds, and thus prevent a sale.

e—It is true that many restrictions or qualifications upon the rights of devisees or grantees may be made effectual by making the sale itself dependent upon such conditions; but where the estate granted is absolute, such restrictions can impose no legal obligation upon the devisees, or limit their power over the estate, when the observance or violation of the restrictions can neither promote nor prejudice any interest but their own. *Mandlebaum v. McDonell*, 29 Mich. 87; *Hall v. Tufts*, 18 Pick. 459.

f—When a restriction in a conveyance of a vested estate in fee-simple, in possession or remainder, is against selling for a particular time, such a restriction is invalid. When a person is entitled absolutely to property, any provision postponing its transfer or payment to him is void. *Id.* (2).

5 Mr Justice CHAMPLIN concurred with LONG, J., upon the ground that the will sought to be construed is void as contravening How. Stat. § 5531. 527 (3).

See EVIDENCE (14, 15).

LAWS REFERRED TO.[1]

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[1] See Statutes construed.

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