MICHIGAN REPORTS.

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

DECEMBER 3, 1892, TO MARCH 10, 1893.

WILLIAM D. FULLER,

STATE REPORTER.

VOL. 94.

CHICAGO:
CALLAGHAN & CO.,
1893.

Copyright, 1893, for the State of Michigan, by John W. Jochim, Secretary of State.

Rec. Aug. 28 1893

CIRCUIT COURT RULE 107.

Adopted May 31, 1893.

Circuit courts shall have jurisdiction, within their respective counties, in all *mandamus* proceedings involving the action of any officer or board of any county, township, city, or school-district, or of the common council of any city or village, and the action of any private corporation, or officer or board thereof. Said circuit courts shall also have jurisdiction to issue writs of *certiorari* in all cases where they may now be issued by the Supreme Court to probate courts, circuit court commissioners, and justices of the peace, or any corporate body or officer thereof. Writs of *certiorari*, and orders to show cause in cases of *mandamus*, shall be made returnable, and service thereof made, within such time as the circuit courts shall upon each application direct.

SUPREME COURT.*

JOHN W. McGRATH (CHIEF JUSTICE),[1] . . . . DETROIT.
FRANK A. HOOKER (CHIEF JUSTICE),[2]. . . . . CHARLOTTE.

ASSOCIATE JUSTICES:

		TERM EXPIRES.
GEORGE H. DURAND, . .	FLINT.	Dec. 31, 1892.
JOHN W. McGRATH, . .	DETROIT, ...	Dec. 31, 1895.
CHARLES D. LONG, . . .	DETROIT, ...	Dec. 31, 1897.
CLAUDIUS B. GRANT, . .	MARQUETTE, . . .	Dec. 31, 1899.
ROBERT M. MONTGOMERY,	GRAND RAPIDS, . .	Dec. 31, 1901.

COURT OFFICERS:

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

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

[1] Until January 1, 1893.

[2] From January 1, 1893.

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

MUNICIPAL JUDGES.

RECORDER'S COURT OF DETROIT,

GEORGE S. SWIFT, Recorder.

F. H. CHAMBERS, Associate Recorder.

Terms of Court.

Sept. 6, Nov. 1, 1893.

SUPERIOR COURT OF GRAND RAPIDS, EDWIN A. BURLINGAME.

Terms of Court.

Sept. 11, Dec. 11, 1893, March 12, 1894.

TERMS OF COURT FOR 1893.

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

TERMS OF COURT FOR 1893.

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

TABLE OF CASES REPORTED.

A.

	PAGE
Ahlberg v. German Ins. Co.	259
Armitage v. Saunders	482
Atlee v. Board of Supervisors	562
Attorney General v. McQuade	439
Auditor General v. Prescott	190
Auditor General v. Williams	180

B.

Ball v. Phenicie	355
Banghart v. Hyde	49
Barron v. City of Detroit	601
Baumann v. Salt & Lumber Co.	363
Bay City Bank v. Lindsay	176
Belknap v. Board of Canvassers	516
Berridge v. Slawson	484
Bishopp v. Circuit Judge	461
Blakeley v. Moshier	299
Board of Supervisors v. Township of Mentor	386
Boehmer v. Free Press Co.	7
Bond v. McMahon	557
Bradley v. Railway Co.	35
Busch v. Jones	223

C.

Cleveland v. Miller	97
Codd v. Seitz	191
Common Council of Muskegon v. Gow	453
Cooper v. Lansing Wheel Co.	272
Crawford v. Osmun	533
Crowell v. Truax	585

D.

Damon v. DeBar	594
Dunlap v. Dunlap	11

E.

Erickson v. Drazkowski	551

F.

Fenton v. Miller	204
Ferris v. McQueen	367
First National Bank v. Guntermann	125
Forbes v. Darling	621
Fournier v. West Bay City	463

G.

Gillespie v. Beecher	374
Gladstone Bank v. Keating	429
Graf v. Railway Co.	579
Griffin v. Helme	494
Gustin v. Union School-Dist.	502

H.

Hanley v. Balch	315
Harrison v. Harrison	559
Hasse v. American Express Co.	153
Hatt v. Evening News Ass'n	114, 119
Henderson v. Board of Canvassers	452

	PAGE
Henkel v. Schaub	542
Hensel v. Maas	563
Hickox v. Railway Co.	237
Hicks v. McLachlan	278
I.	
In re Estate of King	411
In re Estate of Lambie	489
In re Estate of Stebbins	304
In re Petition of Waterbury	78
J.	
Jewell v. Paron	83
Johnson v. Morton	1
K.	
Keating v. Railroad Co.	219
Kern v. Myll	477
Koehler v. Buhl	496
Kornetzski v. City of Detroit	341
L.	
Ladd v. Brown	136
Lane v. Jones	540
Lane v. Ruhl	474
Law v. Mutual Accident Ass'n	266
Leo Austrian & Co. v. Springer	343
Leube v. Thorpe	268
Lindstrom v. Board of Canvassers	467
Luton v. Sharp	202
M.	
Maurer v. Cliff	194
Maxted v. Fowler	106
May v. Board of Canvassers	505
McDonald v. Maltz	172
McGrail v. City of Kalamazoo	52
McLelland v. A. P. Cook Co.	528
Michigan Shingle Co. v. Insurance Co.	389
Miller v. Hanley	253
Mills v. McLeod	627
Montross v. Eddy	100
Moreland v. Houghton	548
Munro v. Meech	596
Murphy v. Nelson	554
N.	
Newton v. Board of Canvassers	455
Nichols v. Nichols	569
Nye v. Lothrop	411
P.	
Packard v. Board of Canvassers	450
Pearce v. Ware	321
Pennell v. Delta Transportation Co.	247
People v. Betts	642
People v. Hodgkin	27
People v. Howlett	165
People v. Mills	630
People v. Smith	644
People v. Steele	437
People v. Westbrook	629
Potter v. Lee	140
R.	
Renz v. Stoll	377
Retan v. Railway Co.	146
Robinson v. Chambers	471, 473
Robinson v. Charles Wright & Co.	283
Rosenfield v. Fortier	29, 34
Roux v. Blodgett & Davis Lumber Co.	607
Russell v. Russell	122
S.	
Sanborn v. Circuit Judge	519
Sherwood v. Milford State Bank	78

	PAGE
Silvers v. Mutual Benefit Ass'n	39
Slade v. Lee	127
Smith v. Runnells	617
Smith v. Thompson	381
Snyder v. Hitchcock	313
Stebbins v. Stebbins	304
Sterling v. Callahan	536
Stevens v. Pendleton	405

T.

Tillotson v. City of Saginaw	240
Toliver v. Brownell	577
Township of Caledonia v. Rose	216
Township of Cumming v. Schick	222
Turnbull v. Monaghan	87

V.

	PAGE
Vail v. Winterstein	230
Vanderhoof v. Prendergast	18
Van Voorhis v. Van Voorhis	60

W.

Webber v. Turner	589
Welch v. Hodge	493
Western Publishing House v. School-Dist.	262
Wheeler v. Board of Canvassers	448
Wheeler v. Stewart	445
Wilkin Manfg. Co. v. Loud & Sons Lumber Co.	158
Wilson v. Railroad Co.	20
Wolf v. Estate of Troxell	573
Worthington v. Major	325

ERRATUM.

Hasse v. American Express Co. will be found on page 133, rather than 153, as printed in tables herein.

TABLE OF CASES REPORTED

IN VOLUME 94,

WITH DIGEST OF POINTS DECIDED.

A.

PAGE

A. P. COOK CO., MCLELLAND V. 528

AHLBERG V. GERMAN INSURANCE CO. 259

Fire insurance—Policy issued on oral application, without asking for any statement as to the title to the land on which the buildings stand, and none being made, the agent knowing that it is held under a lease—Company cannot escape liability under a clause voiding the policy if the land is not owned by the insured in fee, unless otherwise provided by agreement indorsed on the policy.

AMERICAN EXPRESS CO., HASSE V. 153

APPEAL OF MCMILLAN 489

ARMITAGE V. SAUNDERS 482

Account stated—Recovery may be had upon without proof of the antecedent debt—A creditor of a partnership, who continues to deal with a succeeding firm, to whose account he transfers his credit, and to whom he thereafter renders monthly statements, has a right to apply payments made upon the new account in satisfaction of the old debt in the order in which they are made.

ATLEE V. BOARD OF SUPERVISORS OF WEXFORD CO. 562

Organization of township—Proceedings for will not be

PAGE

Atlee v. Board of Supervisors of Wexford Co.—Continued.

reviewed on *certiorari*, after officers have been elected and property assessed for taxation.

ATTORNEY GENERAL v. MCQUADE 439

Election law of 1891—Voter cannot be compelled to state how he voted—If not registered he has no right to vote, unless registered on election day upon taking the prescribed oath—Provisions as to entering booth alone, and as to manner of preparing and folding ballot, and for marking ballots of illiterate or physically disabled electors, are mandatory—Action of chairman of board of inspectors in receiving and depositing in the ballot-box the ballots of 13 unregistered persons, and the ballots of a large number of persons who had shown them after they had been marked, and in allowing third persons to enter the booths with electors, and, after their ballots had been marked by such third persons, depositing them in the ballot-box, is held to have vitiated the vote of the election precinct.

AUDITOR GENERAL v. PRESCOTT 190

Taxes—Intentional omission of taxable personal property from roll, and assessment of the real estate of the township at one-fourth of its cash value—Invalidates State and county taxes levied upon lands of other taxpayers in other townhips, which were assessed at their cash value.

AUDITOR GENERAL v. WILLIAMS 180

Taxes—Land patented to a "not-so-competent Indian," under a treaty prohibiting its alienation without the consent of the government, is not subject to taxation.

B

BALCH, HANLEY v. 315

BALL v. PHENICIE 355

Husband and wife—Suit to set aside deed to wife as in fraud of creditors—Court is not precluded from con-

PAGE

Ball v. Phenicie—Continued.

struing their testimony, when called as witnesses in behalf of complainant—Course of dealing by which husband becomes indebted to wife for moneys advanced and loaned by her from time to time, the aggregate amount claimed to be due being the sums originally advanced, with interest, without any deduction whatever on any account, calls for a very careful scrutiny of the testimony—Sale to wife at an agreed price, being the value of the land, which exceeds the amount of his indebtedness to her—If she fails to pay the remainder, execution creditor of husband will be subrogated to a vendor's lien arising in favor of husband.

BANGHART v. HYDE 49

Evidence—That value of property was largely in excess of note of vendor surrendered by vendee—Is competent as tending to prove agreement of vendee to make additional payment.

BARRON v. CITY OF DETROIT 601

Municipal corporations—Erection by a city of a market building, under a charter provision authorizing, but not requiring, it to erect or maintain market houses—City will be held to the same degree of care, not only in the construction, but in the plan of the construction itself, as a private corporation or an individual.

BAUMANN v. MANISTEE SALT & LUMBER CO. 363

Statute of frauds—Loan upon the credit of the president of a corporation, for which he gives his notes—Liability of corporation, if any, arising from its receipt of the money, as shown by entries on its books, is collateral, and its promise must be evidenced in writing—A writing relied upon to take a promise out of the statute must contain all of the terms of the contract.

BAY CITY BANK v. LINDSAY 176

Banks and banking—Payment of draft upon the oral agreement of the drawer with the acceptors to take care of a sight draft drawn by them on him in favor of the bank for the amount of the first draft—Bank cannot

PAGE

Bay City Bank v. Lindsay—Continued.

recover the money paid under a count for money paid for the use of the drawer.

BEECHER, GILLESPIE V. 374

BELKNAP V. BOARD OF CANVASSERS OF IONIA COUNTY 516

Elections—Law of 1887, providing for a recount of ballots, does not apply to the office of Congressman—*Mandamus* will lie to compel board of county canvassers to reconvene and recanvass votes according to the original returns, and report the result to the Secretary of State.

BERRIDGE V. SLAWSON 484

Partnership—Retirement of one partner, with the knowledge of his copartners, who have knowledge of the giving of a renewal note by the new firm for the notes of the old firm, which the new firm were to pay, and which note is indorsed and paid by the retiring partner—Retiring partner can recover the amount so paid of his copartners.

BETTS, PEOPLE V. 642

BISHOPP V. HILLSDALE CIRCUIT JUDGE 461

Liquor traffic—Druggists in local option counties are governed by the general liquor law of the State—They should be prosecuted under the local option law, if they have filed their bonds, for a violation of the provisions of the general law.

BLAKELEY V. MOSHIER 299

Mechanic's lien—If once waived cannot be revived—Taking note in settlement of claim, which does not mature until after the 30 days within which the claim must be filed under 1885 law to make it effectual as against a *bona fide* purchaser or incumbrancer, amounts to a waiver of the lien to the extent of the items then furnished—Refusal to accept pay for materials afterwards furnished, and statement that he would collect it all together, is a waiver of the right of the material-man to claim a lien for such materials.

PAGE

BLODGETT & DAVIS LUMBER CO., ROUX v. 607

BOARD OF CANVASSERS OF IONIA CO., BELKNAP v. 516

BOARD OF CANVASSERS OF MANISTEE CO., HENDERSON v. 452

BOARD OF CANVASSERS OF MANISTEE CO., LINDSTROM v. 467

BOARD OF CANVASSERS OF MANISTEE CO., WHEELER v. 448

BOARD OF CANVASSERS OF MENOMINEE CO., PACKARD v. 450

BOARD OF CANVASSERS OF WAYNE CO., MAY v. 505

BOARD OF CANVASSERS OF WAYNE CO., NEWTON v. 455

BOARD OF SUPERVISORS OF CHEBOYGAN CO. v. SUPERVISOR OF TOWNSHIP OF MENTOR 386

Mandamus—Will not lie to compel a supervisor to levy a county tax which, while purporting to have been voted for the purchase of a poor-farm, is really being raised to aid in securing a location for a tannery in the county.

BOARD OF SUPERVISORS OF WEXFORD CO., ATLEE v. 562

BOEHMER v. DETROIT FREE PRESS CO. 7

Libel and slander—Charge that a franchise has been procured by the use of "boodle"—Inference is that the persons granting it were, as officials, bribed by money to make the grant.

BOND v. MCMAHON 557

Evidence—Suit upon an alleged promise to pay the debt of another—Order given by the promisor to the promisee on a fourth party at the time the promise is alleged to have been made, for the amount of the debt, is admissible as a part of the *res gestæ*—Question whether the order was received in payment of the debt is for the jury—Bill of exceptions—Failure of record to show that it contains all of the evidence—Court will presume that there was sufficient evidence to justify the instructions given to the jury.

BRADLEY v. FORT WAYNE & ELMWOOD RAILWAY CO. 35

Negligence case—Injury to passenger by being thrown

PAGE

Bradley v. Fort Wayne & Elmwood Ry. Co.—Continued.
from a street car by a *sudden jerk* while preparing to alight—Evidence of what caused the sudden jerk is essential to a recovery.

BROWN, LADD v. 136

BROWNELL, TOLIVER v. 577

BUHL, KOEHLER v. 496

BUSCH v. JONES 223

Set-off—3 How. Stat. § 7370*a*, prohibiting a discontinuance by the plaintiff or his submission to a nonsuit where notice of set-off has been given, does not prevent the withdrawal of certain items of his claim—Judgment for defendant on trial covering the remaining items is not *res judicata* of the items withdrawn.

C.

CALLAHAN, STERLING v. 536

CHAMBERS, ROBINSON v. 471, 473

CHARLES WRIGHT & CO., ROBINSON v. 283

CHICAGO & CANADA SOUTHERN RAILWAY CO., HICKOX v. 237

CHICAGO & NORTHWESTERN RAILWAY CO., GRAF v. 579

CITY OF DETROIT, BARRON v. 601

CITY OF DETROIT, KORNETZSKI v. 341

CITY OF KALAMAZOO, MCGRAIL v. 52

CITY OF SAGINAW, TILLOTSON v. 240

CLEVELAND v. MILLER 97

Principal and agent—Suit by principal to recover moneys received by the agent, in which the agent limits his set-off to a stated sum for services rendered—Agent can only recover the amount actually paid for a mortgage held by him for collection against the principal, which he paid off at a discount by an arrangement with the principal.

PAGE

CLIFF, MAURER V. 194

CODD V. SEITZ 191

Husband and wife—Suit against to recover commissions on sale of real estate—If on the trial it appears that the liability, if any, is that of the wife, the court may allow the plaintiff to discontinue as to the husband, and proceed against the wife, and to that end make the necessary amendments—Circuit Court Rule No. 71—Does not authorize the plaintiff to discontinue as to some of the defendants, and proceed against a joint obligor, or against more than one and less than all of the obligors upon a joint and several obligation.

COMMON COUNCIL OF THE CITY OF MUSKEGON V. GOW 453

Municipal corporations—Issue of bonds without vote of electors—Sustained under the facts of this case.

COOPER V. LANSING WHEEL CO.[1] 272

Contract—Proposition to be accepted within a given time—Is a continuing offer, and, if accepted before it is retracted, a valid contract is made.

CRAWFORD V. OSMUN 533

Tender—Held sufficient to relieve complainant from payment of interest after it was made.

CROWELL V. TRUAX 585

Attorney and client—Evidence that, two years before the services sued for were rendered, the attorney agreed to accept $10 per day for services, does not tend to prove the value of the services sued for—Bill of exceptions—If all of the testimony is not shown to have been included therein, it will not be assumed that no foundation was laid for hypothetical questions—Charge to jury—Error cannot be assigned for failure to mention the subject of a payment on the account sued on, which was admitted, and, for aught that appears in the record, was considered by the jury.

[1] On the question as to the validity of a contract for an indefinite quantity, which is one that text-books do not seem to have considered to any extent, see *Wells v. Alexandre* (N. Y.), 15 L. R. A. 218, where the few cases on the subject are collated.

PAGE

DAMON v. DE BAR 594

Former decision—Is *res judicata* as to question decided in all subsequent proceedings in the same case, upon the same state of facts.

DARLING, FORBES v. 621

DE BAR, DAMON v. 594

DELTA TRANSPORTATION CO., PENNELL v. 247

DETROIT FREE PRESS CO., BOEHMER v. 7

DRAZKOWSKI, ERICKSON v. 551

DUNLAP v. DUNLAP 11

Evidence—Of widow, who claims to be the owner by gift from her husband of notes with which the heirs seek to charge her on settlement of her account as administratrix—Disability to testify as to the entire transaction between herself and husband is waived by heirs calling her as a witness, and interrogating her as to the transaction—Gift—Acceptance by donees presumed, unless the contrary appears, where the donation is for their advantage.

E.

EDDY, MONTROSS v. 100

ERICKSON v. DRAZKOWSKI 551

Attachment—Temporary residence in another state, caused by the unlawful seizure of household goods—Will not subject the goods to attachment at the suit of the party guilty of the original trespass, on the ground that the owner is a non-resident of this State—Evidence—Value of household furniture—Householders are presumed to have such knowledge on the subject as to render them competent to testify to such value.

ESTATE OF TROXELL, WOLF v. 573

EVENING NEWS ASSOCIATION, HATT v. 114, 119

F

PAGE

FENTON v. MILLER 204

Deed—Presumption of delivery from recording by grantor —Applies where he, as register of deeds, records the deed, and remains in possession of the land conveyed—Ouster and adverse possession—Cannot exist, as between heirs, until the one in possession has done or said something which is unequivocal notice to his co-heirs that he claims the entire property as against them—Refusal of guardian of minor heirs, who is in possession, to recognize the rights of the other heirs in the land, her plea of the general issue in an action of ejectment brought on such refusal, and of adverse possession to a bill for partition, amount to a total denial of the rights of the co-heirs, within the meaning of How. Stat. § 7812—Erroneous description of property will not defeat the effect of a written document, where both parties fully understand the subject-matter of the controversy—Evidence—Of mother, in ejectment suit against her and her infant children—If she is disqualified from testifying, such disability extends to her co-defendants, who would be benefited by her testimony.

FERRIS v. MCQUEEN 367

Mortgage—Given for $340 more than the amount due the mortgagee, for the purpose of defrauding creditors, is void—Question whether it was so given or not is for the jury—A creditor may extend further credit to a debtor, who is largely indebted to others, and secure his debt by a mortgage on the debtor's stock in trade in preference to other creditors—He cannot, however, enter into a fraudulent scheme to hold the debtor out as deserving of credit, and thus enable him to purchase goods of other creditors, for the purpose of taking security upon them, knowing that they are not paid for.

FIRST NATIONAL BANK OF KALAMAZOO v. GUNTERMANN 125

Chattel mortgage—If *bona fide*, though unfiled, is valid as against existing creditors, but not if they became such after its execution and before its filing, without knowledge of its existence.

PAGE

FORBES v. DARLING 621

Will—Omission to provide for child—Cannot be claimed where provision is made for support and education of all of the testator's children until of full age—Devise of all of the testator's property, including his farm, to his wife, with directions to pay his debts and funeral expenses, and to keep and use the residue for the support and maintenance of herself and family and the education of his children, construed as a devise in fee of the farm, burdened with the duty or trust aforesaid, which is enforceable in equity—If children have been supported and schooled, although in a meager manner, the court will not inquire further, or require from the mother or her estate a retrospective accounting—Process—Constitutional requirement that all process shall run "In the name of the People of the State of Michigan," is mandatory—Omission of from a chancery subpœna will deprive the court of jurisdiction, if the defendant does not appear.

FORTIER, ROSENFIELD v. 29, 34

FORT WAYNE & ELMWOOD RAILWAY CO., BRADLEY v. 35

FOURNIER v. WEST BAY CITY 463

Municipal corporations—Resolution fixing a salary, while not an act appropriating money, makes an appropriation of the compensation so fixed obligatory—Charter provision requiring a vote of a majority of all of the aldermen elect to pass a resolution appropriating money applies to a resolution fixing a *per diem* compensation for the street commissioner, under a further provision requiring the council to determine annually the salary to be paid to the several city officers.

FOWLER, MAXTED v. 106

G.

GERMAN INSURANCE CO., AHLBERG v. 259

GILLESPIE v. BEECHER 374

Husband and wife—May join in a suit against their land-

PAGE.

Gillespie v. Beecher—Continued.

lord for an unlawful disturbance of their possession under a lease executed to them jointly

GLADSTONE EXCHANGE BANK v. KEATING 429

Banks and banking—Payment of partnership checks, in violation of instructions from the firm to pay no checks unless countersigned by its bookkeeper—Bank cannot recover, without showing that the firm received the benefit of the money paid on the checks, and it has the burden of making such showing—Defendants are not estopped from making such defense on the ground that it was their duty to examine the checks when returned to them, and notify the bank of its violation of said instructions.

GOW, COMMON COUNCIL OF THE CITY OF MUSKEGON v. 453

GRAF v. CHICAGO & NORTHWESTERN RAILWAY CO. 579

Negligence case—Brakeman has a right to presume that a man who is approaching a crossing, and can stop with safety when within three or four feet of the track, will do so—Is under no obligation to stop cars until he sees that the man intends to cross regardless of the danger.

GRIFFIN v. HELME 494

Poor debtors—Chapter 309, How. Stat., which provides for their release from imprisonment, does not apply where a bond has been given for the jail limits.

GUNTERMANN, FIRST NATIONAL BANK v. 125

GUSTIN v. UNION SCHOOL-DISTRICT OF BAY CITY 502

Lease—Agreement of lessor to convey the land to the lessee at the expiration of the lease, upon payment of the agreed purchase price—Rent reserved is a sufficient consideration for the agreement—Lease vests in the lessee a right to purchase, which, with the lease, passes to his administrator, who may assign it—On payment of purchase price assignee may enforce the agreement in equity.

H.

PAGE

HANLEY v. BALCH 315

Corporations—Rule that suit by stockholder must be brought in equity is subject to some exceptions—Right to sue at law is affirmed in this case.

HANLEY, MILLER v. 253

HARRISON v. HARRISON 559

Divorce—Pregnancy before marriage—When a sufficient ground for annulling the marriage—Answer in the nature of cross-bill, under Chancery Rule No. 128—Must be verified in order to warrant a decree for the defendant—May be amended by supplying the verification where proof shows an absence of collusion.

HASSE v. AMERICAN EXPRESS CO. 153

Goods expressed C. O. D.—Liability of company as a common carrier ceases upon the safe carriage of the goods to their place of destination, notice to the consignee, and offer of delivery on payment of charges—If consignee is not ready to make such payment, it is the duty of the company to safely store and care for the goods, and hold them for a reasonable time awaiting such payment, and to notify the consignor of the action taken—Liability of the company in the meantime is that of a warehouseman.

HATT v. EVENING NEWS ASSOCIATION 114, 119

Libel and slander—A publication, the natural result of which is to bring ridicule or contempt upon the plaintiff, is libelous, if untrue—Exemplary damages are properly awarded if the jury find that information of the falsity of the article was brought home to the reporter of the defendant newspaper before its publication—Evidence—That plaintiff's associates ridiculed him, and that he left his employment in consequence, held inadmissible, unless alleged as a basis for special damages.

HELME, GRIFFIN v. 494

PAGE

HENDERSON v. BOARD OF CANVASSERS OF MANISTEE CO. 452

Elections—Recount—See *Packard v. Board of Canvassers.*

HENKEL v. SCHAUB 542

Libel and slander—Words, spoken or written, injurious to a person in his business, and false and malicious, are actionable *per se*—Special damages need not be alleged or proved.

HENSEL v. MAAS 563

Principal and agent—Authority of agent to make a sale of specific property, given six months before its sale—Will be presumed to have continued until the sale, in the absence of contrary proof—Evidence—Of statements of agent, well calculated to induce the belief that his authority was unlimited—Error to admit, and exclude testimony offered by the principal to show the real extent of the agent's authority.

HICKOX v. CHICAGO & CANADA SOUTHERN RAILWAY CO. 237

Railroad companies—Abandonment of portion of road—Question of is to be determined from the facts, and not from testimony as to the intention of the officers of the railroad company, where it has not run cars over the portion claimed to have been abandoned for 12 years—*Res judicata*—Former decision will not be reviewed in the same case, and on the same state of facts.

HICKS v. MCLACHLAN 278

Husband and wife—Conveyance of 80 acres, including the homestead 40, to the wife, in payment of a *bona fide* indebtedness amounting, with the homestead exemption, to the value of the entire land, is sustained—If in a suit to set aside the deed as fraudulent as to creditors the complainant relies upon the testimony of the husband and wife to make out his case, he cannot discriminate between that which is favorable and unfavorable, where it is all equally probable.

HILLSDALE CIRCUIT JUDGE, BISHOPP v. 461

HITCHCOCK, SNYDER v. 313

PAGE

HODGE, WELCH v. 493

HODGKIN, PEOPLE v. 27

HOUGHTON, MORELAND v. 548

HOWLETT, PEOPLE v. 165

HYDE, BANGHART v. 49

I.

IN RE ESTATE OF KING 411

IN RE ESTATE OF LAMBIE 489

Estates of deceased persons—Mortgage upon land belonging to an estate, not given by a decedent, is a debt against the estate—Probate court has power to authorize the administrator to mortgage the estate to raise money to pay off the mortgage.

IN RE ESTATE OF STEBBINS 304

IN RE PETITION OF WATERBURY 78

J.

JEWELL v. PARON 83

Mechanic's lien—Bill to enforce lien of material-man—Will be dismissed if it appears that the value of the work done at the time the lien was filed was less than the sum then paid the contractor, and that the necessary cost of completing the building will exceed the unpaid portion of the contract price.

JOHNSON v. MORTON 1

Order to hold to bail—Granted upon an affidavit setting forth facts indicating fraud or breach of trust—Protects the affiant and party applying for the *capias*, when no malice or want of probable cause is shown.

JONES, BUSCH v. 223

JONES, LANE v. 540

K.

PAGE

KEATING, GLADSTONE EXCHANGE BANK v. 429

KEATING v. MICHIGAN CENTRAL RAILROAD CO. 219

Statute of limitations—Does not commence to run as against an infant until he attains his majority—Is not set in motion by the commencement of suit by an infant by his next friend.

KERN v. MYLL 477

Landlord and tenant—Nuisance caused by the settling of the filling in an old well under the leased building, and the accumulation of water therein—Landlord is not guilty of such negligent ignorance of the nuisance as is equivalent to actual notice where 10 or 11 years have elapsed since the well was filled up, and the premises have been continuously occupied without any complaint that such a nuisance existed.

KOEHLER v. BUHL 496

Contract of employment—By which the employé agrees that his work shall be done to the satisfaction of his employer—Employer is the judge, and the question of the reasonableness of his judgment is not for the jury—Nor is he obliged to take advantage of the first violation of the contract—Evidence—That the same fur cutters were employed while a furrier was working for the common employer as before, and that before his employment the work had been good, does not tend to show that he is an incompetent workman—Tender—Of bank notes is good, unless objected to on the ground that they are not legal tender.

KORNETZSKI v. CITY OF DETROIT 341

Street railways—Primary purpose of track is use by railway company—Person driving upon it assumes the ordinary risks attending its use.

L.

LADD v. BROWN 136

Landlord and tenant—Parol agreement with a tenant from

PAGE

Ladd v. Brown—Continued.
year to year that, if he sows wheat, he may reoccupy the premises after expiration of tenancy for the purpose of harvesting the wheat, is enforceable, if founded upon a sufficient consideration—Such an agreement is without consideration if, under the terms of the lease, the tenant is obligated to leave such crop on the ground at expiration of lease.

LAKE SHORE & MICHIGAN SOUTHERN RAILWAY CO., RETAN v. 146

LAMBIE, IN RE ---- 489

LANE v. JONES ---- 540
Justices' courts—Defendant may show, in support of a motion to dismiss, that the summons was served more than 12 days before the return-day—Justice, on granting the motion, may give judgment for costs.

LANE v. RUHL ---- 474
Landlord and tenant—Assent by tenant, in possession under a lease for one year, to its termination, and a holding thereafter from day to day under a new arrangement—If tenant repudiates such arrangement, and claims the right to hold under the terminated lease, to which the landlord does not assent, he is not entitled to notice to quit.

LANSING WHEEL CO., COOPER v. ---- 272

LAW v. NEW ENGLAND MUTUAL ACCIDENT ASSOCIATION ---- 266
Accident insurance—Suit on policy—Barred by a provision requiring it to be brought, or arbitration required, within one year after the injury, where more than five months elapse, after the assured is fully advised of the refusal of the company to pay or arbitrate the claim, before the expiration of the year, and suit is not brought within the year.

LEE, POTTER v. ---- 140

LEE, SLADE v. ---- 127

LEO AUSTRIAN & CO. v. SPRINGER ---- 343
Sale—Order for goods, signed by the orderer, and giving

PAGE

Leo Austrian & Co. v. Springer—Continued.

prices and date of shipment, supplemented by a paper signed by the agent of the vendor and delivered to the orderer, acknowledging the ordering of the goods, which are described, and prices and time of shipment given, the same as in the order, creates a contract for the sale of the goods—Principal and agent—Parties dealing with agent have a right to presume that his agency is general—A known agent will be presumed to be acting within the scope of his authority—Character of agency may be shown by persons who have dealt with the principal through the agent—Authority of agent must depend, as to innocent third persons who have relied thereon, upon the character bestowed, rather than the instructions given—Agents sent out by manufacturers to solicit orders—Are held out to the trade as having authority to act according to the general usage, practice, and course of business conducted by the principals through them—Question of what is usual or necessary to be done by such agents is ordinarily for the jury—Custom—If general, and so well settled and notorious as to raise the presumption that it was known to the buyer and seller, cannot be rebutted by the testimony of the seller that he was ignorant of its existence—Damages—Measure of for breach of contract to sell and deliver personal property—Is the difference between the contract and market prices at the time and place of delivery—Evidence—Contents of written instrument—Not necessarily called for by a question calling for the name of an association, to which the witness has referred in a letter written by him.

LUEBE v. THORPE 268

Married woman—Is liable for services rendered for her under an agreement made with her husband as her authorized agent—Jury—Excusing a juror, upon challenge for cause, who is over the statutory age—Is not prejudicial error where it does not appear that there were not remaining enough of the jurors of the regular panel to form a jury to try the case, or that the complaining party had any ground of objection to any of the

PAGE

Leube v. Thorpe—Continued.

jurors who sat in the case, or that he had exhausted his peremptory challenges.

LINDSAY, BAY CITY BANK v. 176

LINDSTROM v. BOARD OF CANVASSERS OF MANISTEE CO. 467

Election law of 1891—Provision voiding all ballots bearing any distinguishing mark or mutilation applies to the individual ballot cast by the voter—The law provides for but one vignette—Voter who votes a ticket appearing upon the official ballot cannot be disfranchised by the action of the board of election commissioners in printing a separate vignette at the head of the county ticket, or by failing to have a proof copy of the ballot on file in the office of the county clerk for 10 days prior to election—Candidate who is not shown to have participated in any fraud cannot be defeated of his election on these grounds.

LOTHROP, NYE v. 411

LOUD & SONS LUMBER CO., WILKIN MANUFACTURING CO. v. ... 158

LUTON v. SHARP 202

Principal and agent—Knowledge of principal cannot be imputed to the agent with respect to a matter in which the agent is acting in his own interest—Execution—Levy on real estate for want of personal property—Return of sheriff of such fact is conclusive in ejectment by a purchaser at the execution sale, for value and without notice, against a prior grantee of the execution debtor, whose deed was not recorded until after such sale.

M.

MAAS, HENSEL v. 563

MAJOR, WORTHINGTON v. 325

MALTZ, MCDONALD v. 172

MANISTEE SALT & LUMBER CO., BAUMANN v. 363

PAGE

MAURER v. CLIFF 194

Taxes—Assessment of omitted personal property—Will not be compelled by *mandamus* after the time for reviewing assessments has expired—Logs and lumber piled along a railroad track, awaiting the convenience of the owner or the facilities for shipment, are assessable in the township where situate—Supervisor should not consider, as affecting such assessment, the fact of the existence of contracts to load the property, or that some event has transpired to prevent its shipment, or the intention to ship in the near future.

MAXTED v. FOWLER 106

Sale of mining stock—Representation by the owner to the purchaser who is unacquainted with mining property, that the stock is readily selling at one dollar per share, is a representation of a fact upon which the purchaser has a right to rely—Right of recovery, in a suit for breach of warranty as to the value of mining stock, is not affected by proof of the retention of his stock by the purchaser, and of his employment by the mining company to assist in developing the mine—Measure of damages—Is the difference between the market value of the stock as represented and its actual value at time of its transfer.

MAY v. BOARD OF CANVASSERS OF WAYNE CO. 505

Elections—Recount under law of 1887—Statute gives an aggrieved party the right to a recount, upon complying with its provisions, enforceable by *mandamus*—Provision giving board of canvassers power to cause the ballot-boxes to be brought before it is directory—Neither the board nor the committee appointed to make the recount has power to investigate alleged frauds committed at the election—Nor can the board compare registration and poll lists to see if unregistered persons have voted, and exclude the entire vote of a precinct on that ground—Authority of committee to open ballot-boxes is limited to those used in the precincts named in the petition for a recount—Correction by board of returns from a precinct according to an unauthorized recount of the ballots cast therein, and by the rejection

PAGE

May v. Board of Canvassers of Wayne Co.—Continued.

of the vote of an entire precinct on the ground that votes were cast by unregistered persons—*Mandamus* will lie to compel the board to reconvene, and vacate a resolution directing the issuance of a certificate of election based on said corrected returns, and direct its issuance to the candidate who is shown by the original returns to have been elected.

McDONALD v. MALTZ 172

Land broker—Who negotiates a sale under a private arrangement with the purchaser that he is to have a commission, and who receives one from the land-owner unbeknown to the purchaser, cannot recover the agreed commission, it appearing that both parties relied to some extent upon his judgment as to the amount of timber on the land, and its value.

McGRAIL v. CITY OF KALAMAZOO 52

Negligence case—Injury by falling on a defective sidewalk by reason of the tipping up of a loose plank—Plaintiff cannot show that others fell upon the walk three or four days *after* his fall—Defendant may show, by witnesses who testify to having frequently passed over the walk without noticing the particular defect complained of, that, if there had been a loose plank, they would have noticed it, to rebut the claim of constructive notice to the city of such defect—Such notice will not be inferred unless the defect is open and notorious, of long standing, and of such a character as naturally to arrest the attention of the passers-by—Burden is upon the plaintiff to establish these conditions—Jury—Challenge for cause of juror on regular panel over statutory age—Error is not assignable upon a ruling sustaining challenge.

McLACHLAN, HICKS v. 278

McLELLAND v. A. P. COOK CO. 528

Deed—Right of action by grantee of part-paid swamp land, if any, is upon the covenants in his deed, and not by contesting foreclosure of mortgage given for the

PAGE

McLelland v. A. P. Cook Co.—Continued.

purchase price, where he remains in undisturbed possession for five years before a patent is issued to his grantor, and for ten years after its issuance, without being threatened with litigation growing out of the non-payment of taxes assessed before the patent was issued, which contained a reservation of the liens which the State might have for such taxes.

McLeod, Mills v. 627

McMahon, Bond v. 557

McQuade, Attorney General v. 439

McQueen, Ferris v. 367

Meech, Munro v. 596

Michigan Central Railroad Co., Keating v. 219

Michigan Central Railroad Co., Wilson v. 20

Michigan Mutual Benefit Association, Silvers v. 39

Michigan Shingle Co. v. State Investment and Insurance Co. 389

Fire insurance—Promissory warranty to maintain a clear space of 150 feet between the insured property and adjacent mills—If agent, with full knowledge of the exact amount of continuous clear space kept and to be kept, decides that, in consideration of the situation of the property and its surroundings, such clear space is equivalent to 150 feet, as ordinarily understood by insurance men, and inserts that distance in the warranty clause, and receives the premium, the rate of which is fixed in view of the premises, the company is estopped from insisting upon a literal construction of the warranty.

Milford State Bank, Sherwood v. 78

Miller, Cleveland v. 97

Miller, Fenton v. 204

PAGE

MILLER v. HANLEY 253

Execution—Issuance of *alias* writ after the return-day of the original, and while it is in the officer's hands with a return *nulla bona* indorsed after the release of a levy upon real estate found to belong to a third party—Court may direct a return of the original *nunc pro tunc*, and thus cure the irregularity in the issuance of the *alias* writ—Justification by officer under—Want of notice of such defense must be taken advantage of in the trial court—Husband and wife—Conveyance of property by husband to wife to pay a debt originating 25 years before, no account of which has been kept, nor evidence of the debt given, and no payment thereon having been made or requested—Judgment creditor should be allowed to inquire fully into their financial condition for the entire 25 years.

MILLS v. MCLEOD 627

Equity practice—Discretion of court in refusing to open an order *pro confesso* will not be reviewed unless clearly abused

MILLS, PEOPLE v. 630

MONAGHAN, TURNBULL v. 87

MONTROSS v. EDDY 100

Real-estate broker—Can legally receive compensation from both parties where he simply brings them together, and has no hand in their negotiations—Can recover what his services are reasonably worth under an agreement with the owners that, if he effects a sale at a price fixed by them, they will pay him for it.

MORELAND v. HOUGHTON 548

Mortgage—Assignment by agent, pursuant to verbal instructions of mortgagee—Delivery of mortgage and assignment gives the assignee a sufficient title to the mortgage to enable him to foreclose it in equity—If the purpose of the assignment is to secure the assignee as surety, the fact that it does not in terms purport to

PAGE

Moreland v. Houghton—Continued.
convey any right or title to the mortgage note will not prevent his taking a beneficial interest in the mortgage —Foreclosure by assignee—The only question open to the mortgagee, who is made a defendant, is the superiority of the assignee's title to his—Mortgagee cannot complain of the non-production of mortgage notes.

MORTON, JOHNSON v. 1

MOSHIER, BLAKELEY v. 299

MUNRO v. MEECH 596
Deed—Of right to build and use a dock upon a designated piece of land—Only conveys the right to use the land for the purpose mentioned—Parol testimony—That the merits of the case were not decided in a former suit, pleaded in bar, is admissible—Assignment for benefit of creditors—Execution of trust by assignee, without filing statutory bond, and without objection from the assignor or his creditors—*Bona fide* purchaser from the grantee of the assignee will be protected as against an unrecorded deed executed by the assignor before the assignment.

MURPHY v. NELSON 554
Libel and slander—Special appeal from justice's judgment —Affidavit in support of application for leave to appeal —Allegation that the judgment is in fact a fraud upon the defendant's rights is not a charge of corruption and fraud upon the part of the justice who rendered it.

MYLL, KERN v. 477

N.

NELSON, MURPHY v. 554

NEW ENGLAND MUTUAL ACCIDENT ASSOCIATION, LAW v. 266

NEWTON v. BOARD OF CANVASSERS OF WAYNE CO. 455
Elections—Recount under law of 1887—Application for by candidate for Supreme Judge—Comes too late, if made on the last day on which the Board of State Canvassers

PAGE

Newton v. Board of Canvassers of Wayne Co.—Continued.

are required to canvass the returns and issue the certificate—Statute provides for a recount antecedent to the determination by the board of county canvassers of the number of votes cast for the office as to which a recount is asked—Application, after a full determination by the board of the result as to the candidates for other offices, comes too late.

NICHOLS v. NICHOLS 569

Deed—By father to his children, and lease from them to him of a life-estate—Will be construed as one instrument, and grantees will hold subject to the life-estate—Validity of deed affirmed.

NYE v. LOTHROP 411

Bills and notes—Demand of payment, or institution of suit, is a condition precedent to interest beginning to run on a demand note—Statute of limitations—Indorsement, signed by the maker, that "the within note shall not be outlawed," and the delivery of the note to the payee, with the remark that such indorsement will make it all right with him, are held sufficient to take the case out of the statute.

O.

OSMUN, CRAWFORD v. 533

P.

PACKARD v. BOARD OF CANVASSERS OF MENOMINEE CO. 450

Elections—Recount under law of 1887—*Mandamus* will lie to compel in a proper case, if seasonably applied for—Remedy of party claiming to be aggrieved by such recount, after the result is declared and the board have adjourned, is by a *quo warranto* proceeding to test the validity of the election—Return of committee need not contain a statement of the contested ballots, with the reasons for their rejection.

PARON, JEWELL v. 83

PAGE

PEARCE v. WARE 321

Sale—Fraudulent statements of vendors' agent, with whom the vendee has combined to purchase the land for a less price than that which he had agreed with the agent to pay—Equity will not relieve the vendee if he is deceived by such statements—Parties—The vendors and their agent are held to be necessary parties to a suit brought to foreclose the mortgage given to secure a portion of the purchase price of the land to both vendors, and which one of them has assigned to the other, before a rescission can be granted at the instance of the vendee for such fraud.

PENDLETON, STEVENS v. 405

PENNELL v. DELTA TRANSPORTATION CO. 247

Custom—Evidence of is admissible only on the ground that the parties to the contract were cognizant of, and are presumed to have contracted with reference to, it—Cannot change a definite contract—Must be certain, definite, uniform, and notorious to be binding—If restricted to a certain locality or business, though shown to have become general and uniform, party sought to be charged may show that it was unknown to him.

PEOPLE v. BETTS. 642

Criminal law—Trial of respondent at the term at which his corespondents have been tried and convicted—Not error to compel, where the record fails to show that any of the jurors were prejudiced by reason of the former trials, or were otherwise incompetent.

PEOPLE v. HODGKIN 27

Sodomy—Emission is a necessary ingredient of the offense—May be inferred from proof of penetration and the other circumstances of the case.

PEOPLE v. HOWLETT 165

Schools and school-districts—A high school is not a "college," within the meaning of Act No. 147, Laws of 1891, creating the office of county commissioner of schools—A special first-grade certificate not granted

PAGE

People v. Howlett—Continued.

at a regular public examination, or granted without an examination, or at a public examination after the election of the holder, will not make him eligible to said office—Holding the office of secretary of the board of examiners, under Act No. 266, Laws of 1887, is not equivalent to having held the office of county commissioner under the act first cited.

PEOPLE v. MILLS 630

Criminal law—Duty of police officers to detect and discover crime, and of prosecuting officers to procure evidence of its commission—General character of respondent may be commented upon when he puts it in issue—Credibility of female witness—Cannot be impeached by showing her lack of chastity—Information—Indorsement of name of police officer, who has been present during the trial, as a witness—Properly allowed after he is sworn, it appearing that such non-indorsement was an oversight—Carnally knowing a girl, theretofore chaste, of the statutory age—Statute does not exclude from its protection a female who may have erred, but who has reformed, and for years led a virtuous life.

PEOPLE v. SMITH 644

Criminal law—Information for receiving stolen property—Time and place of larceny need not be alleged—Statute providing for a greater maximum punishment for than for the larceny itself does not authorize cruel and unusual punishment—Imprisonment in State prison—Respondent, in order to avoid, must make a showing to the court before sentence that it is his first offense, and that he has made satisfaction to the injured party.

PEOPLE v. STEELE 437

Criminal law—Offense cognizable by justice of the peace—Respondent has a right to a trial with or without a jury, as he may elect.

PEOPLE v. WESTBROOK 629

Criminal law—Indecent assault by father upon his daughter—Wife is not a competent witness for the people, nor can she make a complaint for said offense.

PAGE

PHENICIE, BALL V. 355

POTTER V. LEE 140

Sale—Of goods by sample, with right of return after 10 days' examination at option of vendee—If complaint is made of quality of goods by purchasers within the 10 days, and vendee continues making sales after their expiration, without notice to vendor, he cannot set up a warranty and its breach in a suit to recover the purchase price.

PRENDERGAST, VANDERHOOF V. 18

PRESCOTT, AUDITOR GENERAL V. 190

R.

RENZ V. STOLL 377

Declaration of trust—Not required to be made in any prescribed form of words—Must contain the substantial terms of the trust, or at least sufficient to identify the subject-matter by writing.

RETAN V. LAKE SHORE & MICHIGAN SOUTHERN RAILWAY CO. 146

Negligence case—Duty of railroad company to keep a sidewalk which it has constructed across its right of way at a street crossing under a notification from the village council, and assumed for years to keep in repair, in a reasonably safe condition for public travel—Question of plaintiff's contributory negligence, in getting his foot caught in a hole in the walk, held for the jury—Judgment for $30,000 as compensation for pain and suffering endured by plaintiff, and the loss of both feet, will not be reversed upon the ground that the damages awarded are excessive.

ROBINSON V. CHAMBERS 471, 473

Criminal law—A witness who is committed to jail for failing to recognize for his appearance to testify on behalf of the people is entitled to the statutory fees while detained in jail.

ROBINSON V. CHARLES WRIGHT & CO. 283

Negligence case—The sudden breaking or giving way of

PAGE

Robinson v. Charles Wright & Co.—Continued.

a piece of properly constructed machinery will not justify the conclusion of negligence—Employé who is familiar with the construction and use of a freight elevator, and knows that, unless the brake is properly set and locked, a weight placed on the car will cause it to descend, is charged with the duty of seeing that the brake is properly set and locked before using the elevator.

ROSE, TOWNSHIP OF CALEDONIA v. 216

ROSENFIELD v. FORTIER 29, 34

Sale—On commission, to be measured by the excess on sales above the list price—Consent of employer to sales at a less price will not imply an agreement to pay the salesman the discount thus made to effect a sale—Right of employer to fill the orders at the reduced price is not affected by the claim of the salesman for credit for such discount on reporting the sales.

ROUX v. BLODGETT & DAVIS LUMBER CO. 607

Negligence case—Foreman charged with the duty of seeing that certain machinery, which is dangerous to employés working around it if uncovered, is covered, is not a fellow-servant of such employés in that regard—Evidence—Error in admitting testimony of statements of agent is cured by principal calling the agent as a witness, who denies making the statements—Charge to jury—Assuming existence of fact which the undisputed evidence tends to prove—Cannot be assigned as error, where the existence of such fact was not questioned on the trial, except by a general request for the direction of a verdict in favor of the appellant.

RUHL, LANE v. 474

RUNNELLS, SMITH v. 617

RUSSELL v. RUSSELL 122

Specific performance of an oral agreement by a father and mother that if their son would return home, and build a house and settle upon 48 acres of land owned by the

PAGE

Russell v. Russell—Continued.

father, they would convey the land to him—Will be enforced, if the agreement and performance on the part of the son is clearly established by the testimony.

S.

SANBORN v. ST. CLAIR CIRCUIT JUDGE 519

Probate courts—Special appeal to circuit court—Discretion of circuit court in allowing will not be disturbed by *mandamus*, where the petition sets forth facts sufficient to call for its exercise—Will not be refused upon the denial of an interested party of such facts—Circuit court should consider both the petition and answer, and determine whether the petitioner is without default, and whether justice requires a revision of the case—Executor's account—If improvidently allowed, and to the injury of the rights of minor heirs, the appeal should ordinarily be granted.

SAUNDERS, ARMITAGE v. 482

SCHAUB, HENKEL v. 542

SCHICK, TOWNSHIP OF CUMMING v. 222

SCHOOL-DISTRICT NO. 1, WESTERN PUBLISHING HOUSE v. 262

SEITZ, CODD v. 191

SHARP, LUTON v. 202

SHERWOOD v. MILFORD STATE BANK 78

Trust fund—Payment of note of depositor of insolvent bank with his check, the drawing of which is warranted by the state of his account—Will not create a trust fund in favor of the owners of the note, no money being set apart for them, or reaching the hands of the receiver afterwards appointed for the bank, on account of the transaction.

SILVERS v. MICHIGAN MUTUAL BENEFIT ASSOCIATION 39

Benefit associations—Contract of insurance will be construed under the organizing act in force when it was

PAGE

Silvers v. Mich. Mutual Benefit Ass'n.—Continued.

made—Insurance agreed to be paid to the wife, *heirs*, administrator, or assigns of a member, in a certificate issued under Act No. 104, Laws of 1869, is payable to *his* heirs according to the statute of distributions, in case he survives his wife—Revisory act of 1887, which prohibits the issuance of a certificate upon any life in which the beneficiary has not an insurable interest, but which provides that in case of a violation of this prohibition the insurance shall be payable to the heirs of the deceased member, includes heirs who have not such insurable interest—Refusal of association to make assessment—Full amount of insurance agreed to be paid may be recovered under a declaration avering, and evidence showing, performance of contract by decedent, and that the assessment, if made, would have produced the amount claimed.

SLADE v. LEE 127

Sale—Of lumber at an agreed price per thousand feet, to be paid for after its inspection by an inspector agreed upon by the parties, and its shipment—Title does not pass until lumber is inspected, in the absence of evidence showing a contrary intention by the parties.

SLAWSON, BERRIDGE v. 484

SMITH, PEOPLE v. 644

SMITH v. RUNNELLS 617

Attachment—Service upon one partner warrants a judgment against the firm, and the levy of an execution upon the partnership property—Publication of notice of attachment is only required where neither of the defendants can be found—Failure to file declaration within the time prescribed by rule—Declaration may be filed at any time before entry of plaintiff's default for not filing—Affidavit—Failure of notary public to add to his signature to the jurat the name of the county for which he was appointed—Will not render affidavit defective, if county is named in the caption.

PAGE

SMITH v. THOMPSON 381

Pleading—Declaration charging, in effect, that the defendants have procured the stock and control of a corporation by deception and fraud, for the purpose of wrecking the corporation, is a declaration in case for fraud.

SNYDER v. HITCHCOCK 313

Statute of limitations—Circuit court judgment—*Assumpsit* lies upon at any time within 10 years after its entry.

SPRINGER, LEO AUSTRIAN & CO. v. 343

ST. CLAIR CIRCUIT JUDGE, SANBORN v. 519

STATE INVESTMENT AND INSURANCE CO., MICHIGAN SHINGLE CO. v. 389

STEBBINS v. STEBBINS 304

Will—Omission of provision for child—Question whether it was unintentional is one which the contestant has a right to have submitted to a jury, whose verdict is conclusive, if based upon any competent evidence—May be shown to have been unintentional by the terms of the will or by extrinsic parol testimony—Relation of testator to devisees and legatees and to the omitted child, his intelligence, mental and physical condition, and the circumstances connected with the making of the will, are all proper matters for consideration by the jury.

STEELE, PEOPLE v. 437

STERLING v. CALLAHAN 536

Liquor traffic—Proof that liquor was furnished to a minor warrants a recovery by the father of at least $50 damages, and costs of suit—Not necessary to hand liquor to a minor in order to furnish it to him—Charge to jury—Erroneous instruction, apparently acted upon, is none the less damaging because accompanied by a request containing a correct statement of the law.

STEVENS v. PENDLETON 405

Burden of proof—Jurors generally understand that it is upon the plaintiff in all cases—Refusal to instruct them,

PAGE

Stevens v. Pendleton—Continued.
in a proper case, when it shifts to the defendant, is reversible error—Bill of particulars—Admission of in evidence is held to have been non-prejudicial error, if error at all.

STEWART, WHEELER v. 445

STOLL, RENZ v. 377

SUPERVISOR OF TOWNSHIP OF MENTOR, BOARD OF SUPERVISORS v. 386

T.

THOMPSON, SMITH v. 381

THORPE, LUEBE v. 268

TILLOTSON v. CITY OF SAGINAW 240

Statutes—Covering the same subjects—Both must be given effect, if possible—Repeals by implication not favored—Act authorizing a city to borrow $75,000 for bridge purposes, held not to repeal provision of charter authorizing the council to issue bonds for $125,000 for the construction of certain bridges.

TOLIVER v. BROWNELL 577

Justices' courts—Docket entry of date when judgment was rendered—Cannot be changed by justice's return to a writ of *certiorari* so as to show that the judgment was rendered on the previous day, when the justice was within the State, and by mistake entered as of the day following, when he was out of the State.

TOWNSHIP OF CALEDONIA v. ROSE 216

Taxes—Curative provisions of the tax law do not apply to jurisdictional defects—Board of review—Is the only tribunal in which the tax-payer can contest an unequal or excessive assessment—Provision requiring board to meet is mandatory—Tax-payer has a right to assume that the board will remain in session the full statutory time—If he is prevented from appearing and objecting to his assessment by the failure of the board to do so, the taxes levied against him are void.

PAGE

TOWNSHIP OF CUMMING v. SCHICK 222

Findings of fact and law—Are a condition precedent to a review of the conclusions of fact and law reached by the court in a case tried by the court without a jury.

TRUAX, CROWELL v. 585

TURNBULL v. MONAGHAN 87

Accounting.

TURNER, WEBBER v. 589

U.

UNION SCHOOL-DISTRICT OF BAY CITY, GUSTIN v. 502

V.

VAIL v. WINTERSTEIN 230

Married woman—May enter into partnership relations with others than her husband, and thus make her separate estate liable for the debts of the firm.

VANDERHOOF v. PRENDERGAST 18

Attachment—Dissolved by defendant's suing out writ of *certiorari* to review justice's judgment, and giving bond to pay circuit court judgment—Replevin of attached property—If the evidence tends to show its purchase in good faith by the plaintiff from the attachment debtor before the levy of the attachment, the defendant can only justify his holding on the ground that the transfer was fraudulent as to creditors, which is a question for the jury.

VAN VOORHIS v. VAN VOORHIS 60

Divorce—Complainant must come with clean hands, and keep them clean, so far as relates to the procurement of testimony to make out his case.

W

WARE, PEARCE v. 321

PAGE

WEBBER v. TURNER 589

Bills and notes—Payment—Collateral security.

WELCH v. HODGE 493

Highways—Tenant of the owner of a life-estate in land through which a highway is to run must be served with notice of the application to lay out the highway.

WEST BAY CITY, FOURNIER v. 463

WESTBROOK, PEOPLE v. 629

WESTERN PUBLISHING HOUSE v. SCHOOL-DISTRICT NO. 1 262

Schools and school-districts—"Yaggy's Anatomical Study"—Purchase of can only be made so as to bind the district when authorized by vote of electors.

WHEELER v. BOARD OF CANVASSERS OF MANISTEE CO. 448

Elections—Act of 1887, providing for a recount of votes, does not apply to the office of State Senator.

WHEELER v. STEWART 445

Promise—By one person to another for the benefit of a third, who is a stranger to the consideration, will not support an action by the latter.

WILKIN MANUFACTURING CO. v. LOUD & SONS LUMBER CO. ... 158

Contract by correspondence—Not consummated if minds of parties do not meet as to time and terms of payment of purchase price.

WILLIAMS, AUDITOR GENERAL v. 180

WILSON v. MICHIGAN CENTRAL RAILROAD CO. 20

Negligence case—A brakeman who, instead of using side ladders provided for mounting cars, crawls over or under the bumpers of the cars of a moving train in order to reach a foothold or handhold on the opposite side, and use it in place of a ladder, cannot recover for consequent injuries—Violation of rules made for the protection of railroad employés—Employé is chargeable with contributory negligence, unless he is compelled by positive orders of the company to violate such rules, or such a

PAGE

Wilson v. Mich. Central Railroad Co.—Continued.
system of timing trains or conducting the business of the company is adopted as to make such violation necessary in order to do the work required of him.

WINTERSTEIN, VAIL v. 230

WOLF v. ESTATE OF TROXELL 573

Compounding a felony—Note given to settle an embezzlement by an agent is valid, in the absence of a promise not to prosecute for the embezzlement—Threats of prosecution are only evidence tending to prove such promise—Evidence—Suit upon notes given, as claimed, to prevent the prosecution of the maker's son for a felony—Will of the father, made some years before the notes were given, by which he disinherited the son, is inadmissible in support of such defense.

WORTHINGTON v. MAJOR 325

Equity practice—Jury trial—The same rules of evidence should be observed as in a jury trial at law—Mortgage—Discharge set aside on the ground of undue influence and in capacity of mortgagee to make it.

MICHIGAN CASES CITED.

A.

PAGE

Abbott v. Chaffee, 83 Mich. 256..... 600
Adsit v. Secretary of State, 84 Mich. 420..... 470
Ætna Live Stock, etc., Ins. Co. v. Olmstead, 21 Mich. 246.....396, 404
Albrecht v. Gies, 33 Mich. 389..... 484
Allen v. Mills, 26 Mich. 124..... 541
Anderson v. Robinson, 38 Mich. 407.. 193
Andrews v. Probate Judge, 74 Mich. 285..... 512
Apsey v. Railroad Co. 83 Mich. 489.. 583
Artman v. Ferguson, 73 Mich. 146.. 233
Ashman v. Railroad Co., 90 Mich. 567..... 616
Ashley v. City of Port Huron, 35 Mich. 296..... 604
Atlas Mining Co. v. Johnston, 23 Mich. 39..... 271
Auditor General v. Jenkinson, 90 Mich. 523..... 191
Au Sable River Boom Co. v. Sanborn, 36 Mich. 358..... 303
Avery v. East Saginaw, 44 Mich. 587..... 218
Avery v. Miller, 81 Mich. 85..... 315
Ayres v. Gallup, 44 Mich 13..... 365

B.

Bailey v. Bailey, 25 Mich. 185..... 623
Bailey v. Bailey, 36 Mich. 185..... 211
Banner Tobacco Co. v. Jenison, 48 Mich. 459, 462..... 350
Bassett v. Shepardson, 52 Mich 3.... 233
Beardslee v. Reeves, 76 Mich. 661.. 16
Beebe v. Knapp, 28 Mich. 53.....385, 499
Benfey v. Congdon, 40 Mich. 283.... 477
Blodgett v. Hovey, 91 Mich. 571.... 130
Board of Education v. Common Council, 80 Mich. 548..... 264

PAGE

Board of Park Commissioners v. Common Council, 28 Mich. 228.... 606
Bostwick v. Mahaffy, 48 Mich. 342.. 17
Bowen v. McCarthy, 85 Mich. 26.... 164
Bowers v. Horen, 93 Mich. 420..... 553
Brady v. Whitney, 24 Mich. 154..... 385
Brennan v. Railroad Co., 93 Mich. 156..... 26
Brezee v. Powers, 80 Mich. 172..... 613
Brigham v. Fawcett, 42 Mich. 542 .....281, 361, 362
Brink v. Freoff, 44 Mich. 69..... 121
Brown v. Brabb, 67 Mich. 17..... 126
Brush v. Sweet, 38 Mich. 574..... 385
Burdick v. Michael, 32 Mich. 246.... 139
Burland v. Association, 47 Mich. 424 48
Burt v. McBain, 29 Mich. 260....118, 120
Busch v. Wilcox, 82 Mich. 315, 336.. 224
Bushey v. Raths, 45 Mich. 185, 186.. 19
Butler v. Wendell, 57 Mich. 62..... 600
Byles v. Colier, 54 Mich. 1..... 130

C.

Campau v. Moran, 31 Mich. 282..... 51
Campbell v. White, 22 Mich. 178..... 235
Carley v. Graves, 85 Mich. 483..... 82
Carpenter v. Graham, 42 Mich, 193.. 130
Childs v. O'Donnell, 84 Mich. 533.... 145
Christy v. Farlin, 49 Mich. 319..... 315
City of Detroit v. Beckman, 34 Mich. 125..... 603
City of Detroit v. Corey, 9 Mich. 165 606
City of Grand Rapids v. Bateman, 93 Mich. 135..... 438
City of Lansing v. Toolan, 37 Mich. 152..... 604
Coll v. Board of Canvassers, 83 Mich. 371..... 512, 514
Colwell v. Iron Co., 36 Mich. 51..... 130
Common Council v. Rush, 82 Mich. 532..... 441

PAGE

Common Council v. Schlich, 81 Mich. 405 ... 388
Comstock v. Grand Rapids, 54 Mich. 641 ... 218
Connors v. Iron Co., 54 Mich. 168 ... 245
Cook v. Hopper, 23 Mich. 511 ... 559
Cook v. Perry, 43 Mich. 623 ... 193
Cooper v. Detroit, 42 Mich. 584 ... 606
Crane v. Abel, 67 Mich. 242 ... 422
Cross v. Railway Co., 69 Mich. 363 ... 152

D.

Daggett v. Davis, 53 Mich 35 ... 385
Damon v. DeBar, 33 Mich. 262 ... 595
Darling v. Hurst, 39 Mich. 765 ... 281, 361, 362
Davis v. City of Jackson, 61 Mich. 530 ... 604
Dayton v. Fargo, 45 Mich. 153 ... 385
Detroit & Milwaukee R. R. Co. v. Van Steinburg, 17 Mich. 99 ... 594
Dewey v. City of Detroit, 15 Mich. 307 ... 58
Dickinson v. Seaver, 44 Mich. 631 ... 385
Dixon v. Commissioner of Highways, 75 Mich. 225 ... 494
Dubois v. Campau, 28 Mich. 304 ... 215

E.

Edwards v. Clement, 81 Mich. 513 ... 447
Edwards v. McEnhill, 51 Mich. 165 ... 233
Ellis v. Secor, 31 Mich. 185 ... 380

F.

Farmers' & Mechanics' Bank v. Kingsley, 2 Doug. 389 ... 254
Farrington v. Smith, 77 Mich. 550 ... 145
Fenton v. Steere, 76 Mich. 405 ... 208
Final v. Backus, 18 Mich. 218 ... 385
Finan v. Babcock, 58 Mich. 301 ... 366
Finn v. Corbitt, 36 Mich. 318 ... 395
First National Bank v. St. Joseph, 46 Mich. 526 ... 218
Fosdick v. Van Husan, 21 Mich. 576 ... 499
Fox v. Color Works, 84 Mich. 676 ... 294
Fox v. Iron Co., 89 Mich. 387 ... 616
Fractional School-dist. v. School Inspectors, 27 Mich. 3 ... 563
Franke v. Coots, 41 Mich. 75 ... 255
Franks v. Fecheimer, 44 Mich. 177 ... 600
Freedman v. Campfield 92 Mich. 118 ... 372

PAGE

Freeman v. Railway Co., 74 Mich. 86 ... 583
French v. Railway Co., 89 Mich. 537 ... 583
Fuller v. Bowker, 11 Mich. 204 ... 121
Fuller v. Hasbrouck, 46 Mich. 78 ... 600

G.

Gault v. Stormont, 51 Mich. 636 ... 380
Gay v. Bidwell, 7 Mich. 519 ... 362
Glaze v. Insurance Co., 87 Mich 349 ... 209
Glover v. Scotten, 82 Mich. 369 ... 26
Goodrich v. Hubbard, 51 Mich. 62, 70 ... 352
Goodrich v. Leland, 18 Mich 110 ... 315
Gott v. Culp, 45 Mich. 275 ... 308
Gould v. Insurance Co., 90 Mich. 302 ... 268
Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308 ... 272
Grant v. Smith, 26 Mich. 201 ... 385
Greenlee v. Lowing, 35 Mich. 63 ... 559
Grostick v. Railroad Co., 90 Mich. 594 ... 583
Grovier v. Hall, 23 Mich. 11 ... 308

H.

Hackley v. Headley, 45 Mich. 569 ... 576
Hahn v. Fredericks, 30 Mich. 223 ... 130
Haines v. Saviers, 93 Mich. 440 ... 222
Haire v. Insurance Co., 93 Mich. 481 ... 396
Hall v. Insurance Co., 90 Mich. 403 ... 396
Hall v. Soule, 11 Mich. 494 ... 365
Haney Manfg. Co. v. Perkins, 78 Mich. 1 ... 548
Harris v. Township of Clinton, 64 Mich. 447 ... 343
Haskell v. Hunter, 23 Mich. 305 ... 352
Haughton v. Maurer, 55 Mich. 323 ... 348, 567
Heffron v. Armsby, 61 Mich. 505 ... 347
Hickox v. Railway Co., 78 Mich. 615 ... 238
Hidden v. Chappel, 48 Mich. 527 ... 447
Hill v. Bowman, 35 Mich. 191 ... 362
Hill v. Graham, 72 Mich. 659, 660 199, 218
Hollister v. Lord, 2 Mich. 316 ... 362
Hood v. Judkins, 61 Mich. 575 ... 198
Hoose v. Insurance Co., 84 Mich. 309 ... 261
Hunn v. Railroad Co., 78 Mich. 529 ... 157
Hunt v. Strew, 39 Mich. 368 ... 447
Hutchinson v. Whitmore, 90 Mich. 255 ... 385

I.

PAGE

English v. Ayer, 79 Mich. 516....348, 350

J.

Jenkinson v. Monroe, 61 Mich. 454.. 130
Johnson v. Insurance Co., 12 Mich. 216..... 626
Johnson v. Stephenson, 26 Mich. 63. 164
Jones v. Phelps, 5 Mich. 218..... 366
Jordan v. White 38 Mich. 253..... 362
Joslin v. Ice Co., 50 Mich. 516..... 121

K.

Keeler v. Robertson, 27 Mich. 116 129.....514, 517
Kelsey v. Chamberlain, 47 Mich. 241..... 366
Kern v. Myll, 80 Mich. 525..... 478
Kinney v. Kinney, 34 Mich. 250..... 625
Kwiotkowski v. Railway Co., 70 Mich. 549..... 583

L.

Lacy v. Wilson, 24 Mich. 479..... 499
Lamb v. Henderson, 63 Mich. 305... 252
Larkin v. County of Saginaw, 11 Mich. 88..... 603
Lee v. School-dist., 71 Mich. 361..... 170
Lewis v. Rice, 61 Mich. 104..... 385
Lingham v. Eggleston, 27 Mich. 324 .....130, 131
Littauer v. Houck, 92 Mich. 162..... 126
Lobdell v. Horton, 71 Mich. 681..... 130
Lockhart v. Van Alstyne, 31 Mich. 76..... 492
Lombar v. Village of East Tawas, 86 Mich. 14.....55, 154
Loomis v. Smith, 37 Mich. 595..... 362
Lovejoy v. Michels, 88 Mich. 15..... 539
Lyman v. Becannon, 29 Mich. 466... 600

M.

Manistique Lumbering Co. v. Griswold, 58 Mich. 634 198
Manistique Lumbering Co. v. Witter, 58 Mich. 625..... 198
Mann v. Hyde, 71 Mich. 278..... 623
Marquette, etc., R. R. Co. v. Kirkwood, 45 Mich. 51..... 539
Mawich v. Elsey, 47 Mich, 10..... 611
Maynard v. Board of Canvassers, 84 Mich. 228.....514, 518
Mayor v. Park Commissioners, 44 Mich. 602..... 606

PAGE

McCoy v. Anderson, 47 Mich. 502... 197
McDonald v. Maltz, 78 Mich. 685... 172
McGrail v. City of Kalamazoo, 94 Mich. 52..... 272
McIntyre v. Insurance Co., 52 Mich. 189..... 268
McKenzie v. Board of Canvassers, 70 Mich. 147..... 509
McQuade v. Furgason, 91 Mich. 438 442
Michels v. Stork, 52 Mich. 263 541
Mich. Cent. R. R. Co. v. Burrows, 33 Mich. 6..... 121
Mich. Dairy Co. v. McKinlay, 70 Mich. 574..... 218
Mich. Mutual Benefit Ass'n v. Rolfe, 76 Mich. 146..... 44
Mich. Shingle Co. v. Insurance Co. 91 Mich. 441.....398, 404
Mich. State Ins. Co. v. Lewis, 30 Mich. 41..... 396
Miller v. Strabbing, 92 Mich. 300... 495
Mills v. McLeod, 86 Mich. 290..... 628
Misner v. Darling, 44 Mich. 438..... 51
Monroe v. Greenhoe, 54 Mich. 9..... 197
Moore v. Mandlebaum, 8 Mich. 443. 175
Moran v. Lezotte, 54 Mich. 83..... 598
Morrison v. Berry, 42 Mich. 393..... 270
Mortlock v. Williams 76 Mich. 568.. 34
Morton v. Preston, 18 Mich. 60..... 385
Morton v. Railroad Co, 81 Mich. 423..... 615
Motz v. City of Detroit, 18 Mich. 522.. 238
Munn v. Haynes, 46 Mich. 140..... 193
Mutual Benefit Ass'n v. Hoyt, 46 Mich. 473..... 44
Mynning v. Railroad Co., 64 Mich. 93..... 583
Mynning v. Railroad Co., 67 Mich. 677..... 595

N.

Naumann v. Board of Canvassers, 73 Mich. 252.....449, 517
Neely v. Rood, 54 Mich. 134..... 81
Newberry v. Trowbridge, 13 Mich. 278 595
Newcomb v. Andrews, 41 Mich. 518. 270
Newton v. Board of Canvassers, 94 Mich. 455..... 517
Niles Water Works v. City of Niles, 59 Mich. 324..... 606

O.

PAGE

O'Donnell v. Segar, 25 Mich. 378.... 371
Oliver v. Perkins, 92 Mich. 304..... 548

P.

Packard v. Board of Canvassers, 94 Mich. 450..... 453
Palmer v. Palmer, 36 Mich. 487..425, 428
Patrick v. Howard, 47 Mich. 40..... 209
Patton v. Chamberlain, 44 Mich. 5.. 380
Pease v. Warren, 29 Mich. 9..... 550
Peet v. Knights of Maccabees, 83 Mich. 92..... 447
Peninsula Iron and Lumber Co. v. Crystal Falls, 60 Mich. 510..... 218
Pennell v. Transportation Co., 94 Mich. 247 351
People v. Bates, 11 Mich. 364..... 469
People v. Baumann, 52 Mich. 534... 271
People v. Cicott, 16 Mich. 283..... 511
People v. Clark, 33 Mich. 112..... 640
People v. Goldberg, 39 Mich. 545.... 646
People v. Hubbard, 36 Mich. 440.... 646
People v. Hurlbut, 24 Mich. 36..... 605
People v. Knapp, 42 Mich. 268..... 640
People v. McKinney, 10 Mich. 54.... 559
People v. Millspaugh, 11 Mich. 278 640
People v. Murphy, 93 Mich. 41..... 463
People v. Quanstrom, 93 Mich. 254.. 629
People v. Rawn, 90 Mich. 377 ....54, 271
People v. Schultz, 85 Mich. 114..... 646
People v. Squires, 49 Mich. 487..... 640
Peoria Ins. Co. v. Hall, 12 Mich. 202, 213 .....395, 405
Petrie Lumber Co. v. Collins, 66 Mich. 64..... 218
Picard v. McCormick, 11 Mich. 68.. 109
Pierce v. Holzer, 65 Mich. 263..... 81
Pipp v. Reynolds, 20 Mich. 88..... 447
Powers v. Irish, 23 Mich. 429..... 121
Powers v. Russell, 26 Mich. 179.... 235
Prentis v. Bates, 93 Mich. 234..... 310
Printz v. People, 42 Mich. 144..... 553
Putman v. Township of Fife Lake, 45 Mich. 125..... 197
Pzolla v. Railroad Co., 54 Mich. 273. 583

R.

Rankin v. West, 25 Mich. 195..... 235
Ranney v. Donovan, 78 Mich. 318 .....105, 174
Richardson v. McGoldrick, 43 Mich. 476..... 51
Richmond v. Railway Co., 87 Mich. 392..... 157
Ritter v. Daniels, 47 Mich. 617..... 553
Robert v. Estate of Morrin, 27 Mich. 306..... 362
Roberts v. Pepple, 55 Mich. 367..... 611
Robertson v. Commissioner, 44 Mich. 274..... 531
Robinson v. Chambers, 94 Mich. 471. 473
Roemer v. Board of Canvassers, 90 Mich. 27.....512, 513, 514, 517
Rood v. Hovey, 50 Mich. 395.....623
Roux v. Lumber Co., 85 Mich. 519.. 608
Royce v. Goodwin, 22 Mich. 501..... 459
Ruppe v. Peterson, 67 Mich. 437.... 365
Ryan v. Wilson, 9 Mich. 262..... 599

S.

Sadowski v. Car Co., 84 Mich. 100.. 615
Sandler v. Bresnaham, 53 Mich. 567 130
Scribner v. Collar, 40 Mich. 375..... 175
Shaw v. Hoffman, 21 Mich. 151..... 121
Sherburne v. Horn, 45 Mich. 160.513, 514
Sherwood v. Landon. 57 Mich. 219.. 315
Sigler v. Platt. 16 Mich. 206 315
Sissung v. Sissung, 65 Mich. 180.... 561
Smith v. Circuit Judge, 82 Mich. 93..... 526
Smith v. Pinney, 86 Mich. 484 447
Smith's Appeal, 52 Mich. 415..... 17
Solomon v. Township of Oscoda, 77 Mich. 365..... 191
Spafford v. Beach, 2 Doug. 150..... 255
State Bank v. Whittle, 48 Mich. 1.. 362
Stebbins v. Dean, 82 Mich. 385..... 385
Steele v. Insurance Co., 93 Mich. 81 268
Stevens v. Pendleton, 83 Mich. 342; 85 Id. 137.....406, 407
Stevens v. Tuller 4 Mich. 387..... 484
Stewart v. Railway Co., 89 Mich. 315, 328..... 151
Stuyvesant v. Wilcox, 92 Mich. 233. 157

T.

Theisen v. Johns, 72 Mich. 285..... 539
Tice v. Bay City, 84 Mich. 465..... 57
Tillman v. Shackleton, 15 Mich. 447. 235
Toms v. Williams, 41 Mich. 552..... 623
Toomey v. Steel Works, 89 Mich. 249..... 287
Torrent v. Yager, 52 Mich. 506..... 197

PAGE

Treat v. Dunham, 74 Mich. 114 19
Tryon v. Evening News, 39 Mich. 636 116
Turnbull v. Boggs, 78 Mich. 158 34
Tweed v. Metcalf, 4 Mich. 579 626

U.

Union Mutual Ass'n v. Montgomery, 70 Mich. 595 46

V.

Van Dusen v. Letellier, 78 Mich. 492 615
Van Hoesen v. Cameron, 54 Mich. 614 252
Voorheis v. Society, 91 Mich. 469 268

W.

Wagar v. Farrin, 71 Mich. 370 ..... 130, 131
Wagar v. Railroad Co., 79 Mich. 648 130
Waldron v. Waldron, 45 Mich. 354 625
Walsh v. King, 74 Mich. 350 191
Ward v. People, 30 Mich. 116 438
Wardell v. Williams, 62 Mich. 50 164

PAGE

Watkins v. Wallace, 19 Mich. 77 372
Weaver v. Lammon, 62 Mich. 366 578
Welch v. Tribune Publishing Co., 83 Mich. 661 10
Welch v. Whelpley, 62 Mich. 15 123
Weston v. Probate Judge, 69 Mich. 600 ..... 449, 517
Wheeler v. Board of Canvassers, 94 Mich. 448 517
Whitcomb v. Whitney, 24 Mich. 486 ..... 130, 131
Whiteford v. Hitchcock, 74 Mich. 208 164
Willard v. Magoon, 30 Mich. 273 270
Williams v. Saginaw, 51 Mich. 120 218
Winslow v. Herrick, 9 Mich. 380 193
Wisconsin, etc., Bank v. Filer, 83 Mich. 496 366
Wisner v. Davenport, 5 Mich. 501 626
Woodman v. Circuit Judge, 84 Mich. 521 ..... 41, 447
Wood v. Auditor General, 52 Mich. 28 218
Wright v. Towle, 67 Mich. 255 539
Wright v. Wilson, 17 Mich. 203 618

OCTOBER TERM, 1892.*

WILLIAM R. JOHNSON v. ROBERT MORTON AND THE MORTON BAKING COMPANY.

94 1
96 429

94 1
108 426
94 1
154 507

Capias ad respondendum—Validity of writ—Order to hold to bail —Jurisdiction of court—False imprisonment.

1. An order to hold to bail, granted by a circuit judge upon an affidavit setting forth facts indicating fraud or breach of trust, protects the party making the affidavit and applying for the issuance of the *capias*, when no malice or want of probable cause is averred or shown.
2. When an application is made to a circuit judge to hold to bail, it is his duty to hear and investigate; and if the affidavit sets up facts and circumstances tending to show fraud or breach of trust, thus bringing the case within the exceptions of the Constitution, authority to act depends upon the facts, and the determination of the judge has all of the qualities of a judicial decision, and as such protects the judge, the officer, and the party.

Error to Wayne. (Reilly, J.) Argued October 13, 1892. Decided December 3, 1892.

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

Elbridge F. Bacon (*Brennan & Donnelly*, of counsel), for appellant, contended:

1. The jurisdiction of the circuit judge to act in the premises is special and limited, regulated by, and entirely dependent upon, the statute, and, if the case presented by the affidavit does not come within all the requisites prescribed by the statute, he has

*Continued from Vol. 93.

no jurisdiction, and his action is *coram non judice;* citing *Chandler v. Nash,* 5 Mich. 409; *Elliott v. Dudley,* 8 Id. 62; *Osborne v. Robbins,* 10 Id. 277; *Perkin v. Proctor,* 2 Wils. 382; *Broadhead v. McConnell,* 3 Barb. 175; *Staples v. Fairchild,* 3 N. Y. 41; *Taylor v. Moffatt,* 2 Blackf. 305

2. The circuit judge at chambers is not invested with the powers of the circuit court, and the presumptions which apply to the judgments of a court of general jurisdiction do not apply to his acts, but his powers are limited and special, being the same in this case as those of a circuit court commissioner, and his jurisdiction must affirmatively appear; citing *Railway Co. v. Dunlap,* 47 Mich. 456; *Risser v. Hoyt,* 53 Id. 185; *Rowe v. Kellogg,* 54 Id. 206; *Taylor v. Moffatt,* 2 Blackf. 305.

3. The circuit judge having, under the statute, power to make the order holding to bail only upon the filing of an affidavit showing certain facts, unless an affidavit is filed which complies with all the statutory requirements, the judge acquires no jurisdiction to act, and his order admitting to bail is void; and the fact that he assumes to act, or decides he has jurisdiction, cannot render his acts valid; citing *Johnson v. Maxon,* 23 Mich. 136; *In re Smith,* 16 Ill. 347 *Forbes v. Hyde,* 31 Cal. 342; *Miller v. Brinkerhoff,* 4 Denio, 118; *Staples v. Fairchild,* 3 N. Y. 41; *Broadhead v. McConnell,* 3 Barb. 175; *Vredenburgh v. Hendricks,* 17 Id. 179; *Perkin v. Proctor,* 2 Wils. 382.

4. The affidavit required by the statute to authorize the arrest of a party must state facts such as in law tend to make out a case in all its parts; citing *Brown v. Kelley,* 20 Mich. 27; *DeLong v. Briggs,* 47 Id. 624; *Meddaugh v. Williams,* 48 Id. 172.

5. The application for a *mandamus* was a collateral attack upon the proceedings to hold to bail, and if the circuit judge had jurisdiction to make the order the *mandamus* could not have been granted, and, as it was granted, it is an adjudication upon that question, and is conclusive upon the parties in this case; citing *Josselyn v. McAllister,* 22 Mich. 300; *Vredenburgh v. Hendricks,* 17 Barb. 179.

6. But, assuming that it is still an open question, the affidavit was insufficient to authorize the issuing of the *capias,* or to give the judge jurisdiction to make the order holding the plaintiff to bail, for the following reasons:

a—It appears from the affidavit that whatever money came into plaintiff's hands belonging to the defendants was lawfully in his possession, and there are no allegations in the affidavit that any demand was made on plaintiff for any money in his hands, or that he ever refused to pay over any money in his

hands, belonging to defendants, and without such demand and refusal there could be no conversion by plaintiff; citing *People v. McAllister*, 19 Mich. 215; *Proctor v. Prout*, 17 Id. 473; *Brown v. Kelley*, 20 Id. 27; *Hackett v. Circuit Judge*, 36 Id. 335.

b—It does not appear from the affidavit that the facts stated therein are within the knowledge of the affiant, but, on the other hand, it affirmatively appears that the affiant's statements are founded on hearsay,—mere statements made by other parties to him; citing *Proctor v. Prout*, 17 Mich. 473; *Badger v. Reade*, 39 Id. 774; *Sheridan v. Briggs*, 53 Id. 569; *Stensrud v Delamater*, 56 Id. 144; *Luton v. Palmer*, 70 Id. 152.

c—Because there are no specific statements of amounts plaintiff received from any person or all persons. It simply states that he has received large sums of money. This would be bad as a declaration, and much more so as proof. There is nothing stated in the affidavit which would support an indictment for perjury if the affidavit is untrue, and this is the proper measure of the sufficiency of the affidavit; citing *Benson v. Bennett*, 25 N. J. Law, 166; *Imlay v. Ellefsen*, 2 East, 453; *Omealy v. Newell*, 8 Id. 364.

7. The affidavit being insufficient, the judge acquired no jurisdiction to make the order to hold to bail, and the order, and all proceedings had thereunder, are void, and afford no justification to the defendants in this action, but they are liable to plaintiff for false imprisonment on account of the arrest under such process; citing *Stensrud v. Delamater*, 56 Mich. 144; *Smith v. Bouchier*, 2 Str. 993; *Spice v. Steinruck*, 14 Ohio St. 213; *Eggington v. Lichfield*, 5 El. & B. 100; *Parsons v. Loyd*, 3 Wils. 341; *Dynes v. Hoover*, 20 How. 65; *Mosher v. People*, 5 Barb. 575; *Vredenburgh v. Hendricks*, 17 Id. 179; *Curry v. Pringle*, 11 Johns. 444; *Loder v. Phelps*, 13 Wend. 46; *Kerr v. Mount*, 28 N. Y. 659; *Miller v. Adams*, 52 Id. 409; *In re Bradner*, 87 Id. 171; *Gorton v. Frizzell*, 20 Ill. 291; *Johnson v. VonKettler*, 66 Id. 63; *Hauss v. Kohlar*, 25 Kan. 640; *Painter v. Ives*, 4 Neb. 122; *Fenelon v. Butts*, 53 Wis. 344; *Cody v. Adams*, 7 Gray, 59; *Boeger v. Langenberg*, 97 Mo. 390.

8. Even if the order to hold to bail were voidable only, and not void, and would be a protection to the parties acting under it until it was set aside, when set aside it ceased to be a protection for acts done under it while in force; citing *Perkin v. Proctor*, 2 Wils. 382; *Parsons v. Loyd*, 3 Id. 345; *Barker v. Braham*, Id. 368; *Woodcock v. Bennet*, 1 Cow. 711; *Day v. Bach*, 87 N. Y. 56; *Chapman v. Dyett*, 11 Wend. 31.

Atkinson & Carpenter, for defendants.

McGRATH, C. J. Plaintiff was arrested upon a *capias*. He moved to vacate the order to hold to bail and quash the writ on the ground that the affidavit was insufficient. The motion was denied, but, upon application to this Court, a *mandamus* was issued, directing that the writ be vacated and the proceedings quashed. Plaintiff now brings trespass for false imprisonment, and the sole question is whether the order to hold to bail, granted by the circuit judge, protects the party making the affidavit and applying for the issuance of the writ, when no malice or lack of probable cause is averred or shown.

Section 7302 of our statute provides that certain actions named, arising upon contract, may be commenced by *capias*, when the plaintiff, or some one in his behalf, shall make and attach to the writ an affidavit stating certain facts. Section 7304 provides that "personal actions may be commenced by *capias ad respondendum* in cases of claims for damages, other than those arising upon contract, express or implied, where an order for bail shall be indorsed on the writ by a judge of the court from which the writ issues or a circuit court commissioner;" and section 7305 provides that "such order shall be made only upon the affidavit of the plaintiff, or some person in his behalf, showing the nature of the plaintiff's claim." Under sections 7304 and 7305, the plaintiff is required simply to set forth the nature of his claim, and the judge or circuit court commissioner judicially determines whether the case made comes within the exceptions named in the Constitution, and whether it will warrant the indorsement and issuance of the writ. The statute expressly confers upon the judge or circuit court commissioner authority to act, and power to determine the question.

The judge to whom application was made for the order had ample power to entertain the application, and, upon the proper affidavit, to indorse the order. An affidavit

was presented in which defendant here set forth, in substance, that plaintiff here was employed as agent of affiant to sell goods and make collections; that as such agent he had collected sums of money which he had not accounted for; that he had falsely and fraudulently pretended that he had accounted for all moneys received by him; that settlements had been made with said agent upon the faith of his representations; that he had not accounted for all moneys collected; that he had collected large sums of money, and fraudulently kept back and concealed the same, and converted the same to his own use, intending to cheat and defraud his employer, and to embezzle the same; that affiant obtained his knowledge that moneys had been collected and not accounted for by comparison of the statement of moneys collected, made by said agent, with the statements made by customers; that it also appeared, by many receipts given by said agent to customers, that large sums of money had been collected by said agent that said agent had not accounted for; that it also appeared, by admissions made by said agent to affiant, that many accounts had been collected by said agent that he had not reported or accounted for. It is evident that this affidavit lacks in detail and in certainty, and for that reason it is insufficient; but it cannot be said that it sets forth no facts or circumstances indicating fraud or breach of trust. It is true that this Court, by a *mandamus*, directed the circuit court to quash the proceedings; but that was a proceeding in the nature of a review of the action of the court below, and there has been no adjudication by this Court that the proceedings were absolutely void. As is said in *Miller v. Brinkerhoff*, 4 Denio, 118, 120:

"When certain facts are to be proved to a court of special and limited jurisdiction as a ground for issuing process, if there be a total defect of evidence as to any essential fact, the process will be declared void in whatever form the question may arise. * * * But when the proof has

a legal tendency to make out a proper case, in all its parts, for issuing the process, then, although the proof may be slight and inconclusive, the process will be valid until it is set aside by a direct proceeding for that purpose. In one case the court acts without authority; in the other, it only errs in judgment upon a question properly before it for adjudication. In one case, there is a defect of jurisdiction; in the other, there is only an error of judgment. Want of jurisdiction makes the act void; but a mistake concerning the just weight and importance of evidence only makes the act erroneous, and it will stand good until reversed." *Staples v. Fairchild,* 3 N. Y. 41; *Spice v. Steinruck,* 14 Ohio St. 213; *Taylor v. Moffatt,* 2 Blackf. 305; *Hauss v. Kohlar,* 25 Kan. 640; *Forbes v. Hyde,* 31 Cal. 342; *Benson v. Bennett,* 25 N. J. Law, 166; *Harman v. Brotherson,* 1 Denio, 537; *In re Faulkner,* 4 Hill, 602; *Mills v. Collett,* 6 Bing. 85; *Brittain v. Kinnaird,* 1 Brod. & B. 432; *Stewart v. Hawley,* 21 Wend. 552; *Tompkins v. Sands,* 8 Id. 462; *Easton v. Calendar,,* 11 Id. 90; *People v. Collins,* 19 Id. 56.

Mr. Cooley, in his work on Torts (2d ed. p. 548), lays down the rule—

"That, if the jurisdiction depends upon the facts, and these are presented to a court having general jurisdiction of that class of cases, and the court decides that it has authority to act, and proceeds to do so, this decision protects, not the officer merely, but the party also."

When an application is made to a judge to hold to bail, it is his duty to hear and investigate; and if the affidavit sets up facts and circumstances tending to show fraud or breach of trust, thus bringing the case within the exceptions of the Constitution, authority to act depends upon the facts, and the determination of the judge must be held to have all the qualities of a judicial decision, and as such protects the judge, the officer, and the party.

The judgment, which was for defendants, will therefore be affirmed,

The other Justices concurred.

WILLIAM BOEHMER v. THE DETROIT FREE PRESS COMPANY.

Libel—Pleading—Question for jury.

1. In these times, when it is charged that a franchise has been procured by the use of "boodle," there can be but one inference, namely, that the persons granting the franchise were, as officials, bribed by money to make the grant.
2. Where a publication charges a township board with granting a franchise, and the officers composing the board, naming them, and the highway commissioner, naming him, with signing it, and then refers to the transaction as suspicious, and expresses the opinion that "boodle" was used in obtaining the franchise, it is for the jury to say whether, from the whole of the article, the defamatory language used applies to the highway commissioner as well as to the township board.

Error to Wayne. (Reilly, J.) Submitted on briefs October 26, 1892. Decided December 3, 1892.

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

John G. Hawley, for appellant.

Dickinson, Thurber & Stevenson, for defendant.

MCGRATH, C. J. Case for libel. Plaintiff appeals from a judgment on demurrer.

The declaration sets forth that since May 1, 1891, plaintiff was and is highway commissioner of the township of Hamtramck, in the county of Wayne; that on May 7, 1891, plaintiff, acting with the supervisor, township clerk, and one of the justices of the peace of said township, and composing the township board of said township, granted a franchise to Henry Plass and others to construct and operate a certain railway along the highway known as "Gratiot

Road" or "Gratiot Avenue," in said township; that on June 13, 1891, a portion of the said township, including a portion of said Gratiot avenue, upon which said railway was to be operated, was annexed to the city of Detroit; that on the 13th day of December, 1891, the defendant falsely, wickedly, and maliciously printed, uttered, published, and circulated of and concerning the plaintiff a certain false, wicked, and defamatory libel, in the words and figures following, viz.:

"'The Gratiot Avenue Franchise [meaning said franchise].

"'It [meaning said franchise] was carefully dissected at a meeting yesterday morning.

"'The Gratiot avenue street-car franchise [meaning said franchise] was considered yesterday morning by the committee on streets and ordinances, the board of public works, and city attorney, at a meeting held in the mayor's office. Edwin F. Conely appeared for the railway company, and argued that the city could not alter the contract entered into by the projectors of the road with the township of Hamtramck without the consent of the promoters. He claimed that the franchise was a valid one, and that the city had no control over it, except so far as the general police supervision of the street on which it is proposed to build the line is concerned. It mattered not if the contract contained no restrictions as to the time it was in operation. He said that he would immediately move to have the injunction dissolved.

"'City Attorney Casgrain said that he had made a careful examination of the franchise, and was of the opinion that it had been legally granted, although it was bad in effect.

"'Commissioner McVicar scored the township board of Hamtramck for granting the franchise under the circumstances they had. There had been no official notification, he said, given to the board of the existence of the charter. The transaction [meaning the granting of said franchise by said plaintiff and said other persons who acted with him in granting it] appeared to him to be very suspicious, and he was of the opinion boodle [meaning money corruptly paid to and received by a public officer as a bribe] had been used [meaning had been paid by the persons to

whom said franchise had been granted to the officers who had granted the same] in the same [thereby imputing and meaning that the plaintiff and the said other officers who acted with him in granting said franchise had corruptly and feloniously accepted and received money for the granting of said franchise, and thereby imputing and meaning that the plaintiff had been guilty of a felony under the provisions of section 9242 of Howell's Annotated Statutes of Michigan].'

"And the said plaintiff further avers that in the same newspaper and in the same newspaper article in which the foregoing false, scandalous, and defamatory language was contained and published as hereinbefore recited, said defendant further uttered and published of and concerning the said plaintiff the following language, viz.:

"'The franchise [meaning said franchise] is signed by Supervisor Roger Echlin, Richard Giff, Jr., justice of the peace, Columbus Burnett, township clerk, and Wm. Boehmer [meaning said plaintiff], highway commissioner.'"

The declaration alleges that the defendant falsely, maliciously, and wickedly printed, uttered, and published of and concerning the plaintiff a certain false, wicked, and defamatory libel in the words and figures set forth. The declaration does not aver that the language complained of was simply repeated by the defendant, and, in view of the averments, we cannot assume that to be the fact. The publication purports to be a report of what was said at the meeting of the committee on streets, but we cannot assume that such was the fact, or, if simply a report, that it was a correct report. The facts, therefore, upon which the claim of privilege is based do not appear.

The word "boodle" is defined as "money fraudulently obtained in public service; especially, money given to or received by officials in bribery, or gained by collusive contracts, appointments, etc.; by extension, gain from public cheating of any kind; often used attributively." See Cent. Dict. In these times, when it is charged that a franchise has been procured by the use of "boodle," there can be but one inference, viz., that the persons granting the franchise

were, as officials, bribed by money to make the grant Bribery was an indictable offense at common law, and has been made a felony by statute. The language used is susceptible to the inference that "boodle" was the operating force in the procurement of the franchise.

The publication alleges that the franchise was signed by the supervisor, the justice, the township clerk, and plaintiff as highway commissioner. The publication does not allege that improper inducements were resorted to with any one of the persons named, but generally that "boodle" was used. In *Welch v. Tribune Publishing Co.*, 83 Mich. 661, it was held that an individual juror had a right of action upon a charge that the jury had perjured themselves. *Byers v. Martin*, 2 Colo. 605; *Robertson v. Bennett*, 44 N. Y. Super. Ct. 66. The publication charges the township board with granting the franchise, but plaintiff was not a member of the township board. He appears to have joined in the grant. The publication afterwards refers to the transaction as suspicious, and to the opinion that "boodle" had been used in obtaining the same. It is for the jury to say whether, from the whole of the article, the language used applied to plaintiff as well as to the township board.

The declaration is good, and the judgment must be set aside, with costs to plaintiff. Defendant will have 20 days within which to plead.

The other Justices concurred.

94 11
119 566

94 11
123 259

94 11
f149 [1]482

In the Matter of the Estate of Gordon Dunlap, Deceased. Joseph Dunlap et al. v. Jane Dunlap, Administratrix, etc.

Gifts inter vivos—Acceptance by donees—Witness—Matters within knowledge of decedent—Waiver.

1. Donees will be deemed to have accepted a gift, unless the contrary appears, where the donation is for their advantage.
2. The disability of a widow, who claims to be the owner by gift from her husband of certain notes which the heirs seek to charge her with on the final settlement of her account as administratrix, to testify in her own behalf to the entire transaction between herself and husband relative to the gift to her of the notes, is waived by the heirs calling her as a witness, and interrogating her as far as they see fit as to such transaction; citing *Beardslee v. Reeves*, 76 Mich. 661.[1]

Error to Clinton. (Daboll, J.) Argued November 2, 1892. Decided December 3, 1892.

Appeal by heirs from an order of the probate court allowing the final account of the administratrix. Judgment of circuit court, affirming that of probate court, affirmed. The facts are stated in the opinion.

John H. Fedewa and *Edwin H. Lyon*, for appellants.

High & Walbridge, for appellee.

McGrath, C. J. This is an appeal by heirs from an order allowing the final account of the administratrix, who is the widow of decedent. Gordon Dunlap died August 20, 1889, without issue. He left a large amount of personal property other than the notes in controversy. The disputed question is as to whether certain notes,

[1] See *Lilley v. Insurance Co.*, 92 Mich. 153.

aggregating some $18,000, held by the widow, and claimed by her as a gift from her husband during his life-time, should be inventoried and treated as a part of the estate, and accounted for by her as administratrix.

At the hearing in the probate court the heirs called the widow as a witness, and examined her fully as to the circumstances of the gift to her, and, among other things, she was asked to make out a detailed list of all the notes given to her by her husband, with the date of each, the time, the name of payee, name of maker, place of payment, amount, rate of interest, indorsements of payments, and the history of each note, and furnish the same, which she did. The list was headed, "Memorandum of Notes belonging to Jane Dunlap, given to her by Gordon Dunlap," and the notes ranged from $5 up to $600.

The probate court allowed her account, refusing to treat the said notes as the property of the estate. The heirs appealed to the circuit, and the issue was there narrowed to a question of gift or no gift. On the trial in the circuit court the heirs again called the widow as a witness, who testified as follows:

"I made application for the administration of my husband's estate on the 11th day of September following his death. A few days after my return I was at Joseph Harris' house in Ovid, and had a conversation with him and Mrs. Harris, relating to some notes that I told him Mr. Dunlap had given me more than a year before his death, and told me what to do with them.

"*Q. What notes did you refer to?*

"*A. He had a pocketbook of notes.*

"*Q. A pocketbook of $18,000 of notes?*

"*A. Yes, or thereabouts.*

"*Q.* You say you told him your husband had given you these notes more than a year before his death?

"*A.* Yes, sir.

"*Q.* What else did you say about it?

"*A.* I asked him what he thought about it. He said he didn't know; and I said I was going to know,—was

going to find out. I said nothing further to Mr. and Mrs. Harris. This paper shown me, marked 'Exhibit 3,' is a list of the notes making up the $18,000, or such a matter, of notes that I had reference to in my talk with Mr. Harris. The list was made out under my direction.

"*Q.* I call your attention to the headings of the columns, and ask you whether or not these headings represent the various essentials or parts of the notes that they purport to represent.

"*A.* It represents the notes.

"*Q.* You don't understand me. Take the first column, headed 'Date of Note,' and state whether or not that is a statement of the dates of the notes at the time you furnished the list.

"*A.* Yes, sir.

"*Q.* And this list that you have now identified was a list, was it not, of all the notes in your possession at that time that originally made up this $18,000 of notes, or notes purchased with the proceeds or the money paid upon the original $18,000 of notes?

"*A.* Yes, sir.

"*Q.* Is it not a fact, Mrs. Dunlap, that you said to Mr. Harris, 'Suppose that a man should turn over to his wife a bundle of notes, whether or not that would constitute a good gift?'

"*A.* I don't think I put it in that way.

"*Q.* Then, how did you put it?

"*A.* I told him Mr. Dunlap had given them to me, and he told me to give so much to one and so much to the other.

"*Q.* You are sure, now, that you said to him on that occasion, there in the presence of Mrs. Harris, that your husband had given you those notes something over a year before his death?

"*A.* Yes.

"In the spring of 1890, some time, I saw Mr. Van Vleet at my residence in the village of Ovid. He broached the subject of these notes, and told me he was interested in the estate in behalf of some of the heirs. He asked me if I was willing to show him the notes, and I told him: 'No, sir; I didn't have to. When the judge of probate called for them they were ready.'

"*Q.* What did you say to him about your control of the notes?

"*A.* He wanted to know what I did with the money,

and I told him I had deposited it as a separate matter of my own,—of my personal property; and I was to give Joseph $7,000 of this money, and Elon $3,000, and the balance was mine.

"*Q.* When did you tell him you would pay it to Joseph and Elon.

"*A.* I was not to pay it until it was collected. I was not to pay it as fast as it was collected, but I was to pay it when I got the amount.

"*Q. Got what amount?*

"*A. When it was all collected.*

"*Q. What amount?*

"*A. Eighteen thousand dollars.*

"*Q. When you got the whole of the notes?*

"*A. Yes, sir.* I didn't have to pay it to them until after Mr. Dunlap's death.

"*Q.* Is that what you told him, or are you telling something else?

"*A.* That is what I told him.

"*Q.* You told him you didn't have to pay it to them until after Mr. Dunlap's death?

"*A.* No, I did not have to.

"*Q.* Did you say you didn't have to until after Mr. Dunlap's death?

"*A.* No; not until I settled up the estate.

"*Q.* When did you tell him that,—the first time or the second?

"*A.* I don't know.

"*Q.* Did you tell him anything further, with reference to the notes, upon either of these occasions?

"*A.* I think not.

"*Q.* Have you those notes with you, Mrs. Dunlap, making up the $18,000 of notes, or the notes purchased with their proceeds?

"*A.* Yes, sir.

"*Q.* I wish you would produce them. (Witness produces notes.)

"*Q.* What do you say as to whether or not these 12 notes that I show you are a part of the notes that you had reference to as making up the $18,000 of notes?

"*A.* These are part of the notes.

"The notes marked 'Exhibits 4, 5, and 6' were included in that $18,000. I know John Van Sice and his wife, of Ovid. I have known them four or five years. I was at their house several times after the death of my husband.

Upon one of these occasions I remember having a conversation with Mrs. Van Sice about these notes. None of the three had been paid at that time. Mrs. Van Sice asked me to consent that the payment on the notes be extended. I told her if the money was mine it would be different.

"*Q.* Did you not tell her that these notes constituted a part of the estate of Mr. Dunlap?

"*A.* No, sir.

"*Q.* Didn't you further tell her, in that connection, if the money was yours it would be different?

"*A.* I said if all the money was mine. I told her I intended to collect the notes, and pay up the heirs with the money, and hold the mortgages.

"*Q.* You say that you told her that if the money was all yours it would be all right, but you intended to collect up the interest and pay off the heirs and hold the mortgages?

"*A. Yes, sir; the notes were mine.*

"*Q. The notes were yours, and you intended to do that?*

"*A. Yes.*

"I didn't tell her the notes constituted a part of the estate of Mr. Dunlap, and I had to have them paid because I had to settle up the estate. This was along in the winter of 1889-90. I was, as a matter of fact, collecting the money in on the notes at that time, and was not renewing them. I never had a conversation with Mr. or Mrs. Van Sice, after my husband's death, in which I stated that I had attempted to get my husband to make a will, or to deed me some of his property; nor did I state to Mrs. Van Sice, in the conversation referred to, that I had attempted in my husband's life-time to get him to make some provision for me, but that he had declined to do so, saying the law was good enough for me. I never made such a statement to Mr. Van Sice, either."

The heirs then called Mr. Van Vleet, Mrs. Van Sice, John Van Sice, Mrs. Harris, and Joseph Harris as to the conversations had with the administratrix after her husband's death. Two or three other witnesses were called, who testified to dealings with decedent, as to their notes, which were included in the list, relative to payments of interest, extensions of time, etc., after the date of the

alleged gift. The list of the notes was then put in evidence, and the heirs rested. The administratrix was then recalled by her own counsel, and permitted to go fully into the transactions between her husband and herself, relative to the gift, her continued possession of the notes, and her husband's agency for her respecting them.

The jury found for the appellee, and the heirs bring the case here for review.

The principal controversy is as to the admissibility of the testimony of the appellee. We think that the question is ruled by *Beardslee v. Reeves*, 76 Mich. 661. That was trover for the conversion of certain notes and a mortgage, which defendant claimed as a gift from his father before his father's death. Defendant was summoned into the probate court by the administrator, to answer interrogatories as to the disposition of the property in dispute. On the trial in the circuit the stenographer who took the minutes of defendant's testimony in the probate court was called, and read from his minutes, to show that defendant testified that he had the notes in his possession, and that he had received the money on the mortgage. On cross-examination the stenographer was asked if defendant did not also state on that examination that his father, before he died, gave and delivered the mortgage to him, to which question, under objection, he answered, "Yes." The Court say:

"It is contended that this was testimony of a fact equally within the knowledge of his father, now deceased, and consequently barred by the statute above noted. We think the testimony, under the circumstances, was admissible. It would seem that upon the inquisition in the probate court the disability of the defendant to testify under this statute was waived by the plaintiff. But, whether this was so or not, if any part of such examination was used by the plaintiff in the circuit court, the defendant was entitled to the whole of his testimony given

on such examination, or such parts thereof as he deemed material. See *Smith's Appeal,* 52 Mich. 415."

In the present case the widow was not only called to the witness-stand in the probate court, interrogated fully as to the transaction between herself and husband, and asked to make out a list giving the history of the notes, but she was called to the stand in the circuit court, asked to produce the remaining notes, which she did, her attention was called to the list which she had made, and the same was identified, and introduced in evidence. This list showed that several of the notes had been renewed during the life-time of her husband, and after the date of the alleged gift; that several of these renewal notes had been taken in her husband's name; and that others had been paid to her since her husband's death, and the amounts appropriated by her. The other testimony brought out upon her examination by counsel for the heirs cannot be said to have been confined to admissions made by her after the death of her husband. The widow's disability was waived, not only in the probate court, but in the circuit. The heirs could not be allowed to go into matters equally within the knowledge of the deceased, so far as they deemed necessary to charge her with these notes, and then revive her disability, so as to prevent her from giving the entire history of the transaction, and thus explain what had been drawn out by counsel for the heirs.

There is no force in the objection that there could be no valid gift to Joseph and Elon without an acceptance on their part. The donation being for their advantage, they will be deemed to have accepted it, unless the contrary appears. *Preston v. Sonora Lodge,* 39 Cal. 116; *Howard v. Bank,* 40 Vt. 597; *Bostwick v. Mahaffy,* 48 Mich. 342.

We find no error in the record, and the judgment is affirmed, with costs to appellee.

The other Justices concurred.

94 18
105 418

DAVID G. VANDERHOOF v. JOHN PRENDERGAST.

Attachment—Dissolution by certiorari—Replevin—Fraudulent conveyances—Question for jury.

1. The effect of suing out a writ of *certiorari* by a defendant to review a justice's judgment in an attachment suit, and of giving the statutory bond for the payment of any judgment that may be rendered in the circuit court, is to dissolve the attachment; citing *Bushey v. Raths*, 45 Mich. 185.
2. Where, in replevin for attached property, there is evidence tending to show its purchase in good faith by the plaintiff from the attachment debtor before the levy of the attachment, the defendant can only justify his holding on the ground that the transfer was fraudulent as to creditors, and this is a question for the jury.

Error to Saginaw. (Gage, J.) Submitted on briefs November 16, 1892. Decided December 3, 1892.

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

Harris & Kendrick, for appellant.

F. E. Emerick, for defendant.

MONTGOMERY, J. Plaintiff brought replevin for 90,000 feet of saw-logs. Defendant justified under a writ of attachment issued against the goods and chattels of one R. M. Vanderhoof, brother of plaintiff, and offered evidence to show that the property originally belonged to the defendant in attachment, and was transferred to the plaintiff in fraud of creditors. The defendant offered in evidence the writ of attachment, affidavit, and proceedings before a justice of the peace. It subsequently appeared that the attachment case proceeded to judgment before the justice, but that the judgment so obtained was reversed on *certiorari* after the commencement of the present suit. The plaintiff offered

various objections to the sufficiency of these proceedings, which were overruled by the circuit judge, and judgment was entered for the defendant for costs, but the judge found the plaintiff to be the general owner of the property, and therefore gave no judgment for its return.

It appeared by testimony that after the case had been removed from justice's court to the circuit court by *certiorari* the defendant was notified of that fact, and that a *certiorari* bond had been given for the payment of the debt, and that he still refused to deliver the property to the plaintiff. We think the effect of suing out the *certiorari* and giving the statutory bond for the payment of any judgment that might be rendered in the circuit court was to dissolve the attachment.

It was held in *Bushey v. Raths,* 45 Mich. 185, 186, that an appeal by a defendant released property from the lien of the attachment. As the condition of the *certiorari* bond is substantially the same, we see no reason for distinguishing between the two cases. The case of *Treat v. Dunham,* 74 Mich. 114, is not opposed to *Bushey v. Raths.* In that case the judgment was against the plaintiff, and of course the appeal-bond gave him no security for the payment of his debt.

The circuit judge was also in error in directing a verdict for the defendant for another reason. There was evidence tending to show a purchase of this property in good faith by the plaintiff before the levy of the attachment, which ran not against the plaintiff, but against a third person. Under these circumstances, even though the writ may have been valid and still in force when the demand was made, the defendant could only justify his holding on the ground that the transfer from R. M. Vanderhoof to the plaintiff was fraudulent as to creditors. This presented a question for the jury, which should have been submitted to them under proper instructions.

It becomes unnecessary to examine the other errors assigned.

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

The other Justices concurred.

94 20
109 440

94 20
140 322
140 323
j140 325

GEORGE S. WILSON, ADMINISTRATOR, ETC., v. THE MICHIGAN CENTRAL RAILROAD COMPANY.

Railroad companies—Injury to employé—Contributory negligence—Violation of rules—Directing verdict—Error without prejudice.

1. So long as the result attained by the direction of a verdict is the right one under the law, the reasons given by the court for such action, even though fallacious, cannot be prejudicial.
2. Where an experienced freight brakeman, instead of using side ladders provided by the company for mounting cars, goes between the cars of a moving train, and crawls over or under the bumpers of the cars, in order to reach a foothold or handhold on the opposite side, which he could use as a ladder to enable him to get to the top of the cars, no claim can be sustained for damages on account of the resulting consequences; citing *Glover v. Scotten*, 82 Mich. 369.
3. The contention that, because the defendant must have known that many of its employés, in violation of its rules, were frequently accustomed to go between the cars of moving trains, therefore it cannot be considered negligence for them to do so, can have no force in this case, however conclusively it may be made to apply to strangers, who, seeing repeated violations of known rules, are led into the belief that they are abrogated, or to employés who are compelled by positive orders to violate such rules, or when such a system of timing the trains or conducting the business of the company is adopted as to make it necessary for them to violate known rules of safety in order to do the work required of them. When no such condition exists, employés should observe rules made for their protection

as well as for the safety of their fellow-workmen, and, failing in this, the fault must be considered their own; citing *Brennan v. Railroad Co.*, 93 Mich. 156.

Error to Jackson. (Peck, J.) Argued November 16, 1892. Decided December 3, 1892.

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

Blair, Wilson & Blair, for appellant.

Parkinson & Day, for defendant.

DURAND, J. The declaration in this cause contains two counts. The neglect charged in each count is that the defendant, in violation of its duty, negligently caused to be used upon the freight train upon which plaintiff's decedent, Samuel H. Wardwell, was employed as a brakeman, a certain car which was unsafe, in that the wood in which certain screws or bolts were fastened, which held in place a certain iron rail or bar on the end of the car, used by the brakeman as a foothold to step upon, was rotten and decayed, and that, when the deceased attempted to use it for that purpose, it pulled out of the rotten wood, and gave way, and he was killed. In the first count it is charged that the accident occurred by reason of his having stepped upon this foothold, and, in the second count, that it occurred by reason of his grasping it with his hands to support his weight, and that by reason of the defect in the wood it pulled out, and he was precipitated to the ground, and killed by the moving train. The declaration also contains the usual and necessary averments of due care on the part of the deceased, and that the accident was without fault on his part.

The evidence shows that the deceased was, at the time of the accident, a brakeman in the defendant's employ,

and had been engaged for it in that capacity for several years. He was a strong, healthy man, of good habits and intelligence, and was 43 years of age. He was a trusty man, thoroughly experienced in the business, and fully aware of the dangers attending it, as well as of the necessity of observing great care in the performance of his duties in order to protect himself from the serious accidents to which those engaged in that employment are constantly subjected.

On the morning of August 1, 1890, he left Jackson with a freight train, upon which he was acting as rear brakeman, and arrived at Lansing at about 4:30 o'clock A. M., standard time. The train stopped at Lansing for a short time, where some cars were cut out, but, as they were taken from the front part of the train, the work connected with it was attended to by the head brakeman, whose duty it was, and the deceased had nothing to do with it, nor any duty to perform in relation to it. There was therefore no reason growing out of his employment, or connected with his discharge of any duty or service for the defendant, requiring him to leave the train at all during its stop at Lansing. He did, however, do so for some purpose of his own, and the conductor, who is plaintiff's witness, testified that before the train started he saw him leaning against a car on a side track east of the train, and some three or four feet south of the south line of Michigan avenue, and gave him the signal that the train was about to start; that, when he was motioned to, he walked towards the train, after the train got under headway. He was walking southward, and the train was moving northward. This was the last time he was seen before he was killed.

The Michigan avenue referred to is a street running east and west at right angles with the railroad track, and it appears from the testimony that at least 9 or 10 cars of the train were south of the avenue at the time it was started. There is no living witness who saw what happened

after the train started, but it is apparent from the circumstances disclosed by the undisputed testimony that the deceased walked about 75 feet south of Michigan avenue before he attempted to get on the train, and during this time several cars passed him that had side ladders upon them, and which he could have used with comparative safety in getting aboard the train, had he chosen to do so. This he did not do, but went to the rear end of a car described as a "C. S. L.," or Canada Southern Line car, furnished by the Chicago & Eastern Illinois Railroad Company, and which was then being drawn as a part of the train by the defendant, and attempted to get aboard at that place. In doing so it is entirely clear from the testimony that he passed in between the cars from the easterly side of the train, and crawled either over or under the bumpers, and attempted to get on top of the car by the use of what is variously called by the witnesses a "handhold" or "foothold," which was fastened into the west side of the rear end of the car. When his absence was discovered it was found that the handhold referred to had pulled out of the wood; that the wood into which it was fastened had become rotten, and, when the strain was put upon it, it gave way, and he was dragged along under the train and killed.

Testimony was given in relation to the inspection of the car in the ordinary way, and that the defect complained of was latent, and not discoverable by the ordinary methods of inspection; that it appeared to be a dry rot, which the paint on the car had concealed; and it was also proven that the car did not belong to the defendant, but was being drawn by it in the usual manner pursued by a prudent railroad company, with cars belonging to and received by it from other railroad companies.

It also appears from the testimony that rule 29 of the

defendant company, among other things, contains the following:

"Many of the foreign and line cars running over this road are not equipped with ladders like those on Michigan Central cars; some having the ladders on the ends, others on the sides; some having stirrups on the bottoms of the car bodies, and others without. Trainmen and switchmen will examine the ladders of all cars, and note the situation and condition, before making use of same. * * * Jumping on or off cars or engines in motion, entering between cars in motion to couple or uncouple them, and all similar imprudences, are forbidden. Every employé is required to exercise the utmost caution to avoid injury to himself and fellow-employés, especially in coupling, switching, or other movements of cars and trains."

The deceased was entirely familiar with this rule. In a paper signed by him on December 21, 1884, and delivered to defendant's agent, he admitted that this rule had been read over to him; that he was furnished with a copy of it; that the dangers of the employment were explained to him; that he was enjoined to use constant and proper care to avoid injury to himself and others; and in it he promised to make himself familiar with, and be governed by, the rules and regulations of the company. It appears that he had receipted for 10 different time cards, each of which contained the rule referred to, and that he had receipted for the time card No. 286, in force at the time of his death, and which included the same rule. Besides this, being an intelligent, trusty, and sober man, he had obtained by long experience a thorough knowledge of the great danger he was placing himself in by getting onto a moving train in the manner he did.

Under this state of facts, the circuit judge took the case from the jury, and ordered a verdict in favor of the defendant. The plaintiff contends that he did so erroneously. As the action of the circuit judge in directing a

verdict for the defendant was right under the plaintiff's own showing, it is unnecessary to adopt, or even to discuss, the reasons he gave for such action. So long as the result attained is the right one under the law, his reasons for such action, even though fallacious, cannot be prejudicial.

The fact that the defendant may have neglected a duty, and that an injury has resulted, is not all that it is necessary to show to entitle the plaintiff to recover. In addition to this, it is necessary for it to appear that the person injured was in the exercise of due care, and that he did not have a share in contributing to the resulting injury. The latter is as important a factor in an action for damages for negligence as the former. This rule is unquestioned, and is to be fairly and promptly recognized in all cases when its application is required.

In this case it is clear that the decedent was guilty of as serious negligence, and did as much to contribute to the injury, as the defendant is charged with having done. He was fully advised of the danger, and from his own knowledge and experience was entirely able to judge of the care required of him in order to protect himself from serious injury. He was not in the performance of any duty for the company after he left and before he attempted to get aboard the train at Lansing. He was not ordered by the defendant or any of its officers or agents having authority to give such orders to take the risk he did, and there was no reason for his waiting until the train was in motion before attempting to get upon it. There was no reason why he should have permitted cars to pass by him that had side ladders upon them, which he could have used with safety, without using them for the purpose of climbing upon the train. The method he adopted of going in between the cars of a moving train, and crawling over or under the bumpers, in order to reach a foothold

or handhold on the opposite side, which he could use as a ladder to enable him to get to the top of the cars, was so unnecessary, and so extremely hazardous, that it must be held that he was guilty of such contributory negligence as to preclude the plaintiff from recovering for the injury, even though the defendant was also negligent in not having made proper inspection of the car. The defendant having furnished side ladders which he could have used without danger, it was his duty to use them for the purpose for which they were intended. Instead of doing so, he took a course which was the most dangerous he could possibly have chosen, and one which no person of ordinary intelligence or observation should have taken. Having done so, no claim can be sustained for damages on account of the resulting consequences. *Glover v. Scotten*, 82 Mich. 369.

The contention that, because the defendant must have known that many of its employés, in violation of its rules, were frequently accustomed to go between the cars of moving trains, therefore it cannot be considered negligent for them to do so, can have no force in this case, however conclusively it may be made to apply to strangers, who, seeing repeated violations of known rules, are led into the belief that they are abrogated, or to employés who are compelled by positive orders to violate such rules, or when such a system of timing the trains or conducting the business of the company is adopted as to make it necessary for them to violate known rules of safety in order to do the work required of them. When no such condition exists, employés should observe rules made for their protection as well as for the safety of their fellow-workmen, and, failing in this, the fault must be considered their own. *Brennan v. Railroad Co.*, 93 Mich. 156. In this case the evidence of contributory negligence is undisputed, and is so conclusive that there is no fact in regard to it.

which should have been left to the determination of the jury, and the circuit judge did right in directing a verdict for the defendant.

It follows that the judgment must be affirmed, with costs.

The other Justices concurred.

THE PEOPLE v. WILLIAM HODGKIN.

Sodomy—Sufficiency of evidence.

Emission is necessary to the consummation of the offense of sodomy, and, while it may be inferred from proof of penetration and the other circumstances of the case, it is a fact which the prosecution must establish before a conviction can be claimed.

Error to Sanilac. (Beach, J.) Argued November 17, 1892. Decided December 3, 1892.

Respondent was convicted of the crime of sodomy, and sentenced to the State House of Correction at Ionia for three years. Judgment reversed. The facts are stated in the opinion.

J. B. Houck and *Charles H. McGinley*, for respondent.

A. A. Ellis, Attorney General, and *W. H. Burgess*, Acting Prosecuting Attorney, for the people.

MONTGOMERY, J. The respondent was informed against under section 9292, How. Stat., and convicted of the crime of sodomy. The circuit judge instructed the jury that the evidence of the offense was complete upon proof of penetration only. The defendant assigns error upon this

instruction, which assignment presents the only question which we deem it necessary to consider.

The statute does not, in terms, define what shall constitute the offense. There has been some disagreement in the cases upon the question of whether proof of emission is necessary to establish the offense at the common law, the two offenses of rape and sodomy having been regarded by some courts as kindred, so far as relates to this question; but, as stated by Mr. Bishop, "though writers generally assume that rape and sodomy stand on common ground, reflection may suggest differences." 2 Bish. Crim. Law, § 1127. In England the question was not fully settled until 1781, when it was held that proof of emission was necessary to the consummation of the offense. *Hill's Case*, 1 East, P. C. 439. See *Stafford's Case*, 12 Coke, 37. The American cases are not uniform. The following cases support the claim of the prosecution that proof of penetration only is necessary: *Com. v. Thomas*, 1 Va. Cas. 307; *Comstock v. State*, 14 Neb. 205 (15 N. W. Rep. 355); *Pennsylvania v. Sullivan*, 1 Add. 143. In North Carolina and Ohio the doctrine that emission is necessary obtains. *State v. Gray*, 8 Jones (N. C.), 170; *Williams v. State*, 14 Ohio, 226.

The question has never been decided by the Supreme Court of this State. But the Legislature in 1841 enacted a statute, the second section of which reads:

"*Whereas*, upon the trials for the crimes of buggery and rape, * * * offenders may escape by reason of the difficulty of the proof which has been required of the completion of those several crimes: for a remedy thereof, be it enacted, that it shall not be necessary, in any of these cases, to prove the actual emission of seed, in order to constitute a carnal knowledge, but that carnal knowledge shall be deemed complete upon proof of penetration only."

By Rev. Stat. 1846, p. 730, this statute was repealed. A subsequent statute has been enacted which dispenses with the necessity of proof of emission in rape. It is contended

that the effect of the repeal of the statute of 1841 is to revive the common law, and such, we think, is the general rule (End. Interp. Stat. § 475), although this rule may perhaps be subject to exception. See *State v. Slaughter,* 70 Mo. 484. But it will be observed that the act of 1841 was a clear legislative recognition of the common-law rule as laid down by the Ohio and North Carolina courts, and we think that the repeal of this statute evinces a purpose to revive the common-law rule as it was then understood to obtain in this State, and should be given force in determining what the common-law rule in this State then was, prior to the enactment of that statute. We think, therefore, that proof of emission was a necessary ingredient of the offense, and, while it may be inferred from proof of penetration and the other circumstances of the case, yet it is a fact which the prosecution must make out before a conviction can be claimed, and the instruction was therefore erroneous.

Judgment will be reversed, and a new trial ordered. The prisoner will be remanded to the custody of the sheriff of Sanilac county.

The other Justices concurred.

ISAAC ROSENFIELD v. JOSEPH M. FORTIER.

Contract—Sale on commission—Estoppel.

1. Where a traveling salesman is entitled to receive the excess on sales above the list price of the goods, the consent of his employer to his making sales at less than the list price will not imply an agreement to pay him the discount thus made to effect a sale.

2. A claim made by the salesman for credit for such discount, on reporting the sales, will not affect the right of the employer to fill the orders at the reduced price, and thus secure the benefit of the trade, he allowing the salesman the agreed commission for making them.

Error to Wayne. (Hosmer, J.) Submitted on briefs October 7, 1892. Decided December 22, 1892.

Assumpsit. Plaintiff brings error. Reversed on original hearing, and affirmed on a rehearing. The facts are stated in the opinions.

Adam E. Bloom, for appellant.

Cowles & Jerome, for defendant.

MONTGOMERY, J. Plaintiff brought suit to recover for commissions earned in selling tobacco for the defendant. The circuit judge directed a verdict for the defendant, and the plaintiff brings error.

The defendant is a dealer in tobacco, having his place of business at Montreal, and plaintiff is a traveling salesman, and was engaged in that business in 1889, carrying samples in different lines. In May, 1889, he called upon defendant, and had some conversation with him, whereupon defendant addressed the following letter to him:

"MONTREAL, May 28, 1889.

"MR. ROSENFIELD, Care Balmoral Hotel, City.

"*Dear Sir:* Herewith I send you the following samples, care of above address, viz.: [mentioning samples, with price of each, and number of bales of each on hand]. Hoping you will find them O. K., I remain,

"Yours, etc., J. M. FORTIER.

"Commission to be paid when the goods are paid for. Commission as follows: 1 per cent. on all sales accepted by me, and whatever above these prices are yours. Terms, four months. J. M. F."

On the trial the plaintiff testified that this letter truly stated the agreement between the parties, and was the

contract under which he operated. Later in the case the plaintiff testified that in July, 1889, he met defendant in New York, and that defendant then told him to receive the best offers that he could get, "'and send in the orders, and if I can possibly fill them I will do so, and if I do not fill them I shall always notify you.' He told me to sell goods at any price that I could get offered,—to accept the offer subject to his approval." The plaintiff subsequently testified that a further contract was entered into between him and Mr. Fortier in May, 1889, which was a long typewritten contract, but which was not produced on the trial, and the court excluded the oral testimony of its contents, to which ruling of the court there is no exception nor just ground for complaint.

The first sale was June 7, 1889, to John B. Heil, a quantity of tobacco at 75 cents; and in sending in this order plaintiff stated: "Please credit me on this, when paid, 10 cents per pound." This tobacco was listed at 75 cents. He made claim, however, that he was authorized by a telegram from Mr. Fortier to cut the price to 65 cents to make the sale. The telegram was not produced, but, assuming that the proof was competent upon this point, it would not follow that he was entitled to charge the excess of price over 65 cents. Under the written agreement the plaintiff was entitled to charge the excess of price over the list price named only, and the consent by the defendant that he sell at less than the list price would not imply an agreement to pay the difference between the list price and the discount price which defendant was willing to make to the trade. Other similar sales were made, accompanied by requests to be credited with discounts, when sales were made at or below the list price. The plaintiff's claim as to these transactions is that the defendant is estopped, having filled the orders after receipt of these requests, from disputing plaintiff's claim to com-

missions. There is no element of an estoppel present. Under the agreement it was the plaintiff's duty to sell the tobacco at the best price that could be obtained, and the fact that he put forth claims for compensation in excess of the price agreed upon could not debar the defendant from the right to fill the orders, and get the benefit of the trade, allowing plaintiff the agreed price for sales.

The plaintiff also made a claim for commissions on sales made by the defendant direct to dealers in the United States, claiming that the agreement between him and defendant entitled him to commissions on all such sales; but, according to his own testimony, whatever agreement was in existence between him and defendant—whether we accept the first statement that the letter addressed care of Balmoral Hotel was the contract, or that there was a typewritten contract—was in writing. The terms of this contract were not before the court by any competent testimony, and the court therefore committed no error in disallowing this testimony.

Another item of plaintiff stands on a different ground. This is the charge for commissions and overprice on 27 bales of Sumatra, sold to Benjamin Labe. It appears that June 17 the defendant made out a new price list, which was furnished to the plaintiff, which price list included 50 bales of B. B. 2 Sumatra, listed at 50 cents. The plaintiff sold Labe 2 sample bales, 1 of which was out of the 50-bale lot listed, at 55. September 30 defendant wrote Rosenfield:

"I am also in receipt of a letter this morning from Mr. B. Labe, offering me 50 cents for Bedoga A. 2, 13 bales, and 15 bales of B. B. 2, which he states is what you offered him. Now, you know I cannot sell A. 2 at 50 cents and make any money, but I telegraph him to-day that there are only 10 bales of A. 2 and 17 bales of B. B., and I will let him have the 27 bales at 50 cents net cash. So I wired you to-day that I could only give you 1 per

cent. on the whole sale, and 1 cent per pound on the 17 bales B. B. 2 only. If this is satisfactory to you, I will ship it; if not, I cannot do so."

On October 3 defendant wrote plaintiff:

"Re Benj. Labe, I telegraphed him same day as I wired you,—the 30th Sept.,—telling him I had only ten bales of A. 2 and 17 bales of B. B. 2, and asking him if I might ship them; but have not yet been favored with a reply, and cannot ship till I get one. If I do ship the order, I can only allow you 1 per cent. commission on the whole lot, and 1 cent per lb on 17 bales only."

On December 26 defendant furnished a statement to plaintiff, in which he credited on account of the sale to B. Labe a commission of $23.58, and 1 cent per pound on 17 bales, $29.83. As payment had not yet been received from Mr. Labe and Gray, Morales & Co., another customer, the amounts credited for sales to them were deducted, and a check sent for the balance. On February 19, 1890, the defendant wrote to plaintiff, "Gray, Morales & Co. have not yet settled. B. Labe has, but made a reduction of $247.15." It does not appear upon what ground the deduction by B. Labe was made. On May 12, 1890, a statement was rendered in which plaintiff was credited with the 1 per cent. commission only on the sale to Labe,—$23.58,—but was not credited with the 1 cent per pound which had been credited in previous statements,—$29.83. Plaintiff claimed that he was entitled to 5 cents per pound on this sale, but, in view of the conditions upon which defendant made the shipment, the credit of 1 cent per pound is all that he was entitled to; but he was not credited with this in any settlement, and, so far as the record shows, has not been paid this $29.83. It does not appear that the reduction made on the sale to Labe was owing to any fault of the plaintiff, and his charge for the services in making the sale could not be defeated by any

arrangement between defendant and Labe, unless the reduction was made on account of misstatements made by the plaintiff, and of this there is no proof in the record. It was error, therefore, to instruct the verdict for the defendant, unless there was a settlement which concluded the plaintiff.

On the 21st of June, 1890, defendant inclosed a check for $40.81, which was the amount remaining unpaid, exclusive of the 1 cent per pound on 17 bales, and wrote plaintiff:

"I beg to inclose you check for $40.81, as per statement rendered you on May 12, being in full settlement of all commissions, etc., due you."

Plaintiff testified that he accepted this check under protest. It appears that he at once wrote the defendant, for on July 4 defendant replied as follows:

"Your favor of the 25th June at hand, and contents noted. In reply, I beg to say the check for $40.81 sent you is in full of all commissions due you to date, as per statement sent you."

We think, under this evidence, it was a question for the jury whether there had been an account stated between the parties. See *Mortlock v. Williams*, 76 Mich. 568; *Turnbull v. Boggs*, 78 Id. 158.

For the error pointed out the judgment must he reversed, and a new trial ordered.

The other Justices concurred.

A rehearing was granted upon the application of defendant, and the case reargued February 7, 1893. Upon March 10, 1893, the following opinion was filed:

MONTGOMERY, J. A rehearing has been ordered in this case, and a reargument had.

The only item which it is found by our former opinion the plaintiff had offered sufficient proof of to justify submitting the case to the jury was a charge of commissions and overprice on 17 bales of tobacco sold to Benjamin Labe at some date after October 3, 1889. The opinion was written with the understanding that this was a part of the 27 bales described in the item of plaintiff's bill of particulars under date of July 25, 1890. A re-examination of the case has satisfied us that we were mistaken in this, and that this item was not the one, nor was it included in the 27-bale item, and was not included in the plaintiff's bill of particulars. This conclusion necessarily leads to a different result.

The judgment of the court below will stand affirmed, with costs.

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

WARREN BRADLEY v. THE FORT WAYNE & ELMWOOD RAILWAY COMPANY.

94 35
99 190

94 35
110 495

94 35
e135 29

94 35
137 233

94 35
139 174

94 35
f143 449

94 35
d147 174

94 35
f158 674

Street railways—Injury to passenger—Contributory negligence—Question for jury.

Plaintiff was injured by being thrown from a street car while preparing to alight after signaling the conductor at one of the usual stopping places. The negligence complained of was that the conductor led plaintiff to believe that he was about to stop the car by reaching his hand to the bell rope, and, in reliance upon his action, plaintiff put himself in a position to step safely off, which he could have done had the car stopped, but the conductor wrongfully neglected to stop the car, whereby plaintiff, by a *sudden jerk*, was thrown off and injured. There was

no evidence to show what caused the sudden jerk which threw plaintiff off. And it is held:

a—The question of plaintiff's contributory negligence was properly left to the jury; but—

b—It is not made to appear by affirmative testimony that the street-car company neglected any duty, except to stop when first signaled by plaintiff, which neglect does not appear to have caused the injury, but rather the sudden jerk, the cause of which is not shown.

Error to Wayne. (Brevoort, J.) Argued October 13, 1892. Decided December 22, 1892.

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

Edwin F. Conely and *Orla B. Taylor*, for appellant.

S. E. Engle, for plaintiff.

LONG, J. Plaintiff entered one of defendant's cars at Griswold street on June 16, 1888. It was an open car, going west, and plaintiff intended to get off between Eighteenth and Nineteenth streets. When getting ready to alight he claims to have been thrown off by the sudden starting of the horses, and injured. He had judgment for $300.

His claim upon the trial was that he took a seat about midway of the car, facing forward. When nearing the place where he intended to alight, he signaled the conductor to stop. The conductor at this time was at the rear end of the car. The plaintiff says that he saw the conductor put his hand upon the bell rope, and supposed from this motion that he was going to stop the car; that the conductor saw him signal to have the car stopped. The plaintiff then prepared to get off, went to the side of the car, took his satchel and placed it upon the seat, resting his left hand upon it, and with his right hand grasped one of the standards. His right foot was upon the floor

of the car, his left upon the platform. Seeing that the conductor did not stop the car, he let go with his right hand to again signal him to stop, and before he could get hold of the standard again, by some sudden motion of the car, he was thrown off and injured. The testimony does not show what caused the motion which threw him off, as he says he does not know whether the driver struck the horses with the whip or lines, or that he struck them at all.

The negligence complained of is that the conductor led the plaintiff to believe that he was about to stop the car by reaching his hand to the bell rope, and the plaintiff, relying upon the conductor to do this, put himself in a position to step safely off, which he could have done had the car stopped; that the conductor wrongfully failed and neglected to stop the car, whereby the plaintiff, by a sudden jerk, was thrown off and injured.

It is contended upon the part of the defendant that the declaration does not state a cause of action, because—

1. It does not show negligence on the part of defendant's agents.
2. It does show that the plaintiff was guilty of contributory negligence.

The court submitted both of these questions to the jury by saying:

"After reviewing all this testimony, if you believe this man was hurt from the negligence of the defendant, and that he was not negligent himself in getting off from the car while in motion, and you think he is entitled to damages, then you are to say, under the circumstances, what damages."

Counsel for defendant contend that under the most favorable view of the plaintiff's testimony there was nothing to go to the jury upon either of these points; that the testimony did not make a case. The declaration was not demurred to, nor was objection made to the intro-

duction of the testimony under it, but at the close of the trial defendant's counsel asked the court to direct a verdict for the defendant.

It was admitted upon the argument here that this was one of the usual stopping places of these cars between Eighteenth and Nineteenth streets, where plaintiff on that day intended to get off; and undoubtedly he expected that the conductor would ring his bell, calling the driver to a stop, when signaled. We cannot say as matter of law that it was negligence for the plaintiff to put himself in the position in which he was when thrown off, or that, under the circumstances, he was negligent in letting go of the standard to again signal the car to stop, as he was steadying himself with his left hand. The question of his contributory negligence was properly submitted to the jury.

The question of defendant's negligence is not so clear. The burden was upon the plaintiff to show it. If his testimony is true, he was led to believe that the conductor was about to stop the car. He did not attempt to step down while the car was in motion; but the difficulty is that there is nothing in the case showing or tending to show to the jury just what caused him to fall off. It may have been a sudden jolting of the cars, for which the conductor or driver was in no manner responsible; at least, it is not made to appear by any affirmative testimony that the defendant company neglected any duty, except to stop when first signaled; and it does not appear that that caused the injury, but, upon the plaintiff's own theory, it was a sudden jerk,—from what cause no one pretends to know. We think there was no evidence to go to the jury on this point.

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

McGRATH, C. J., and DURAND, J., concurred. GRANT and MONTGOMERY, JJ., concurred in the result.

94	39
104	152
94	39
110	439

EDWARD D. SILVERS ET AL. v. THE MICHIGAN MUTUAL BENEFIT ASSOCIATION OF HILLSDALE.

[See 84 Mich. 521.]

Mutual benefit associations—Certificate of insurance—Heirs of member—Insurable interest—Action at law—Pleading.

1. The statute under which a mutual benefit association is organized, in force when a contract of insurance is made, forms a part of the contract, and governs as to its construction.
2. Under a certificate of insurance issued by a mutual benefit association organized under Act No. 104, Laws of 1869, prior to the revisory act of 1887 (Act No. 187) taking effect, by which the association agrees to pay the insurance to the wife, *heirs*, administrator, or assigns of the member, the insurance is payable to his surviving brothers and sisters and the children of a deceased brother, in case his wife and children and father and mother do not survive him.
3. Act No. 187, Laws of 1887, which revises the laws providing for the incorporation of mutual benefit associations, and prohibits the issuance of a policy or certificate "upon any life in which the beneficiary named has not an insurable interest," but which provides that in case of a violation of said prohibition the insurance shall be payable to the *heirs* of the deceased member, is construed as embracing heirs who have not an insurable interest in the life of the member.
4. Where the heirs of a deceased member of a mutual benefit association are entitled to a certain sum specified in the certificate of insurance if the assessment, which it is the duty of the association to make, produces that amount, and the association refuses to make such payment, the heirs may recover the sum named under a declaration alleging such facts, and the performance of the contract on the part of the member, supported by proof of such performance and of the refusal of the association to make the assessment, and that, if made, it would have produced more than the amount claimed.
5. An amendment substituting the brothers and sisters of a member of a mutual benefit association, and the children of a deceased brother,—who, as his heirs, are entitled to the insurance agreed to be paid, by reason of the death of the member's

wife, who was named as beneficiary, and of his children, prior to his death,—as plaintiffs in a suit brought at the instance of his administrator in the name of the administrator of his wife's estate, to recover the insurance, is permissible.[1]

Error to Lenawee. (Lane, J.) Submitted on briefs October 13, 1892. Decided December 22, 1892.

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

A. F. Freeman and *Wood & Bird,* for appellants.

Watts, Bean & Smith, for defendant.

LONG, J. June 7, 1887, the defendant issued to Frank L. Silvers its benefit certificate for the sum of $3,000, to continue in force by the payment of the sum of $1.50 on or before the 1st day of March and September of each year, and $1.70, to be contributed to the benefit fund at the death of a member whenever the condition of the benefit fund made it necessary to levy an assessment. By the certificate Mr. Silvers was made a member of the association, subject to its rules and regulations. The certificate contained the following:

"Sixty days after satisfactory proof of the death of said member, and upon the surrender of this certificate, provided that said member is in good standing at the time of such death, the Michigan Mutual Benefit Association of Hillsdale hereby promise and agree to pay, at their office in the city of Hillsdale, to Josie Silvers (wife), heirs, administrators, or assigns, a sum not exceeding $3,000."

On the morning of February 17, 1889, the assured was found at his home, insensible from a pistol-shot wound. The assured's wife and two children were found dead from the same cause, and he died the following day. He left

[1] This head-note corrects the head-note to the *mandamus* case, reported in 84 Mich. 521, as to the class of heirs substituted as plaintiffs.

no family, no father or mother. His heirs at law consist of three brothers, two sisters, and three children of a deceased brother, who are plaintiffs herein. It is conceded by the defendant that the assured paid all dues and assessments which became due and payable in his lifetime. His wife, Josie, left a will, giving all her property to the assured. Plaintiffs herein sought to draw this fund through the estate and will of Josie. Her administrator with the will annexed made the proofs of death, and presented them to the company, and demanded payment thereon. The company refused to pay, and this suit was brought by such administrator. The suit being wrongfully commenced in the name of the administrator of Josie, this Court, by *mandamus*, ordered that the name of the administrator be stricken out, and the suit left to stand in the names of these plaintiffs, who are the beneficial parties. *Wood v. Circuit Judge*, 84 Mich. 521. The amendment to the declaration was made in the circuit court, and on the trial there the court directed the verdict in favor of the defendant company. The reasons the court gave for such direction are:

1. That the contract between the parties seems to provide that the defendant company was under no obligation to do anything more than to take voluntary assessments, and was then to discharge the policy by paying what that assessment might net, and it might be more or less; that the breach is a failure to make the assessment, rather than to pay any particular sum, and the declaration should have been made upon that theory.

2. That the statute under which the defendant company is organized limits its operations to the raising of benefit funds which shall inure to the benefit of such persons as may be designated who are within the class known as possessing insurable interests on the life of the assured, and the company cannot create liability against itself in favor of any person who is not within this class, whether the attempt to do so is by a direct contract, or whether the liability is sought to be raised by indirection; that the

word "heirs" must be construed as those who are members of the assured's family, or other persons who have an insurable interest; that some of the plaintiffs—that is, the children of the deceased brother—are not of that class.

Plaintiffs bring error. We shall discuss the last question first.

The statute in force at the time the policy was issued, and under which the defendant company was organized, was passed in 1869.[1] By the first section of this act it is provided that any number of persons, not less than five, may become a body corporate and politic for the purpose of securing to the families or heirs of any member, upon his death, a certain sum of money, to be paid by such corporation either out of its fund, or by an assessment made upon the members of such corporation, or upon the members of the class in such corporation to which such deceased member belonged, etc. It is provided by the act that, upon the execution and filing of the articles of association, the signers thereof, and those who may thereafter become associated with them, shall become a body politic and corporate for the purposes therein set forth. The act provides for the election of not less than five nor more than twenty trustees, who are empowered to adopt by-laws, with power to change them at pleasure, except so far as they relate to the right of the corporation to assess its members, or the members of a particular class; and except, also, so far as said by-laws affect the rights and benefits belonging to or to be derived by the members. The articles of association are to contain:

1. The names of the persons associating in the first instance.
2. The name of the corporation, etc.
3. The objects of the corporation, the number of classes in such corporation, and the object of the division, etc.
4. The number of trustees, etc.

[1] See Act No. 104, Laws of 1869 (How. Stat. §§ 3949–3955).

5. The terms and conditions of membership therein

This act was amended by the Legislature in 1879, and several new sections added;[1] but this amendment in no wise affects the question here involved.

The contract was made with the assured. He paid in full all his assessments, and complied fully with all the requirements of the articles of association and the by-laws. He named in the certificate as beneficiary one who had an insurable interest in his life. He also named his heirs, who could take in case of the death of his wife before he deceased. This, by the statute and the laws of the company, he could do. Josie and the children died, so that there was no one to take but these heirs. Certainly it was not the understanding of the parties that in such a contingency the policy would lapse, or that no person would be *in esse* capable of taking, so that the defendant company, though having taken payments from the assured during all these years, would escape liability altogether. Neither does the statute nor the laws of the company or the contract contemplate any such limitation upon the word "heirs." The plaintiffs here are the heirs of the member, within the meaning of the statute, and by the express terms of the contract are entitled to have the fund.

The learned circuit judge, in passing upon the question, undoubtedly had in mind the language of the revisory statute, instead of the statute as it then stood. In the revisory act, passed in 1887, it is provided that no co-operative or mutual benefit association shall issue a policy upon any life in which the beneficiary has not an insurable interest. Act No. 187, Laws of 1887, § 16 (3 How. Stat. § 3960*d*5). The court below said of this:

"The statute which furnishes the authority for this com-

[1] See Act No. 73, Laws of 1879 (How. Stat. §§ 3956–3960).

pany to do business of this character at all says that they are limited in their operations to the raising of benefit funds which shall inure to the benefit of such persons as may be designated who are within the class known as possessing insurable interests in the life assured."

The statute referred to, and which the trial court evidently had in mind, while passed in June, 1887, did not take effect until September following the time when this contract was made, so that it could not have any effect on the contract, which must be construed under the former act, as that act entered into and became a part of the contract. But we may derive some light from that statute in aid of the legislative interpretation of the former one. If the former statute bears the interpretation given it by the court below, then the amendment in 1887 was unnecessary, as the Legislature by express enactment imported into the statute the very limitation which the court put upon the word "heirs" before the amendment. The statute of 1887 (section 3960*d*5) provides that no policy shall issue upon a life in which the beneficiary named has not an insurable interest; yet by a later clause of the same section it is provided that, while any certificate or policy issued in violation of the above provisions shall be void as to the beneficiary therein named, yet the amount thereof shall, in case of death, be payable to the heirs of the member. It is therefore evident that, even under the statute of 1887, it was not the intent of the Legislature, under the circumstances found to exist in the present case, that the policy should lapse, and the company escape all liability, but that, though void as to the beneficiary, it should be paid to the heirs of the member, whether they were of a class who had insurable interests or not.

But it is claimed by counsel for defendant that this question was settled in favor of defendant's contention by the cases of *Mutual Benefit Ass'n v. Hoyt*, 46 Mich. 473, and *Mich. Mutual Benefit Ass'n v. Rolfe*, 76 Id. 146. In

Association v. Hoyt, supra, the beneficiary was neither a member of the family of the assured, within the meaning of the contract, nor an heir. In *Association v. Rolfe, supra,* the certificate was upon the life of Francis M. Lyon, and the beneficiary, Lorey E. Lyon, his wife. The certificate, like the one in the present case, named "Lorey E. Lyon (wife), heirs, administrators, or assigns." The wife died before the assured, leaving no children. After the death of the assured, who left no children, letters of administration were issued to Ransom D. Lyon, the father of the assured. Francis M. Lyon, after the death of his wife, sold and transferred the certificate to Simeon N. Rolfe, his brother-in-law. Rolfe thereafter paid all assessments up to the death of the assured. This was the only consideration. A bill of interpleader was filed by the company to determine to whom the moneys were due and payable,—whether to the heirs at law of the assured, who were represented by the administrator of his estate, or to Simeon N. Rolfe and others, who were heirs at law of the wife. Simeon N. Rolfe was not a member of the family of the assured, nor an heir at law. He was the brother of the wife of the assured. He, as well as all the heirs at law of Lorey E. Lyon, were made parties defendant to the bill. It was said by this Court that it was not the intent of the law to secure to the heirs of the beneficiary who is not a member the payment of a sum of money; so that, unless the heirs of the beneficiary are at the same time the heirs of the member, the law would not embrace them in its purpose. It was further said:

"There being no beneficiary named in the certificate qualified to take, and having no family, the money is payable to his heirs [that is, the heirs of the assured]. In this case his father, Ransom D. Lyon, is such heir."

Thus it was held that the father was, as heir at law of the assured, entitled to recover the moneys. The ques-

tion, therefore, whether the heir at law had an insurable interest in the life of the assured, was not involved in that case.

Niblack on Mutual Benefit Societies (section 253), in considering the construction to be placed upon the word "heirs," says:

"Where a member of a mutual benefit society has designated his 'legal heirs' as his beneficiaries, the presumption would clearly be that he intended those to whom the law would give his property, he dying intestate; and hence it is the actual capacity of inheritance at the time of the death of the owner of the property * * * that determines who is an heir of a decedent;" citing *Gauch v. Insurance Co.*, 88 Ill. 251; *Elsey v. Association*, 142 Mass. 224 (7 N. E. Rep. 844).

Again, in section 257 of his work, he says:

"For the purpose of ascertaining the persons who are the beneficiaries under a designation of 'my heirs,' etc., it is necessary to consult the statutes of the state casting the descent of the property of an intestate. * * * When a member has made his certificate payable to his 'heirs' they do not take the fund by descent, but by contract. The statutes of descent and distribution cease to be of use, therefore, at the very moment when the heirs at law of the intestate have been found according to their provisions." *Wilburn v. Wilburn*, 83 Ind. 55.

The same rules of construction should be applied to dispositions of property created by these mutual benefit associations as are applied to bequests by will. *Union Mut. Ass'n v. Montgomery*, 70 Mich. 595.

The court below was also of the opinion that the declaration did not make a case to recover what was sought to be recovered. The declaration counts upon a sum of money due the plaintiffs, not exceeding $3,000; setting forth the provision of the certificate that, if one assessment in accordance with the by-laws, rules, and regulations of said association upon all the members in good standing at the time of the death of the assured shall be less than the

sum named in said certificate, then said amount shall be received in full of all demands against said association, or any individual member of said association, on account of said contract of insurance. The declaration further alleges the performance of the contract upon the part of the assured, and that the defendant became liable to pay, and, being so liable, promised to pay, said sum as aforesaid; but has wholly failed so to do, and wholly refused to make any assessment therefor. It is evident that the declaration proceeds upon the theory that the defendant denied all liability, and this fact fully appeared upon the trial; so that the question is presented whether it became necessary to the plaintiffs' case to rely solely upon the right to demand that an assessment be made, or whether they might, from the claim made by the declaration and proofs, have their judgment against the defendant for the amount claimed, inasmuch as it was disclosed by the proof that there were members enough in good standing against whom assessments might be made to more than meet the amount of the claim made by the plaintiffs under this certificate.

In *Jackson v. Association*, 73 Wis. 507 (41 N. W. Rep. 708), the complaint was that the defendant denied all liability under the policy, and refused to levy any assessment upon the members of the association; and that 80 per cent. of the assessment would have amounted to at least the sum named in the policy. The complaint was demurred to, and the demurrer sustained in the court below. It is said by Mr. Justice Cassoday, speaking for the supreme court, to which an appeal was taken:

"There are certainly authorities to the effect that a bill in equity may be maintained to enforce payment of such certificates by compelling a specific performance of similar contracts through assessments, as stipulated. * * * The decided weight of authority, however, seems to be to the effect that an action at law to recover damages may be maintained upon such contract for a refusal or neglect

to make such assessment;" citing a long line of authorities, among which are: *Earnshaw v. Society,* 68 Md. 465 (12 Atl. Rep. 884); *Suppiger v. Association,* 20 Ill. App. 595; *Neskern v. Association,* 30 Minn. 406 (15 N. W. Rep. 683); *Burland v. Association,* 47 Mich. 424 (11 N. W. Rep. 269); Bac. Ben. Soc. § 453.

The learned justice further said:

"The principal difference in these two classes of adjudications turns upon the question whether such recovery for such breach of contract is limited to mere nominal damages, or extends to substantial damages. * * * We agree with that class of cases which hold, in effect, that for a substantial breach of such contract the beneficiary may recover substantial damages in an action at law. As indicated in *Earnshaw v. Society,* 68 Md. 465, there may be some difficulty as to the true measure of damages, and the enforcement of the judgment in case of recovery. So there may be difficulty in obtaining the requisite proof to establish the plaintiff's claim. But these considerations are not before us on this demurrer. * * * * *

"Under the contract in question the plaintiff was entitled, upon the death of his wife, to 80 per cent. of an assessment to be thereupon levied and collected therefor, not exceeding $4,000, less any payment, etc. Upon such death it became the duty of the defendant, under the contract, to make such levy and collection. According to the allegations of the complaint, it not only neglected and refused to do so, but denied all liability. It is also alleged in effect, and of course admitted by the demurrer, that 80 per cent. of such assessment 'would have amounted to at least $4,000.' With this confession before us, we cannot hold as a matter of law that the plaintiff has only sustained nominal damages by reason of such breach, merely because there may be a total or partial failure of proof, or that it may be difficult, in advance of such levy and attempted collection of such assessment, to ascertain the precise amount of damages which the plaintiff may be entitled to recover. Several of the authorities cited sustain these views. The breach of an agreement to make such levy and collection of such assessment seems to be somewhat similar to the breach of an agreement to insure, upon which actions at law have frequently been sustained."

So, in the present case, these heirs of Frank L. Silvers

were entitled, upon his death, to have the amount of the $3,000 paid them if the assessment—which it was the clear duty of the defendant to make—should produce that amount. Instead of making payment, defendant not only refused it, but, denying all liability, refused to make an assessment for the purpose of paying it. It is clear from the testimony appearing in the record that an assessment would produce more than the amount necessary to meet the full amount of the certificate. We think the allegations in the declaration were sufficient to enable the plaintiffs to recover. The defendant cannot be heard to say, if the averments in the declaration are true, that it denies all liability, and contests the case on that ground, and, when liability is established, then claim it has no funds to pay with, when the fact appears that, if it had made an assessment, a sufficient amount would have been on hand to meet the judgment recovered. It was its duty to make it, and its fault if the funds are not on hand to pay the judgment.

The judgment of the court below must be set aside, with costs, and a new trial ordered.

The other Justices concurred.

---

94 49
100 321
100 420
94 49
108 599
94 49
111 445
94 49
113 553
94 49
121 398
94 49
128 270
94 49
146 611

ISAAC BANGHART v. JAMES HYDE.

Contract of sale—Evidence.

Plaintiff sued to recover $100, which he claimed defendant agreed to pay him, in addition to surrendering his note for $1,200, as the purchase price of certain property sold defendant. The only dispute was as to the agreement to pay the $100. And

it is held that it was competent for plaintiff to show that the value of the property was largely in excess of the note, as a circumstance which the jury might consider in determining which of the parties was entitled to belief as to the agreement to pay the $100.

Error to Shiawassee. (Newton, J.) Submitted on briefs October 12, 1892. Decided December 22, 1892.

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

Watson & Chapman, for appellant.

John T. McCurdy, for defendant.

LONG, J. This case was tried in justice's court, where plaintiff recovered a judgment of $100, which was appealed to the circuit court by defendant, and was again tried.

The facts, as claimed by the plaintiff, were that in June, 1889, he purchased of defendant a threshing separator, engine, and some threshing machinery, and gave defendant his note therefor, amounting to $1,200, with interest at 7 per cent., and that he, between the time of making said note and the last Sunday in April, 1891, had paid on said note $500; that on the last Sunday in April, 1891, he owned the property aforesaid, and also had a feed mill, feed grinder, cornsheller, slat saw mill and building, which he operated in the township of Owosso; that on said last Sunday in April defendant came to his house, and proposed to buy him out, and he (plaintiff) agreed to sell out to the defendant all of the property aforesaid, if the defendant would surrender to him his $1,200 note and give him $100, which agreement was accepted, and plaintiff afterwards received his note and the defendant received all the property mentioned, but, when he asked the defendant for

the $100, he denied owing him anything, and refused to pay.

The defendant admitted the transaction as stated by the plaintiff, but denied agreeing to pay the $100.

There was no other person present at the transaction, and the plaintiff, for the purpose of showing the reasonableness of his claim, offered to show by his own testimony what the value of the property transferred by him to defendant actually was. Defendant was also asked on cross-examination what was the value of the threshing machine and all the other property at the time it was turned over to him by plaintiff. These questions were objected to, and the objections sustained by the court. Plaintiff further offered to show that the value of the property was $1,400 or $1,500, which offer was excluded by the court; and no testimony was allowed upon the subject by the trial court, who not only excluded the testimony, but charged the jury specially that they must not consider it. These are the only errors claimed.

We think this testimony competent. If the property largely exceeded in value the note which defendant surrendered, it was a circumstance which the jury had a right to consider in determining which of the parties was entitled to belief. It was an issue squarely made; one testifying that the $100 was agreed to be paid, and the other denying it *in toto*. As was said in *Campau v. Moran*, 31 Mich. 282:

> "When the parties were thus distinctly at issue upon the terms of the contract, evidence that the cost of performance of such a contract as the defendant set up would be greatly in excess of the contract price would certainly afford some reasonable ground for believing that defendant is in error on the facts."

This rule was also laid down in *Richardson v. McGoldrick*, 43 Mich. 476, and *Misner v. Darling*, 44 Id. 438.

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

The other Justices concurred.

94 52
94 272

94 52
114 453

94 52
s53NW 955
131 448n

CATHERINE MCGRAIL v. THE CITY OF KALAMAZOO.

Jury — Challenge for cause — Municipal corporations—Defective sidewalks—Evidence.

1. Error cannot be assigned upon the ruling of the court sustaining a challenge to a juror upon the regular panel on the ground that he is over the statutory age; and especially is this so where the appellant expresses himself as satisfied with the jury as finally made up, and goes to trial before it without exhausting his peremptory challenges.
2. It is not competent for the plaintiff in a negligence case, who was injured by falling on a defective sidewalk by reason of the tipping up of a loose plank, to show that others fell upon the same walk three or four days *after* the accident to the plaintiff.
3. It is competent in such a case, to rebut the theory of the plaintiff that the defect in the walk caused by the loose plank had existed so long, and that the walk was in such a bad state of repair, as to charge the city with notice of the particular defect complained of, for the defendant to show, by witnesses who testify to having frequently passed over the walk without noticing the defect, that if there had been a loose plank they would have noticed it.
4. Notice to the proper officers of a city that a sidewalk is out of repair cannot be inferred unless the defect is open and notorious, of long standing, and of such a character as would naturally arrest the attention of passers-by; and the burden of proof to establish these facts is upon the party complaining of the non-repair; citing *Tice v. Bay City*, 84 Mich. 465.
5. Where, in a negligence case, it appears that the sidewalk inspector, some 10 days before the accident, went over the walk upon which plaintiff was injured by reason of the tipping up of a loose plank therein, tested the plank at the ends, and,

finding some of them loose, nailed them down, and left the walk in a condition reasonably safe for public travel, in order to charge the city with such constructive notice as to render it liable for any *after* defect developing in the walk it must have been of such a character as naturally to arrest the attention of a passer-by, and the city must have had reasonable time, after such defect was noticeable, to repair it.

Error to Kalamazoo. (Buck, J.) Argued October 13, 1892. Decided December 22, 1892.

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

Howard & Roos, for appellant.

E. M. Irish, for defendant.

LONG, J. This suit was brought to recover for injuries received by plaintiff by falling upon an alleged defective sidewalk on May 10, 1890. It was contended by plaintiff that the sidewalk, at the place in question, was on that day, and had been for a long time prior thereto, in a dangerous and unsafe condition. Her testimony showed that she was a large, fleshy woman, and while passing over the sidewalk, in company with two other ladies, owing to the defective condition of the walk, some of the planks therein being loose, she was tripped up and thrown violently to the ground, and received serious injuries, which are claimed to be of a permanent character. Under a very full charge of the court, the jury returned a verdict against the plaintiff. The errors relied upon relate—

1. To the ruling of the court in sustaining the challenge for cause to two of the jurors, for the reason that they were over 60 years of age.
2. To the ruling of the court in refusing to allow certain testimony to be given, and in the reception of certain testimony.
3. To the ruling of the court in refusing to permit the plaintiff to put in evidence a certain stringer, which it is

claimed was taken from under the sidewalk in question.

4. To the refusal to give certain of plaintiff's requests to charge, and to certain parts of the charge as given.

It appears that two of the jurors were over 60 years of age. They were both on the regular panel for the term. They were challenged by defendant's counsel on account of their age, and the court excused them. It is insisted that this was error, and that this claim is within the ruling of this Court in *People v. Rawn*, 90 Mich. 377. In that case it was held that, though a juror was beyond the age of 60 years, he was not subject to challenge for cause, but that the exemption under the statute from service upon juries when beyond that age was only a personal privilege of the juror. Error was assigned upon the ruling of the court in refusing to set the juror aside, upon a challenge for cause, upon the ground of his being beyond the age of 60 years. It was held not to be error, and the conviction was affirmed.

The question is not presented in this case in that form. Here the court sustained the challenge, and discharged the jurors from the panel. It appears that those persons were on the regular panel, and therefore it is claimed that, under section 7555, How. Stat., requiring the officers who make return of persons for jurors to the county clerk to select the names from the assessment roll, and, in making such selection, to take the names of such only as are not exempt from serving on juries, and section 7571, expressly exempting persons over 60 years of age from serving as jurors, the plaintiff had no legal right to have these jurors on the panel to try the case, and their discharge by the court is no ground of error. We think counsel right in this contention. These jurors had a right to be discharged from the panel if they requested it themselves, as the statute expressly gave them the right; and while it would not have been error, as held in *People v. Rawn, supra*, for the court

to refuse to set them aside on that ground when challenged for cause, it cannot be said that a party to a cause can claim the right to have persons above the age of 60 years sit as jurors in a cause, or, upon their discharge, have a verdict of another jury set aside, with whom he had expressed his satisfaction and before whom he had gone to trial. Especially is this true where it is not claimed that at that time the party had exhausted his peremptory challenges.

It is claimed that the court was in error in striking out the testimony of the witness Mary J. Briggs in regard to a fall she received upon the walk where plaintiff fell. It appeared upon cross-examination that she fell three or four days after the plaintiff received her injuries, and the court struck out the testimony for that reason. In *Lombar v. Village of East Tawas*, 86 Mich. 14, it was permitted to be shown that others had stepped into the same hole prior to plaintiff's injury, for the purpose of showing the existence of the defect at the time the injury occurred; and it was said that such evidence was competent, as it might also tend to show constructive notice of the defect to the village. It was further said in that case that there was some conflict of authority even upon this right. We have been unable to find any case going beyond this ruling, and holding that a plaintiff upon such a trial might introduce proof that others fell or stepped into the hole after the injury occurred, even with a showing that it was in the same condition as when plaintiff was injured. The plaintiff's position here would carry the rule still further, if her counsel's contention is correct. He asked to show that the witness fell on the same defective walk three or four days after plaintiff fell there. How she was walking, or whether using due care, would raise another issue. The injury to plaintiff was not in stepping through a hole in the walk, but in the tipping up of a loose plank; and

the question to the witness was not for the purpose of showing that she fell through the same hole that plaintiff fell through, as in the Lombar case and the cases there cited. The court properly excluded the testimony.

Several witnesses were sworn on the part of the defendant, and testified to having frequently passed over this walk. They were then asked whether, if there had been a loose plank there, they would have noticed it. This was admitted, under objection of plaintiff's counsel. We think there was no error in admitting this testimony. There was no claim on the part of the plaintiff that the city had actual notice of the condition of the walk, but the plaintiff proceeded upon the theory that the defect had existed so long, and the walk was in such a bad state of repair, that the city ought to be charged with notice of the defect. In answer to this proposition, the testimony of these witnesses was proper.

A stringer was brought into court by the plaintiff. It was claimed that it came from under the defective walk, and had been taken out by the city in making repairs after plaintiff's injury. The witness who produced it in court found it standing against the corner of a store near the defective walk. It was offered in evidence by the plaintiff. The court excluded it, on the ground that it had not been sufficiently identified as coming from under the defective walk. We need not recite the testimony here by which it is claimed that it was sufficiently identified. We are satisfied from it that its identification was not established, and the court very properly ruled against its admission.

Counsel asked the court to instruct the jury that there was no evidence of contributory negligence on the part of the plaintiff shown in the case. This was refused, and the court left the question of due care upon her part as a question of fact for the determination of the jury. The

court was right in this. The jury should take into consideration the condition and situation of the walk, the time of day when plaintiff passed there, her knowledge of its condition, and other circumstances connected with her passage over it, and from these facts determine the care which the plaintiff exercised. The burden was upon her to show that she was exercising due care, and it was a question of fact to be found by the jury.

Counsel for plaintiff also asked the court in their second request to instruct the jury:

"You are instructed that it is the duty of the city, and not of passers-by, to notice defects in streets and sidewalks and repair them; and it does not follow, because the defect is not of a character necessarily to attract the attention of the passers-by, that the city, by the exercise of due care, would not have discovered it."

This was refused, and the court instructed the jury upon that point as follows:

"In relation to the condition of the sidewalk, notice to the proper officers of the city of its being out of repair cannot be inferred or presumed, unless the defect was open and notorious, of long standing, and of such a character as would naturally arrest the attention of the passer-by; and the burden of proof to establish these facts is upon the plaintiff."

This statement of the law by the court, as contained in the charge, is but a repetition of the charge of the trial court which was cited with approval in *Tice v. Bay City*, 84 Mich. 465, and was properly given.

Counsel also asked the court to instruct the jury:

"It was incumbent upon the sidewalk inspector to perform his duty. Officers may not ignore the dictates of common sense and the lessons of ordinary experience, and refuse or neglect to see or heed what others understand. When it is generally known that a sidewalk is out of repair, or has become decrepit, or when it has stood so long that there is much suspicion of it, the officer of the city may not disregard the warning conveyed by these circumstances,

and think to excuse his neglect to take action, on the ground of having had no actual notice of its dangerous infirmity."

This was refused, and the court in its charge directed them as follows:

"If the jury find from the evidence that the sidewalk inspector went over that walk a fortnight before the accident, and tested the planks at the ends, and found the walk secure at that time, or, finding defects, remedied them, so that the walk was left in a condition reasonably safe for public travel, then the city would not be responsible or negligent as to loose planks which had been in the walk before; and, if any defect developed in the walk after that, it must have been of such a character as would have naturally arrested the attention of the passer-by in order to have charged the city with such constructive notice as would make it liable, and after such defect was noticeable the city must have had reasonable time to repair it, and if the defect was not of such a character you will find for the defendant."

There was evidence tending to show that the sidewalk inspector of the city went over the walks and examined them the last of April or first of May, 1890. The plaintiff was injured on the 10th day of May, the same year. Some loose planks were found by the sidewalk inspector at the time at or near where plaintiff fell, and were nailed down by him or his assistant. In view of these facts, the court was not in error in refusing the request to charge, or in the charge as given. *Dewey v. City of Detroit,* 15 Mich. 307.

We find no error in the entire charge which calls for a reversal of the case. It was full and fair to the plaintiff, and all questions of fact left for the determination of the jury. In stating the plaintiff's claim the court said to the jury:

"But if you find that it has been shown by a fair preponderance of the evidence in the case that the walk in question, at the time and at the particular place of the

alleged injury, was so defective and dangerous as not to be reasonably safe for public travel, and that said defect or dangerous condition of the walk at that place had existed for such a length of time, and was so manifest to the senses, that the officers or agents of the city could with reasonable diligence know, or by the exercise of reasonable care might have known, of it in time to have remedied the defect before the accident, and that this was not done, then, if you find all the other material facts in favor of the plaintiff, you should render a verdict in her favor.

"If the jury find that the plaintiff was in the exercise of due care and caution, and believe from the evidence that the sidewalk, at the time and place in question, was out of repair as alleged in the declaration, and that the city authorities, by the exercise of reasonable care, might have known of it in time to have remedied the defect before the accident occurred, and did not do so, the city is liable in this suit."

Again, the court, in speaking of plaintiff's care, said:

"If you find that the plaintiff, before she crossed the walk, knew that the planks were loose, she had a right nevertheless to pass over it, provided she did so in an ordinarily careful and cautious manner; and if you find that she did so, guided by what she knew of its condition and the liability to danger, then her conduct would not amount to contributory negligence."

The court said further:

"It is for you to determine from all the evidence in the case whether the plaintiff was injured owing to the defect which she claims existed in the sidewalk."

We find no error in the case.

Judgment is affirmed, with costs.

McGRATH, C. J., MONTGOMERY and DURAND, JJ., concurred. GRANT, J., did not sit.

HENRY VAN VOORHIS v. FLORENCE M. VAN VOORHIS.

Divorce—Evidence—Improper methods of procuring testimony.

1. The principle of the maxim, *falsus in uno, falsus in omnibus*, may be extended to the entire testimony offered in behalf of a litigant who is shown to have been guilty of corrupt practices in procuring the testimony, or any part of it.
2. A party coming into a court of equity, and asking to be released from the bonds of matrimony and its obligations, must come with clean hands, and must keep them clean, so far as relates to the procurement of testimony to make out his case.

Appeal from Kent. (Grove, J.) Submitted on briefs October 13, 1892. Decided December 22, 1892.

Bill for divorce. Defendant appeals. Decree reversed, and one entered here for defendant. The facts are stated in the opinion.

Ward & Ward, for complainant.

Thomas F. McGarry and *William F. McKnight,* for defendant.

MCGRATH, C. J. This is a bill for divorce. The parties were married May 6, 1890, at Carson City, Mich., and the bill for divorce was filed October 3, 1890. Complainant was about 60 years old at the time of the marriage, and owned some property in Grand Rapids, and a large farm at Bancroft, and was reported worth from $45,000 to $50,000. Defendant was 34 years of age; had been married before, and procured a divorce from her former husband; resided with her mother, who kept a boarding house at Carson City. Complainant had known her for a year before the marriage. Soon after the marriage the parties moved into Grand Rapids, and lived at 699 South Division

street, in rooms over a store in a building owned by complainant. Defendant's mother came with her to Grand Rapids, and lived with them.

The original bill charged extreme cruelty; alleged that one Frank Pulford boarded with defendant's mother at Carson City; that after the parties came to Grand Rapids, at the solicitation of defendant, Pulford followed them, visited at their house, and remained for a week or 10 days; that defendant urged complainant to allow Pulford to remain there, but that complainant objected; that thereupon Pulford engaged a room at 628 South Division street; that afterwards defendant made almost daily visits to Pulford at his room, and remained there from 20 minutes to an hour at a time; that Pulford was doing nothing at the time, and defendant was supporting him; that defendant frequently carried food to said Pulford; that Pulford frequently visited defendant at No. 699, remaining there for some time; that on one occasion, when complainant was out of the city for several days, Pulford visited No. 699, and remained all night; that one time defendant was sick, or claimed to be sick, and Pulford came over and sat in the room with her for about half a day; that these visits were clandestine, became notorious, and created scandal; that complainant remonstrated, but without avail; that defendant frequently left complainant alone in one room, and went into another with Pulford; that Pulford has entered the house by the back way, and visited defendant in the kitchen and dining room; that she has withdrawn herself from complainant's society for two weeks at a time, and has substantially left his bed; that she involved him in debt; that she now tells him that she cannot live with him, and is not happy, and that if she continues to live with him she will become crazy.

An answer to this bill was filed November 13, 1890, denying the aforesaid allegations, except that—

"Frank Pulford, named in said bill of complaint, was like one of the family in her mother's house; that said complainant had been there considerably, and knew it and was a friend of Frank Pulford; that he was like a younger brother to her, and she was 11 years the older; that, while he was 22, he was quite a boy, and was treated as such in the house; that herself, her husband, and her mother, with whom she lived, were all as common with Frank Pulford as though he were one of the family; that when she came to Grand Rapids she invited Pulford to visit them when they should get to housekeeping; that some time after they went to housekeeping Pulford did come to visit them; that he was treated in the house by complainant, this defendant, and her mother exactly as before; that after he had been in the house a day or two there was talk in the house about his doing some work for complainant,—fixing up around,—and Pulford expressed himself as not wishing to visit there long, but wanted to go to work, and he did stay there a number of days, and worked for complainant about the premises, complainant working with him; * * * that said Pulford was apparently doing his best, as a country boy, to get something to do in the city, where he might earn his living, and she and her mother did their best to aid him, and she verily believes that said complainant also said and did all he could to help Pulford; * * * that Pulford rented a furnished room in the family of a Mr. Free, on the opposite side of the street, a short distance only from where complainant and this defendant lived; that the room he occupied was practically in open view of the family, the sitting room occupied by the family being adjoining it, and folding doors only between it and the room occupied by Pulford; that it is a fact that she used to run across there and talk with Pulford when he was there, but it was done openly, at all times of day, as she happened, —not daily, however,—and she became familiar there in the house, and ran over there and visited with Mrs. Free; but she says that her visits across there were open as day, in the presence of complainant and everybody else who saw fit to look; that she did so with no thought of wrong, and is sure that complainant never suggested to her, having full knowledge of the situation, that it was improper, or that in any way he made complaint.

"She denies that under pretext that said Pulford was sick at one time, and needed her care, she left said hus-

band at home alone, and went and remained at said Pulford's room the greater part of one night, and that she was with him in his room the next day, and the following evening at his said room, as alleged in said bill of complaint, but, on the contrary, this defendant shows that there was no pretext about it; that said Pulford was sick, and seriously so, and needed attention, at Mr. Free's; that she went over there with her mother, and she and her mother nursed and cared for him; that he had no other friends here to do so for him, and was unable to care for himself; that she did stay in his room,—with her mother, usually,—and nursed him in his sickness, the greater part of one night; that she was there the next day and the next evening, and so was her mother, and went on errands of kindness and care for their friend, and complainant was there, and knew about it, and never thought to make an objection, or find fault with it; that she and her mother were but performing a duty that she thought then, and thinks now, she ought to do; that said Pulford was very sick, and the family in the house aided in caring for him, and there was nothing connected with said sickness or visits about which any person could complain; * * * that, as stated above, she ran over there freely, openly, in the daylight, without a thought of wrong, and did not stay or sit in the room many minutes in the whole time; that the fact is that complainant never objected to it, to her knowledge, or suggested a word of impropriety or offense at it."

Referring to the allegation that, while complainant was absent, at Bancroft, Pulford remained at the house over night, she says—

"It is true that she invited him over there to stay while he was away, and he did stay there; that this defendant had lived but a short time in the city, coming from Carson City; that her mother was there with her, and she occupied the same bed with her mother; that they both felt nervous, and desired that some man be in the house, and went over and asked Pulford to come and stay while Mr. Van Voorhis was gone, and he did so; but she would never have thought of doing such a thing had she supposed the complainant objected to it, and in fact he did not object. * * * * * * * * * *

"That at one time a relative of Pulford was sick in

Detroit, and he wished to go, and needed $5 more money than he had; that this defendant told complainant of his condition, and complainant gave her $5 for the express purpose of loaning it to Pulford to use in going to Detroit; that she also lent said Pulford $5 early in August; that Pulford asked her for it for a day or two, saying he expected money the next day, and would return it, certain; and she says that he did return it to her the next day but one, and the loan injured no one; that this is all the money Pulford had of her, in any manner or at any time; * * * that, while said Pulford was sick, she and her mother carried over to him such things as were needful in a sick room,—a small amount of food suitable for a sick room,—and after he was up from his bed, not able to work, either she or her mother took over things to him that they thought would tempt his appetite, * * * but that she did not persist, for complainant never suggested that he did not wish her to do it, but was there and saw it done as openly as his house was conducted in other ways. * * * * * * * * * * *

"In reference to that part of the complaint that on a certain occasion this defendant was sick, or claimed to be sick, and that Pulford came to their house and sat in defendant's bedroom, where she was, for about half a day, and that complainant has objected to such conduct repeatedly, she says the facts were that she was sick in bed, seriously; that the room in which she was was with open doors, and the two sitting rooms and her bedroom were like one common room; that Pulford did come there, and did come in to see her, and sat there,—not a half day, however, but was there considerably, probably an hour, and in there more than once, but her mother was there, and complainant himself was there, and the first time she ever heard that he had any objection to Pulford's coming in there was when she read it in the bill of complaint; that complainant never thought of being offended at it, and, if he did, he never told it to her. * * * *

"That in their house there are two sitting rooms; that there is a wide opening for a door between them, about six feet wide; that this door is draped a little at the sides, but not but what there is an opening of about six feet,—a third of the width of the room; and it quite likely has happened that she has sat in one or the other of those rooms while complainant was in the other part, but that her mother was always in either one of those two rooms, or

in the adjoining room, with the door open. * * * *

"That there is an outside stairway at the back of their rooms, that they all use more or less, and she has no doubt that Pulford has sometimes come up those stairs, as it was a common habit in the house to use them; but she says that there was no time while she lived in that house that her mother was not present when he or anybody else was there, and she and her mother did the housework.

"She says that it is true that she slept with her mother some of the time, but never without speaking to complainant and procuring his assent; and she denies that she, at the time of filing said bill, had left his bed, but alleges the contrary thereof to be true."

The indebtedness incurred by her is explained, and the amount thereof fixed at $80, which was expended for household furniture.

A replication was filed to this answer. April 3, 1891, complainant filed an amended bill, setting up 17 specific acts of adultery committed by defendant with said Pulford. An answer was filed April 15, denying each and every act charged. The hearing commenced May 18, 1891. Pending the hearing, and after complainant's proof was mostly taken, defendant became mentally deranged, and was adjudged insane May 22, 1891, and was sent to the asylum at Kalamazoo for treatment. She recovered, and was released in September, and the taking of testimony was resumed. At the close of the complainant's proofs, defendant gave notice of an application for leave to file a cross-bill, or an amended answer in the nature of a cross-bill, which was filed September 23, 1891.

The answer to the supplemental bill sets up that, in a conversation had with complainant immediately after the subpœna was served, complainant offered to pay defendant $1,000 if she would not oppose the divorce proceeding. In the answer filed, which was in the nature of a cross-bill, defendant alleges that—

"After filing the answer of this defendant to the

original bill of complaint, and after the said complainant had become fully satisfied that he could not induce this defendant to enter into a conclusive arrangement with him concerning the matter of said divorce, the said complainant entered into a scheme with certain creatures for the purpose of obtaining evidence against her which would justify this court in granting a decree of divorce to the complainant; that it was the avowed purpose of the said complainant, through, by, and with the assistance of the aforesaid creatures, to endeavor to place this defendant in some compromising position or relation, in order that evidence of such fact might be introduced in this case, tending to ruin her reputation in the eyes of the court, and blast her reputation in the opinion of the world; that after the consummation of said scheme the creatures employed to carry it into effect commenced their operations, at the request of, under instructions by, and in the expectation of liberal pay from, the complainant, if successful in said scheme; that various artifices and devices were resorted to in order to compromise this defendant, but each of them proved unsuccessful, and the efforts in that direction were entirely abandoned; that failing to place this defendant in any compromising position or relation, and thus obtain evidence against her for use in this court, some of the creatures hired by the said complainant, as aforesaid, concocted, planned, devised, arranged, and agreed together to swear falsely as to having seen this defendant in improper places, and to having witnessed criminal conduct on her part.

"That thereupon the grounds for divorce alleged in the original bill were substantially abandoned, and the amended and supplemental bill exhibited against this defendant, setting forth with minuteness and particularity the disgusting particulars mentioned therein, all of which this defendant avers were wholly untrue, were known by the complainant to be untrue, but were obtained for the sole and only purpose of succeeding in this litigation, and depriving defendant of her just rights; that it was entered into, as this defendant is informed and believes, and carried into execution, solely as a money-saving expedient on the part of the complainant. * * * * *

"That when the case came on to be heard, and the charges specified in the amended and supplemental bill were attempted to be established by the testimony of the

creatures employed by the said complainant, as aforesaid, and knowing that she had lost her memorandum, and that meanwhile G. Chase Godwin, on whom she relied to conduct her defense, had died, and knowing that the testimony so given was absolutely false, this defendant became overwhelmed with disgrace and shame, broken down in health and spirits, and finally, as she has been informed and believes, became deprived of reason; that she was tenderly cared for by the friends with whom she chanced to be at the time, and the medical attendants who waited upon her; that she was adjudged insane by the probate court for the county of Kent, was removed to Kalamazoo, and confined in the insane asylum, where she remained about three months, and there received such treatment that her reason was again restored; and she returned to her mother, and went out in the country to Carson City, where she had formerly lived, and there remained until on or about the 19th day of the present month, when, in obedience to a letter from her present counsel, she came to the city to attend the trial.

"That on Tuesday morning, September 22, 1891, this defendant for the first time learned that one of the persons who had been employed by the said complainant to obtain evidence against her had made a statement exposing the entire scheme; that up to this time the defendant had no knowledge that any woman had been employed against her; although she suspected the existence of some nefarious plot, she did not believe it extended quite so far, and thought it was confined to men who were low enough to perjure themselves for the money they would receive for so doing.

"That the nature of the testimony that the complainant had procured by the means aforesaid, but not the means by which he had procured it, was frequently given out and repeated by the said complainant to the friends and neighbors of this defendant, while the public press of the city—but, so far as they were concerned, most unwittingly—joined in the work of injustice, so that from one end of the city to the other, and throughout every place where this defendant was acquainted, she was held up to public gaze and public execration as a despised adventuress and disreputable strumpet, and that, too, before she had been afforded an opportunity of saying a single word in her own defense.

"That by reason of the facts aforesaid this defendant

has been compelled to suffer the most poignant sensations of shame and sorrow; that the said complainant has been, in causing and procuring, lending, arranging, assisting, and carrying out the schemes hereinbefore set forth, guilty of extreme cruelty towards this defendant."

Five separate acts of adultery were sought to be proven. The first is alleged to have occurred some time in July, 1890, in one of the rooms occupied by complainant and defendant. This was a storeroom adjoining the hall, having a window looking out upon the back stairway. The time alleged was between 8 and 9 o'clock at night. The witness Davidson says that he and his wife were going up the back stairs; that the curtain was up about an inch from the lower sash; that there was a lamp burning brightly in the room; that he, looking under the curtain, saw the parties in the act; that he called his wife's attention, and they both stood on the stairway from three to five minutes and watched the parties; that the parties were dressed, and, after the act, took the lamp, and carried it into the next room with them. It appears from the cross-examination that the person with Davidson on that occasion was not his wife, but was his adopted daughter, Ida M. Watson, with whom Davidson was then living in open adultery; that Davidson was a married man, having grown-up daughters; that his wife afterwards obtained a divorce from him on the ground of adultery with this very woman, and after the divorce Davidson married this woman, who also swears to having seen the act.

The second act is alleged to have been committed on the 18th of October, 1890, and the third on the 5th of November, 1890, at the Albion House, at Muskegon. One F., who was the proprietor of the Albion House, swears that Pulford staid at his house and occupied the same room on each date. Pulford was then porter at the Occidental Hotel in Muskegon. The witness claimed to know Pulford. He had never seen defendant before. The evi-

dence was looked up by one Burch, who went to Muskegon on St. Patrick's day, 1891, without any knowledge that defendant had ever been there. He claims to have asked F. if Pulford had ever stopped at his hotel, and was informed that he had. He then claims to have asked if he had a woman with him, and was told that he had. He then exhibited to F. a photograph of defendant, and asked if she was the woman, and was told that she was. F. came down to Grand Rapids afterwards, and identified the defendant as she came out of church on Sunday. This testimony was supplemented by that of one M., who knew defendant, and who came to Grand Rapids in the fall of 1890, on the day after election. M. says:

"I met the lady going to the train I got off from. I took her to be Mrs. VanVoorhis.

"*Q.* Did she take the train on that occasion?

"*A.* Why, I think she did.

"*Q.* What did she have with her?

"*A.* If my memory serves me rightly, a satchel. I did not speak to her.

"*Q.* Did you know her well at that time, so as to be certain it was her?

"*A.* Why, I think I should know her. I might have been mistaken. Have known her for 30 years."

On cross-examination:

"*Q.* Where did you say you thought you met Mrs. Van Voorhis?

"*A.* I said I thought I met Mrs. Van Voorhis getting onto the train, on the platform. When I got off the train, and came towards the street car to take the street car, I just passed,—I thought Mrs. Van Voorhis passed me.

"*Q.* She passed you along on the sidewalk?

"*A.* Yes, by the depot.

"*Q.* You did not watch where she went to?

"*A.* No, sir.

"*Q.* Didn't see where she went to?

"*A.* She went towards the car.

"*Q.* Did you see her board that car?

"*A.* I did not.

"*Q.* And you are sure it was her?

"*A.* I think it was her.

"*Q.* Are you sure, now? Don't be 'thinking' about those things.

"*A.* I will say it was her.

"*Q.* How was she dressed?

"*A.* Well, now, I couldn't tell you.

"*Q.* How near dark was it?

"*A.* Somewhere between 3 and 4 o'clock. I cannot tell exactly what time that train got in, for I never paid any attention to it. Came down on the train, and I know the lights were lit up when I got over in the city."

Upon cross-examination F. is required to produce the hotel register, upon which the entries are made with a soft lead pencil, and by the proprietor, and not by the guests. That register is one of the common 26-line hotel registers, with columns for "Call," "Time," "Room," "Name," and "Residence." On the page on which it is alleged that "Frank Pulford & Wife" are first registered, there are 18 entries, 4 of which are different dates. But 4 or 5 of the other entries are intelligibly written. The "Residence" column is filled with all sorts of *memoranda*. In the "Name" column there are 5 entries, then 1 blank, then 4 entries and 2 blanks, then 1 date, then 2 blanks, then 8 entries, and then 3 blanks. On the page where it is alleged that "Pulford & Wife" are next registered, there are 14 entries and 12 blanks. Four of the entries in the "Name" column are different dates. One is "Meals, paid $1." One is "Beny. paid $5." Another is "Smith." Three or four only of the others are intelligibly written. In the "Residence" column there are all sorts of *memoranda*. On neither page is the residence of a guest given, except in a single instance, and that is of a guest from Grand Rapids, registered on the same date, November 5, upon which the entry of "Pulford & Wife" is alleged to have been made. The entry of "Pulford & Wife" is the first entry upon that date, and the letter "L" appears in the "Time" column. In the "Time" column of the

very next entry the letter "S" appears. Both of the entries of "Pulford & Wife" bear unmistakable evidence of rewriting, of erasure, and of rubbing. In both, other lines are present; and, examined with a glass, it is clear that another name was originally written in both spaces, or the names framed out of parts of another name.

The next acts charged are alleged to have been committed on February 26, 1891, and March 12, 1891. After the bill was filed, defendant and her mother continued to reside in the apartments where they had lived. Access to their rooms was had by stairs leading up from Division street. The hallway was narrow, and the foot of the stairs was about six feet from the street door. It was in this hallway, at the foot of the stairs, within a few feet of the sidewalk, at between 11 and 12 o'clock at night, that these two acts are laid. Burch and Woodworth claim to have witnessed the first, and Woodworth and Lane, the second. The observation was made from the head of the stairway in the hall, at a point about six or eight feet from the doorway leading into defendant's apartments. The building stood on the corner of Division street and Eleventh avenue. A back stairway led up from Eleventh avenue. Burch claims to have seen Pulford in Grand Rapids at 11 o'clock on the night of February 23, in company with defendant, on the street, but he did not shadow them. He claims to have seen Pulford again, on the afternoon of February 26, go up this back stairway, and, with a key, open the rear door of the apartments, and enter, but he did not see him go out again. At 8 o'clock that evening, according to Burch, he and Woodworth stationed themselves near the building, and watched from that time until 11:30 at night, when they saw defendant and Pulford get off from a street car, and go into the hallway from Division street. Burch and Woodworth then claim to have gone around to the rear entrance, up the

back stairway, and through the hall to the head of the front stairs, where they saw them in the act. Pulford had his overcoat on, and defendant had her cloak on. Both stood up on the hall floor. The front door was partly open, and there was a street light at the curb, opposite the door, shining in upon the parties.

On March 12, Burch, Woodworth, and Lane claim to have been on watch, and that they saw defendant and a man, whom they think was Pulford, go into this same hallway. Burch remained outside, and Lane and Woodworth went around the back way, up the back stairs, through the hallway, to the head of the front stairway, and there witnessed a repetition of the same act, in the same place, under the same precise conditions. Burch and Woodworth say that on the first occasion, and Woodworth and Lane say that on the last occasion, after the commissions of the act, defendant invited Pulford to her room; but Pulford declined to go, saying that he had an engagement down town. It will be observed that on both of these occasions defendant and Pulford had been out during the evening. It was at an inclement season of the year, and at the same time the act was committed the parties were within a few steps of the apartments occupied by the defendant. It will not do to say, in explanation, that her mother was in these apartments; for one act of adultery is already laid there, and the charges made in the bill, and the testimony offered by complainant, are for the most part irreconcilable with any other theory except that the daughter was being shielded in her adulterous intercourse by the mother.

Smith's Opera House was a variety theater. Lane and Woodworth testify that defendant and Pulford were at that theater on the evening of March 12. Defendant insists that she never was in Smith's Opera House. Pulford denies that he was there. It must be remembered that

the bill had been filed herein October 3. It did not expressly charge adultery, but between the lines it meant to convey the impression that adultery had been committed. Yet it is alleged that in the same month defendant left Grand Rapids, satchel in hand, and took the train for Muskegon, and there went to an hotel with Pulford, and remained all night; that she repeated the same thing on November 5; that on March 12 she went, in company with Pulford, to a disreputable theater, and sat in a box, exposed to the view of hundreds of persons; and no person is found to testify to the fact but Lane and Woodworth, who were in the employ of complainant.

Defendant and Pulford were both sworn, and expressly denied each and all of the acts of adultery charged. Defendant testified that she did not remain away all night from the apartments at 699 Division street during the time that she and her mother occupied them, and her mother corroborates her; that she was not at Muskegon on the dates named, and has never been in Muskegon. Pulford testifies that he left Grand Rapids and went to Muskegon on October 9, 1890, and remained there, and was not at Grand Rapids February 23, February 26, or March 12; that he was at Grand Rapids in December, and again on February 10; that he came in December at the suggestion of defendant's solicitor, and in February he came to see said solicitor; that he never stopped at the Albion House, in Muskegon, and had never been in the house.

A Mrs. Blair is sworn for defendant. She says that in March Burch, whom she had known, met her upon a street car in Grand Rapids, and asked if she was willing to do some detective work. He told her that she "would have a chance to make some money in the case; and I asked him how much, and he said undoubtedly it would be any price I asked." He (Burch) had told her that the woman in the case was a designing woman, and the man, an

abused man. Mrs. Blair refused to enter upon the work without her husband's consent.

"Next day he came to get my husband's consent, and obtained it, and the next day he brought Mr. Van Voorhis, and introduced him as the gentleman who was interested in the case. I was to get entrance into her house as a friend, gain her confidence, take her out for a drive, and get her into a drinking house or other disreputable place. Pulford was to take part, if I could make his acquaintance. I was to make my own plans. Burch was to follow us. I was to fix my own price. I was to try and get her to go to Smith's Opera House. This was agreed between myself, Burch, and Van Voorhis, and they were to furnish the tickets. I did get acquainted with her, took her for a drive once, laid in wait for her again when she was out shopping, and went with her. On both occasions I invited her to take a glass of beer, to go to Smith's Opera House, and to visit disreputable places; but she refused, and I gave it up. I received $6 from Burch."

Mrs. Blair further testifies that Burch told her that he had received $200 for his work. Mr. Blair corroborates his wife as to Burch's visit to his house, as to complainant's visit, and to Burch's statement that he had received $200 for his work.

One Thornton testifies that Burch approached him some time in the spring of 1891, and asked him if he would make one of a party of four—two ladies and two gentlemen—to go out with a double carriage and have a little sport. He said: "Mrs. Van Voorhis and some other—I have forgotten the name—wanted to go out, and he wanted to know if I would be one of the party to go along and have a good time." Thornton was afterwards introduced to Van Voorhis, either by Burch or by the party who had introduced Burch to Thornton.

"It was understood in this way, if we went out for a ride, he [Burch] was to go with another rig. I saw the parties two or three times after that. It was carried along. A lot of talk went with it. Did not amount to

anything. It never came to a focus. I guess they did not get together; some disappointment or something."

One S. was called by complainant to testify as to relations between defendant and Pulford while at Carson City. Two witnesses testify that they were present with this witness, at work, when complainant called upon him, some time before the hearing, and that complainant told S. that he wanted him as a witness in a divorce case. He first asked him if he knew anything against the lady's character, and S. told him that he did not. Complainant had some lengthy conversation with S., in the course of which complainant used this language: "If you will come to Grand Rapids, and swear so and so, I will make it well worth your while. I will pay you well for it."

Defendant takes the witness-stand, and submits herself to a rigid cross-examination. Pulford does likewise. Defendant's mother is a witness, and her testimony covers the entire period. Mr. and Mrs. Free are called by defendant, and neither discloses any improper conduct or attempt at secrecy on the part of defendant.

Upon this record, Burch and Woodworth and Lane were evidently in the employ of complainant. Burch equivocates, evades, and vacillates with reference to his employment. He says he was employed on certain nights, and on others he was not. He guesses he received $10 or $12 for his services, although he says that he was on duty dozens of nights, and went to Muskegon for complainant, and the testimony shows that he was engaged otherwise in obtaining testimony. He at first intimates that his meetings with Woodworth and Lane were purely accidental. He does not know at first how he came to meet them, or where he met them. He it is that worked up the Muskegon testimony, planned the hall investigation, engaged Mrs. Blair to lead defendant astray and manufacture testimony, and evidently Thornton was to act as one of the

parties in this scheme. This was after Burch and Woodworth had already discovered, according to their testimony, Pulford and defendant in the very act; after complainant had been informed, according to Burch, of what had been discovered on February 26, for he says he told complainant on the next morning after that date; undoubtedly, after Lane and Woodworth claim to have discovered Pulford and defendant in the act on the night of March 12; after they had told complainant of this discovery, for he was informed on the very next morning, and "laughed about it;" undoubtedly, after Davidson and his paramour had informed complainant of the discovery claimed to have been made in July, 1890. It was after these alleged disclosures, and on March 17, 1891, that Burch went to Muskegon.

The defendant and her mother testify to the matters set up in the defendant's answer. The allegations of complainant's original bill are for the most part without support in the testimony, so far as they attempt to show improper conduct on defendant's part. Defendant's testimony was that, when the subpœna was served upon her, she sought out complainant, and asked what it meant; that complainant replied that there was so much expense; asked her what she had done with the $80 which he had given her; said that he could not and would not stand the expense; and in the course of conversation he offered her $1,000 if she would allow him to get the divorce, saying that he thought that pretty good pay, and asked her what she had earned since she came there. This is not denied.

Taking into consideration the explicit denials of defendant and Pulford; the testimony of defendant's mother and that of Mr. and Mrs. Free; the relations and character of Davidson and Ida M. Watson; the improbabilities of the story told by Burch, Woodworth, and Lane; the state of the

hotel register at Muskegon; the methods employed by complainant and Burch, acting for him, to procure testimony; and the silence of complainant notwithstanding his implication with Burch,—we can but find that the complainant's charges of adultery are not made out. The methods employed give color to all the testimony offered to prove the charges made, irrespective of any inherent weaknesses or improbabilities in the testimony itself; and the testimony must be weighed in the light and glare of the means resorted to to get it. In the presence of such influences, it is impossible to determine their extent, or to determine what is fabricated and what is not. Nor have parties litigant any right to burden courts with any such duty. The principle of the maxim, *falsus in uno, falsus in omnibus,* may be extended to the entire testimony offered in behalf of a litigant who is shown to have been guilty of corrupt practices in procuring that testimony, or any part of it. A party coming into a court of equity, asking to be released from the bonds of matrimony and its obligations, must come with clean hands, and keep them clean, so far as relates to the procurement of testimony to make out his case.

We think that the allegations of the cross-bill are sustained by the testimony, and that, under the circumstances of this case, the court below was right in permitting defendant to file her amended answer, asking affirmative relief. Defendant is entitled to the relief prayed for.

The decree of the court below is therefore reversed, and a decree entered here for defendant, with costs of both courts to defendant, and a solicitor's fee here of $200. The defendant will be allowed such sum as permanent alimony as may be fixed by the circuit judge after a hearing upon that question, and the record will be remanded for that purpose.

The other Justices concurred.

94 78
103 117
94 78
107 196
94 78
116 283
94 78
119 669

THEODORE C. SHERWOOD, COMMISSIONER OF THE STATE BANKING DEPARTMENT, v. THE MILFORD STATE BANK. IN RE PETITION OF JAMES M. WATERBURY AND CHAUNCEY MARSHALL.

Insolvent bank—Collections—Trusts.

Where a depositor pays his note, held by his bank for collection, with his check, the drawing of which is warranted by the state of his account, and the bank is at the time insolvent, and no money is set apart by it for the owners of the note, or reaches the hands of the receiver soon after appointed for the bank, the owners cannot claim that by the transaction a trust fund is created, which must be treated as such by the receiver, and paid to them in full, without regard to the claims of other creditors of the bank.

Appeal from Oakland. (Moore, J.) Submitted on briefs October 14, 1892. Decided December 22, 1892.

Petition for an order directing a receiver to pay a certain claim in full. Decree dismissing petition affirmed. The facts are stated in the opinion.

Bowen, Douglas & Whiting, for appellants, contended:

1. The payment by check, the surrender of the note, the charge in Crippen's account of the amount of the note as paid, and the credit of the amount to the petitioners, made the relation between the bank and petitioners that of trustee and *cestui que trust.* The amount of the note became a trust fund in the hands of the bank, to be held for petitioners, to be delivered to them, and to be used for no other purpose or purposes; citing *Carley v. Graves,* 85 Mich. 483; *People v. Bank,* 96 N. Y. 32; *Francis v. Evans,* 69 Wis. 115; *Bowers v. Evans,* 71 Id. 133; *Libby v. Hopkins,* 104 U. S. 303.
2. It was a specific appropriation of a particular fund. It became a special deposit to the credit of petitioners, to be paid to them, and not otherwise to be disposed of either by the bank or the

receiver, who took, of course, only the rights of the bank, and no other or different. The violation of this trust would be a fraud, from which neither the bank nor the receiver derived benefit; citing *People v. Bank*, 96 N. Y. 32; *Libby v. Hopkins*, 104 U. S. 303; and though the bank mingled this money with its other assets, so that it cannot be specifically traced, it was, as has been said by this Court, used by the bank either to pay off its debts or to increase its assets, and in either case would benefit its estate, and should be paid on demand by the receiver to petitioners; citing *Carley v. Graves*, 85 Mich. 483; *McLeod v. Evans*, 66 Wis. 401.

Edward J. Bissell, for respondent.

DURAND, J. The petition was filed in this case for an order directing Edward J. Bissell, as receiver of the Milford State Bank, to pay to the petitioners the sum of $488.40, with interest from August 31, 1891.

The evidence shows that the petitioners, on August 18, 1891, sent to the bank for collection a note for that sum, given by W. W. Crippen, the receipt of which was acknowledged by S. H. Wilhelm, the cashier. Crippen was a general depositor of the bank, and on August 31, 1891, had a credit on its books for money which he had deposited from time to time before that date, equal to or greater than the amount of the note. On that day he drew his check for the amount, and gave it to the cashier, who accepted the check, and charged it up against Crippen's account, and delivered up the note to Crippen as paid. The cashier did not forward the money, and, not receiving any returns, the petitioners, on September 15, wrote to inquire about it, and were informed that the bank had failed, and was in the hands of a receiver.

The petitioners insist that the acceptance of the check by the cashier in payment of the note, as stated, is the same in effect as though the money had been actually paid into his hands by Crippen, and by him put into the other funds of the bank to the benefit of the general creditors, or traced into the hands of the receiver, thus giving them

the right to claim that in equity the above amount of money shall be considered as a trust fund in the hands of the receiver, which should be paid to them by him in full, and without regard to the claims of the other creditors of the bank.

The receiver contends that the relation of trustee and *cestui que trust* in relation to this amount does not exist, and bases his contention upon the fact that there was no payment of money for the note by Crippen; that, as a matter of fact, in consequence of the insolvent condition of the bank on the day Crippen gave his check in payment of the note, he had no money on deposit, but only a credit on account of deposits which he had made at different times before that date.

The bank failed on September 9, 1891, and the undisputed testimony shows that at that time the indebtedness, due to its depositors principally, amounted to upwards of $109,000, most of which was owing on August 31, 1891; that the only cash turned over to the receiver was $32.74; that there was not much over $500 cash on hand in the bank at the time the Crippen check was given on August 31; that at that time the bank, besides the general indebtedness stated, was indebted to various parties on account of collections made for them in the usual way customary with banks, to the amount of $2,000 and upwards, which class of indebtedness was increased, until it amounted to more than $3,300 at the time of the failure. No money was at any time set apart for the petitioners by the cashier of the bank on account of the Crippen collection, nor is there any attempt to show or claim made that any money was actually paid by Crippen at the time the note was delivered to him or afterwards on account of this collection, which in any way added to the general assets of the bank, or which could in any way be of benefit to the general creditors of the bank; neither is any showing made that

the check, or its proceeds, in any way got into the hands of the receiver as assets of the bank, or that any of the proceeds or results of that transaction were invested in any property, or used by the bank, either to pay off its debts or to increase its assets, in any manner at all beneficial to the other general depositors of the bank.

If the bank had been paid the money for the note, or if, having taken the check as it did, it had taken the money which it represented, and in either case converted it into another fund or other assets, and it could have been traced into the hands of the receiver by the petitioners, their right to the order asked for would be clear, under the general rule that, when property held upon trust to keep, use, disburse, or invest in any particular manner is misapplied by the trustee, and converted into different property, or sold, and the proceeds thus misapplied, the property may be followed wherever it can be traced through its transformations, and will be subject, when found in its new form, to the rights of the original owner or *cestui que trust*. *Cook v. Tullis*, 18 Wall. 341; *Neely v. Rood*, 54 Mich. 134; *Pierce v. Holzer*, 65 Id. 263. But in all these cases it is held that the funds must be clearly traced into the hands of the person sought to be charged, and that if the trust property does not remain, but has been made way with by the trustee, the *cestuis que trustent* have no longer any specific remedy against any part of his estate in his insolvency, but they must come in *pari passu* with the other creditors, and prove against the trustee's estate for the amount due them. This rule has been as steadily adhered to by the courts both of this country and of England as any rule which has ever been adopted for the protection of the general creditors of a bankrupt or of an insolvent.

It is not seriously contended that the claim of the petitioners comes within the rule stated, but it is insisted that

they have the right to the order asked for, under the principle asserted in *Carley v. Graves,* 85 Mich. 483, in which Chief Justice CHAMPLIN said, in relation to the trust fund then under consideration, that "it cannot be specifically traced, but there is enough in the proof to warrant the inference that it has mingled the trust fund with its own individual means, and has rendered it impossible to be specifically traced into other property in its hands, and that it has been used by the company either to pay off its debts or to increase its assets; in either case, it would be to the benefit of its estate;" and under those facts he applied the principle laid down by a divided court in *McLeod v. Evans,* 66 Wis. 401 (28 N. W. Rep. 173), in support of the position, and held that the petitioner was entitled to the order.

Without discussing the extent which the language used in that case would seem to imply a departure from, or rather an enlargement of, the general rule first stated, it is sufficient to say that no such condition exists here. There was no appropriation of the proceeds of the check; no mingling of the money realized from it with the assets of the bank for its own benefit, as there was no money realized from it; nor any use made of it by the bank, either to pay off its debts or to increase its assets. For these reasons no possible benefit could accrue to the general creditors of the bank on account of the transaction referred to. To adopt a rule which would permit the petitioners, under the facts in this case, to impose upon this transaction the character of a trust, enforceable as such against the receiver, without either tracing any of its results into his hands or showing that it was for the benefit of those who have an interest in the assets, thus enabling them, with others similarly situated, to convert to the payment of their own debt the assets of the bank, to the exclusion

of the general depositors, whose money, as it is plain to be seen from the record, was the source from which all the assets of the bank were obtained, would be grossly inequitable, and would be an unwise departure from those safe rules which the courts have adopted and very generally adhered to in relation to the rights and obligations existing between trustees and *cestuis que trustent.*

It follows that the decree of the court below, dismissing the petition in this case, must be affirmed, with the costs of this Court.

The other Justices concurred.

HENRY A. JEWELL v. PASCAL PARON, LOUIS VILMUR, AND COVELL C. ROYCE.

Mechanic's lien—Failure to complete contract.

1. The rights of a material-man at the time he files his lien cannot be other or greater than would be those of the contractor in a different action.
2. A bill to enforce the lien of a material-man will be dismissed when it appears that the value of the work done on the building at the time the lien was filed was less than the sum before then paid to the contractor, and that the necessary cost of completing the building will exceed the unpaid portion of the contract price.

Appeal from Delta. (Stone, J.) Submitted on briefs October 14, 1892. Decided December 22, 1892.

Bill to enforce a material-man's lien. Defendant Paron appeals. Decree reversed, and one entered here dismissing complainant's bill. The facts are stated in the opinion.

Mead & Jennings, for complainant.

Royce & Waite, for appellant.

MONTGOMERY, J. The bill in this case was filed to enforce a lien for materials furnished to the defendant Vilmur, and used in the construction of a building upon lands owned by the defendant Paron. The work was performed under a written contract, which did not in terms fix any time in which the building was to be completed. This gave rise to some misunderstanding, and an attempt was made to supplement the agreement later by fixing a time; but as Vilmur had given a bond for the faithful performance of his contract, and as he failed to procure the consent of the bondsmen, no change was in fact made.

The contract was dated August 26, 1890, and about the 1st of February, 1891, the defendant Paron took possession of and completed the building. The circuit judge found that Vilmur was not in default, and that defendant Paron was liable to pay for the work, so far as it had progressed; that there was due from Paron to Vilmur, at the date of the service of notice of the lien, $250; and decreed a lien for that amount.

The only questions involved are whether the circuit judge adopted the correct theory in reaching this conclusion, and whether the testimony fairly shows that the value of the work then performed exceeded the amount then paid by the sum named. Section 8385 of Howell's Statutes provides that—

"When the owner of the land shall have failed to perform his part of the contract, and by reason thereof the other party shall, without his default, have been prevented from completely performing his part, he shall be entitled to a reasonable compensation for as much thereof as he has performed, in proportion to the price stipulated for the whole, and the court shall adjust his claim accordingly."

Both parties, in offering testimony, have proceeded upon

the theory that the actual value of the work performed by Vilmur is to be determined by deducting from the contract price the necessary cost of completing the work. This is certainly as favorable a construction of the statute above quoted as the complainant can successfully contend for, as this credits the contractor with all the profits which he would have made upon the entire contract.

The testimony leaves no doubt that, at the time Paron took possession of the building, Vilmur had been paid $2,356.17. The contract price was $4,400. Vilmur was called as a witness for the complainant, and on his direct examination testified that his estimate of the cost of completing the building was $1,200 or $1,250. In this estimate he included the plastering and mason work, at $165 for the work and $80 for the material, making a total of $245. The price of wainscoting he fixed at $28, and it would not appear from his examination that he made any estimate upon the expense of ceiling. It appeared, however, from the testimony of defendant Paron, that the plastering and chimney cost him $590. Vilmur, on being recalled, testified that he had himself contracted to have this work performed at $319,—$74 in excess of his so-called estimate. His own testimony also shows that the value of the lumber necessarily used for wainscoting was much in excess of the price in his estimate for that item. On being recalled, in answer to the question as to what the cost of the work and material in the building up to the time defendant Paron took possession amounted to, he answered, "I think, $2,000 or $3,000." When Paron took control, one of the bondsmen of Vilmur acted with him, and there is no reason to doubt that good judgment was exercised in having the work done and materials provided. As before stated, Paron had then paid Vilmur $2,356.17. His testimony shows that he had actually paid at the time of the hearing, for the completion of the building, the sum of

$2,329.95, and still owed, for work done after he took possession, $250; making the total cost of the building more than $500 in excess of the contract price, if the building was completed according to contract.

There would be strong ground for saying that Vilmur was not proceeding to complete the building in a reasonable time, as, in the absence of an express agreement as to the time, he was bound to do. Nor does the testimony of Vilmur convince us that his delay was occasioned by defendant Paron's default. But, apart from this, we are fully satisfied that the value of the work done on this building at the date the lien was filed was less than the sum which had before that date been actually paid, and that the necessary cost of completing the building was more than remained unpaid on the building at the contract price. It is not the intent of the statute that a penalty should be visited on the owner for a breach of contract. The rights of the lienholder at the time he files his lien cannot be other or different than would be the rights of the contractor in a different action. Were Vilmur the plaintiff here, he would in no view of the case be entitled to more than nominal damages.

The decree will be reversed, and decree entered here dismissing complainant's bill. Defendant Paron will recover costs of both courts.

The other Justices concurred.

94 87
103 509
94 87
s 106 43

JAMES D. TURNBULL v. JOHN MONAGHAN, SIGMUND ROTHSCHILD, MICHAEL W. O'BRIEN, AND THE PEOPLE'S SAVINGS BANK.

Accounting.

This case involves questions of fact arising on an accounting.

Appeal from Alpena. (Kelley, J.) Argued October 5, 1892. Decided December 22, 1892.

Bill for an accounting. Complainant and defendants appeal. Decree modified. The facts are stated in the opinion.

Turnbull & Dafoe and *Frank Emerick*, for complainant.

Keena & Lightner and *J. C. Shields*, for defendants.

MONTGOMERY, J. This is a bill filed for an accounting. It appears that in 1886 the complainant owned a quantity of cedar lands in Alpena county, and defendants Rothschild and Monaghan were interested in other cedar lands, and both were operating in getting out posts and ties at Long lake. It was found that these products were likely to become confused, and it was thought to be to the advantage of both parties that they should operate together in running and loading the ties. An agreement was effected between Rothschild and complainant, and defendant O'Brien as trustee, which recited, in substance, the foregoing situation, and also that the defendant the People's Savings Bank had, through O'Brien, its cashier, agreed to advance money to complainant, by the terms of which agreement the ties and posts put in by each party to the contract were to be inspected before delivery into

Long lake by an inspector or inspectors agreed upon between the parties. O'Brien, as trustee, was authorized to advance to the complainant 14 cents per tie and 6 cents per post as inspected and delivered by complainant in Long lake. The complainant agreed to deliver to O'Brien, as trustee, his promissory notes to represent the amount of advances. The complainant also agreed to run, drive, and deliver the ties and posts over the rail, without charge for dockage, and to keep an accurate account of the expenses and outlays therefor, and such outlays and expenses were to be divided *pro rata*, according to the number of ties and posts produced by the parties. The agreement further provided that—

"All ties and posts so delivered in Long lake, and accepted upon inspection, are to be considered and treated as the property of said trustee. All sales thereof are to be made in the name of each party, and all collections and proceeds are to be remitted to said trustee."

The proceeds were to be applied—*First*, to satisfy and discharge all advances made by the bank or Rothschild to the complainant, and the interest thereon; *second*, to pay the expenses and outlays made by the complainant, with interest at 7 per cent. per annum. The residue, including profits, was to be divided between Rothschild and the complainant, according to the number of ties and posts inspected as aforesaid, having charged against each on the same basis such expenses and outlays.

The parties operated under the terms of this agreement up to July, 1890, although the agreement when entered into only bound them for a single year. Complainant also sold defendants certain posts, which are considered in the accounting. The agreement was, however, from the first departed from in some respects. No accurate account of the actual expenses and outlays in running and loading the cedar was actually kept. There

seems to have been no substantial disagreement between the parties until the summer of 1890, when a contract was entered into between O'Brien, as trustee, and one Ed. E. Ayer, of Chicago, for the sale of ties on hand for that year. This contract was assented to by the complainant. A misunderstanding arose between complainant and Ayer, and complainant refused to permit the ties belonging to him to be shipped in fulfillment of the contract. The defendants Rothschild and O'Brien both insisted that the contract should be performed, and an arrangement was finally made by which Rothschild caused ties to be shipped on his own account to Ayer, and complainant furnished a bond to indemnify the trustee against any suit for damages by Ayer on account of his (complainant's) refusing to fulfill the contract as a whole. Complainant also at this time demanded a settlement and payment, and we are satisfied that the circuit judge was right in holding that the refusal of the defendants to account was unreasonable, and that the complainant was justified in filing the present bill.

An accounting was had, and numerous exceptions to the findings are alleged. We shall not attempt an elaborate discussion in detail of the various items. To do so would prolong this opinion unreasonably.

The defendants' interests at Alpena were looked after by the defendant Monaghan, and, while no actual inspection of the ties and posts was made by a third party, as contemplated by the agreement, the amount put in by each appears to have been reported by the one to the other, and this furnishes the only basis upon which an accounting can be had.

The defendants' first exception is to the allowance as of 1887 of 150,000 posts, at 7 cents each, $10,500. The complainant excepts to the allowance, for the reason that it should have been, as he claims, 177,083 posts. There is

no pretense that the posts were shipped, and it is clear from the complainant's own statement of the charge that he did not expect to receive pay for the posts which were not in fact delivered. Moreover, the contract for the sale was executory, and the complainant could in no event recover anything more than damages for non-fulfillment; and there is no testimony upon which an estimate of any special damages can be based. The defendants' exception is on the ground that the credit should not have been made as in the year 1887. This can only affect the question of interest, but we think the circuit judge was right in giving the credit as of 1887. The evidence shows that the agreement was to take the posts at that time, and it was no fault of the complainant that the delivery of a portion was delayed until the following year.

The defendants' second exception is to the allowance of the item for piling ties in 1889, $186.09, it being contended that this was included in the expense of running, driving, and loading cedar over the rail of the vessel, and that this was compensated for by other allowances, namely, the allowance of three cents each for ties and two cents each for posts. We are satisfied, however, from the testimony of the defendant Monaghan, taken in connection with that of complainant, that this charge is not unreasonable, and that contingencies may have arisen, and doubtless did arise, which rendered this work necessary, and that it was not covered reasonably by the charge of three cents for ties and two cents for posts.

The defendants' third exception is to the allowance of 63,584 posts and 30,000 peeled paving, amounting to $7,383.17. The evidence of defendants shows that there were shipped and sold 170,660 posts in 1889; that before the shipment was made, for the purpose of making the lot salable, 45,000 new peeled paving posts were contributed, of which complainant contributed 30,000 and the defendants 15,000.

These new posts were worth 10½ cents each. The 170,660 posts realized $13,111.89. Deducting the value of the peeled paving posts, $4,725, leaves 125,660 common posts, which realized $8,386.89. After the peeled paving posts were added, the proportion of posts belonging to complainant was 48 per cent. By computation it is shown that of the old posts complainant owned 41.3 per cent. If we add 41.3 per cent. of the $8,386.89 realized for the old posts, or $3,463.78, to the value of the peeled posts furnished by complainant, $3,150, it amounts to $6,613.78, which is the correct amount complainant was entitled to for this item. This amount is slightly in excess of the figures stated in the schedule attached to complainant's bill, but the difference is doubtless due to an error in computation. The basis we have adopted we think is the correct one, and the items should be allowed at the sums stated. There should be deducted, therefore, from the allowance made by the circuit judge for this item, $769.39.

Defendants' next exception is to the allowance of 54.5 per cent. of $34,611.52, net proceeds of ties in 1890. This item is erroneous. A computation shows that but 53 per cent. of the ties sold during this year belonged to complainant. It is claimed by defendants that the complainant's testimony shows that his proportion was but 51 per cent., but a careful examination of the record, and a calculation based upon the number of ties put in by each, convince us that the *pro rata* should be 53 per cent. to complainant and 47 to defendants. In another respect also this item is erroneous. As above stated, the ties in 1890 were sold to Mr. Ayer. After 13 cargoes were shipped, complainant objected to shipping any more on his account, but, as Mr. O'Brien, the trustee, felt bound on his contract, and did not believe any substantial cause existed to depart from it, it was agreed that all ties belonging to defendants should be shipped in fulfillment of the contract,

and complainant, upon furnishing a bond to indemnify defendant O'Brien against any contest with Ayer over the subject-matter, was permitted to withdraw from the contract. The defendants' statement as to these ties is therefore adopted. The first 13 cargoes amounted to $25,031.09, of which 53 per cent. is $13,266.48. The defendants also credit complainant ties shipped both on the "Rhoda Stewart" and the "Golden Rule," less one-half of joint note, $599.17, making a net credit on account of these two cargoes of $3,083.84, giving complainant the benefit of all ties shipped upon these two vessels, and the defendants making the collection for them. This makes the total credit to complainant on account of this item of ties in 1890, $16,350.32, which, being deducted from $18,863.54, the amount credited in the findings of the circuit judge, leaves $2,513.22 to be deducted. This leaves the *status* of the parties, as to this transaction, thus: The contest with Ayer is one which, if had, is to be complainant's, O'Brien being protected by the bond. The defendants' interest in the ties remaining unshipped is reduced by the excess in quantity which they have shipped out on their own account over and above the 47 per cent. of the mass belonging to them.

The next item excepted to is 53.6 per cent. of $4,728.20, proceeds of posts in 1890, and 20,000 peeled posts at 11 cents. It is claimed by defendants that the 20,000 posts were a portion of those which complainant furnished to make up his *pro rata*. But we are convinced that defendants are in error as to this; that complainant is entitled to this allowance, $2,200, to be deducted from the net avails of posts of this year, and is also entitled to his *pro rata* on the balance. The net avails were $6,753.24; deducting $2,200, leaves $4,553.24 to prorate. We are satisfied that the circuit judge was in error in allowing 53.6 per cent. to complainant, and that his interest was but 48 per cent.,

which equals $2,185.55, in place of $2,528.15, allowed in the last decree of the circuit judge. There should be a deduction, therefore, on this item of $342.60.

The next exception is to the allowance of 53.6 per cent. of $1,000, Kinsella and Detroit posts, the claim being that those posts were included in the other items for which credit is given to complainant. We are satisfied from an examination of this testimony that this item was proper, but the per cent. should be 48, the same as in the last item. There should be a deduction on account of this item of $56.

The defendants' seventh exception will be overruled. This is to a charge of 8,110 ties, driving and loading at 3 cents, $243.30; driving and loading 5,007 posts at 2 cents, $100.14.

Defendants also except to the credit items for 46.4 per cent. of $702.26, post money, $327.73; 45.5 per cent. of $3,188.95, tie money, $1,450.95; and to 5,007 posts at 7 cents, $350.49. The objection to these items is based upon the claim that the complainant in accounting should be charged with all the ties and material remaining on hand at the time of the filing of this bill. We think the objection should not prevail. The posts and ties remaining on hand belong to the parties in the proportion in which they were contributed, and, if the complainant sold portions of these posts, credit should be given to defendants. But as to the ties, the proper disposition should be to allow complainant for the avails of sufficient in quantity, so far as he disposed of the same, to offset the ties furnished by defendants to Ayer after the complainant refused to proceed in fulfillment of the contract with him. The defendants shipped of their own ties 36,518. Complainant shipped at defendants' request 18,265 ties, for which credit is given him in this accounting. Complainant also sold, in 1891, 18,000 ties, so that, as against the

ties used by defendants on the Ayer contract, complainant has had 36,265, while defendants used 36,518. Complainant was entitled to 2,209 more, so that the decree must be so modified as to give him in the division the benefit of the credit of this quantity. This, a computation shows, entitles him to receive 56.5 per cent. of the remaining ties. The credit to the defendants on account of the ties sold by complainant in 1891 should therefore be stricken out, reducing the credits of defendants $1,450.95.

The defendants' eighth exception is to the refusal of the court to allow an item of $241.94, balance due on pine. The testimony as to this item is very obscure; in fact, no witness was called by defendants who was familiar with the circumstances. Complainant denies the correctness of the charge, and, while it is not altogether clear, we are disposed to hold that the defendants must fail as to this item for want of proof.

The defendants' ninth exception is to the disallowance of the charge of 20,053 ties, at 20 cents each,—$4,010.60. This exception is based on the claim that the loss was incurred through the fault of complainant. The circuit judge, on the contrary, allowed this in the accounting for the net proceeds of the ties received. We think the circuit judge was right. The contract contemplated the sale by both parties, the language being: "All sales thereof are to be made in the name of each party, and all collections and proceeds are to be remitted to said trustee." While it is true that the proceeds of this transaction were not remitted at once to the trustee, it is also true that the trustee was then in complainant's debt, and that the real purpose of this provision evidently was to protect the trustee for advances. We think the complainant acted in good faith, and the failure to remit promptly should not make him chargeable with any loss that may have occurred on the sale.

The defendants' tenth exception is to the disallowance of the item one-half of joint note for $1,198.35. This item is taken account of in dealing with defendants' fourth exception, and defendants given the benefit of it.

Complainant's first exception is to the allowance of his claim for the allowance of 2.85 cents per piece for driving and loading ties and posts. The allowance of the circuit judge was based upon ample testimony, and was made at 3 cents for ties and 2 cents for posts. Under the contract it was the duty of the complainant to keep an accurate account of the actual expenses and outlays. This he failed to do. The parties assumed in various statements that passed between them that 3 cents for ties and 2 cents for posts was a fair charge. We think the preponderance of the evidence sustains this finding, and these allowances are sufficient.

The modifications of the decree of the circuit judge as to the percentage of liability to each party calls for the correction of another error, not specially noted by the defendants. This is a credit to complainant September 1, 1890, 54.5 per cent. of Lindsey money,—$1,285.10. The complainant should have been credited with but 53 per cent., or, in amount, $1,249.66,—$35.44 less than credit given him. This amount—$35.44—should be deducted. The defendants' credit for tie money in 1889 should be at the rate of 47 per cent., instead of 45.5. The amount is $5,337.36, 47 per cent. of which is $2,508.55, instead of $2,428.33, as credited. Defendants are entitled to have this item increased by $80.22.

The decree should be further modified in fixing the *pro rata* of posts on hand at 55 per cent. for defendants and 45 per cent. for complainant, and the modification of the decree in other respects also leads to the result that the complainant should be entitled to a decree that he shall share in the ties on hand in the ratio of 56.5 per

cent. for complainant and 43.5 per cent. for defendants.

Numerous exceptions are alleged by complainant to the disallowance of interest charges, which may be considered together. The contract provided that the proceeds of such ties and posts should be applied by the trustee in the manner following: "*First,* to satisfy and discharge all advances made by said bank or the party of the first part under this agreement to said second party, with interest thereon; *second,* to pay all expenses and outlays made by said second party [complainant], with interest at the rate of 7 per cent. per annum." Complainant is entitled to compute interest on the balances that were due him. These items of interest are as follows:

On balance from Sept. 1, 1887, to Sept. 1, 1888..	$429 90
On balance from Sept. 1, 1888, to Dec. 31, 1888..	256 65
On balance from Dec. 31, 1888, to Sept. 1, 1889..	39 42
On balance from Sept. 1, 1889, to Sept. 1, 1890..	306 84
On balance from Sept. 1, 1890, to Sept. 1, 1891..	827 22
On balance from Sept. 1, 1891, to Dec. 8, 1891..	240 80
Making total of interest allowed complainant..	$2,100 83

—as against $2,584.09, credited in the circuit judge's accounting. There should be a reduction on account of interest of $483.26. Adding the other deductions, and additions to defendants' allowances, stated above, amounts to $3,796.87, making the total deductions and allowances $4,280.13, which, less the deduction from defendants' allowances, $1,450.95, leaves net deduction from amount of decree $2,829.18, and leaves the amount for which decree should be entered $10,399.73, with interest to be computed from December 8, 1891, the date of the decree in the court below.

The very loose manner in which the business was transacted between the parties has compelled recourse to what we have deemed the best available *data,* and in computing interest we have been compelled to make rests at times

fixed somewhat arbitrarily, but we think the result reached is substantially accurate.

A decree will be entered in this Court for the amount stated. Neither party will be allowed costs in this Court.

The other Justices concurred.

WILLIAM H. CLEVELAND v. CHARLES R. MILLER.

Pleading—Set-off—Attorney and client—Public policy.

Plaintiff sued to recover moneys received by the defendant as his agent. The defendant limited his claim under his notice of set-off to a stated sum for services rendered the plaintiff. On the trial it appeared that, by an arrangement with the plaintiff, the defendant had paid off a mortgage on the plaintiff's property at a discount, he being at the time the attorney for the mortgagee. And it is held that defendant's recovery is limited under the pleadings to the amount actually paid.

Error to Lenawee. (Lane, J.) Argued October 13 and 14, 1892. Decided December 22, 1892.

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

Salsbury & O'Mealey, for appellant.

Watts, Bean & Smith, for plaintiff.

MONTGOMERY, J. The plaintiff brought an action for money had and received. The defendant pleaded the general issue, with notice of set-off, and furnished a bill of particulars of his set-off, which limited his demand to a claim for certain services, amounting to $190.50. On

the trial the plaintiff showed that the defendant received into his hands moneys realized from the sale of property belonging to the plaintiff, amounting to $5,399.52. The defendant testified that he received this money as the agent of plaintiff, and that he was only authorized to pay it out on plaintiff's direction. It appeared that this money was all paid out for plaintiff's benefit, except $573, and that among other items of money paid out by him was one of $1,500, paid to one Beckel for a mortgage he held on property owned by plaintiff. It is contended that the defendant should have been allowed for this item the full face of the mortgage, which was obtained at a discount. The jury found the facts to be as testified to by plaintiff, and that the defendant undertook to buy this mortgage on the best terms he could obtain, and gave judgment for plaintiff.

The defendant's counsel claim that, as it appears that the defendant was acting as Beckel's attorney, such an undertaking on his part was against public policy and void, and that therefore it follows that the plaintiff should have charged against him the full amount of the mortgage. This contention cannot prevail. It is undoubtedly against public policy for an attorney of one party to engage to perform a service for an opposing interest, but when an attorney interposes as a defense his own violation of this rule the court cannot be expected to reframe an issue for his protection. This mortgage is not among his items of set-off, and while it was competent for him to prove the amount of money actually paid out for the plaintiff, and by his direction, as a payment on the plaintiff's demand, he cannot go beyond this on these pleadings, and recover the amount of this mortgage. Furthermore, if this transaction is as he claims it, it is consummated, and, while Beckel may have an action against plaintiff to recover the

balance of the mortgage, no equity is shown in the defendant. He is the one asserting this illegal transaction, and the law will leave him where it finds him.

It is suggested that the court should treat the claimed arrangement between Miller and Cleveland as if it had never been made; but if this be true, the money which Miller received as plaintiff's agent remains unaccounted for, and, as no set-off for this mortgage is allowable, the plaintiff's right to recover is established.

Complaint is made of the charge of the court on the subject of the defendant's claim for services. The part objected to is as follows:

"If you find nothing in the testimony to indicate that it was understood by both that they were services which were rendered gratuitously, then the presumption would be that they were to be compensated for, and they should be allowed at such sums as you find them to be reasonably worth."

It is suggested that this is a statement to the jury, in effect, that, if they found anything to indicate that it was so understood, this was sufficient to defeat defendant's claim for services. The charge, taken as a whole, is not subject to such construction. The court first instructed the jury that, if the services were such as were ordinarily compensated for, the defendant would be entitled to an allowance for them; and then, to cover the ground contended for by the plaintiff, the court said:

"But if the relation between these parties was such that it was not expected upon either hand to be paid for,—if it was a matter of friendship between them, and so understood upon the part of both,—then I do not think that they should be allowed here; but if there was nothing said about it one way or the other,—if you find nothing in the testimony to indicate that it was understood by both that they were services which were rendered gratuitously, * * * —they should be allowed at such sums as you find them to be reasonably worth."

This instruction, taken as a whole, is not subject to the objection urged.

The judgment will be affirmed, with costs.

The other Justices concurred.

---

94 100
117 285

94 100
130 413

94 100
124 419

BENJAMIN N. MONTROSS v. CHARLES K. EDDY AND WALTER S. EDDY.

Real-estate brokers—Compensation from both vendor and vendee.

1. A broker who simply brings the parties together, and has no hand in the negotiations between them, they making their own bargain without his aid or interference, can legally receive compensation from both of them, although each was ignorant of his employment by the other; citing *Ranney v. Donovan*, 78 Mich. 318.
2. A commission dealer in lands, who makes a sale under an agreement with the owners that, if he effects a sale at a price fixed by them, they will pay him for it, can recover what his services were reasonably worth.

Error to Saginaw. (Edget, J.) Argued October 26, 1892. Decided December 22, 1892.

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

Wisner & Draper, for appellants.

George W. Weadock, for plaintiff.

DURAND, J. The plaintiff is a commission dealer in lands, and he brings this suit for services which he claims to have performed for the defendants, in assisting them about the sale, for $90,000, of some pine timber lands, to Pitts & Cranage, of Bay City, Mich.

The plaintiff claims that in 1885 he had these same lands for sale at $50,000, and that, being in Bay City in September, 1887, a Mr. Burton, who knew of this fact, and who represented Pitts & Cranage, asked him if the lands in question had been sold, to which he responded that he did not know, upon which Mr. Burton asked him to find out, and plaintiff told him he would do so; that thereupon he went to Saginaw, and met Walter S. Eddy, the junior member of the firm of C. K. Eddy & Son, the defendants and owners of the timber, where the agreement was made upon which the plaintiff claims the right to recover. The conversation, as shown by his testimony in the record, was as follows:

"I came from Bay City, and met Mr. Eddy right below Moore's drug-store. I asked him if that timber on Hope creek—we called it the 'Hope Creek Timber'—was for sale yet, and he said, 'Yes.' I said, 'I have got a party that I don't know but I can sell it to. I have been talking with them about it.' And I said, 'What do you hold it at now?' He said, 'Ninety thousand dollars.' I said, 'I don't believe I can do anything with it.' I said, 'You have come up big. You advertised it here years ago for $50,000, and these parties knew it. You have come up so much I don't think I can sell it.' He said he would not take any less for it. I said, 'Say $80,000, and I will try and sell it.' No, he would not take that. I said, 'Say $85,000, and I will try.' He said no; he would not take less than $90,000. Well, I said, if that was the best he could do, I had no thought I could sell it,—I didn't believe I could sell it for $90,000. He said he would not take any less. I said, 'Would I, then, be getting the usual commission, if I sell at $90,000?' He said, 'No; you must get your pay from the other party.' I said, 'I wouldn't ask them for it.' I said, 'You know I had it for sale, and I wouldn't ask them to pay a commission on $90,000.' He said, 'We don't want to pay any commission.' I said, 'I won't undertake it;' and he turned to go away from me, and he said, 'Ben, if you make the sale, we will expect to pay you for it.' I said, 'All right.' I told him they were gilt-edged parties, and he would be perfectly satisfied with the parties when he knew who they

were. I said they would make a payment down, and they were gilt-edged parties.

"*Q.* What did he say?

"*A.* He said that would be all right."

After this talk the plaintiff went to Bay City, and told Pitts & Cranage what the purchase could be made for, and they sent a man with him to examine the pine growing upon the land and ascertain its amount and value. After four or five days spent in making the examination and estimate, it was reported to Pitts & Cranage, and about September 27, 1887, they concluded the purchase of the land from the defendants at the sum of $90,000. Pitts & Cranage then gave the plaintiff $500 for the services he had performed for them in respect of the purchase. Pitts & Cranage claim that the $500 was given the plaintiff in payment for his services, while the plaintiff insists that it was a mere gift, and was not in any way to be considered as a payment; but, in the view we take of the case, we do not consider that this is of any importance.

On the day the sale was consummated, the plaintiff went to the office of the defendants, in Saginaw, and after a consultation with each other they gave him their check for $250; and the plaintiff asked them, "Is that all for selling that land?" and Walter S. Eddy, one of the defendants, answered, "That is all we will pay you now." After this time the plaintiff again asked them for money, and was answered that they had no money to spare. Again, in September, 1888, he asked the same defendant for more money, when he was answered that defendants were hard up. Upon giving his note, however, for 60 or 90 days, the defendants gave him their check for $100, at which time he was told that they did not want him to come for any more money. The plaintiff claims that he was never asked to pay this note, although the defendants claim that

they sent him a letter asking him for payment, and that the plaintiff had promised to pay the $100 note subsequent to its maturity. There was no other demand made by the plaintiff for the claim in controversy until shortly before this suit was begun.

The defendants deny that they ever employed the plaintiff to sell their land, or that they promised to pay him anything for the sale, and claim that Pitts & Cranage employed the plaintiff to buy the land, and agreed to and did pay him for his services, and that plaintiff so informed the defendants. They also claim that they were never asked by plaintiff for compensation only shortly before bringing this suit, and that the $250 they paid the plaintiff was a gratuity from them; that they were under no obligation to pay it; and that the $100, given at the time the note referred to was given, was a loan by them to the plaintiff. The plaintiff introduced testimony tending to show that his services were worth 5 per cent. on the selling price of the land, but on cross-examination it was shown that commissions run as low as 1 per cent. on the purchase price of large transactions.

The case was submitted to the jury, who brought in a verdict for the plaintiff for $250.

The defendants contend that under the contract, just as plaintiff testifies to it, before he can recover anything, he must show performance on his part, and that he has failed to do so in this case. This matter was fairly submitted by the circuit judge to the jury, who by their verdict must have found that the plaintiff's version of the conversation with Walter S. Eddy in relation to the sale of this land was a correct one, and that he *did* promise plaintiff that if he effected the sale at $90,000 the defendants would pay him for it. They must also have found that the plaintiff performed his portion of the agreement, and was the instrument who brought about the sale to Pitts & Cranage.

The circuit judge instructed the jury that the plaintiff was in no event entitled to recover on the basis of commission; that there had been no agreement to pay him a commission; but that, if the jury believed that the defendants agreed to pay him for his services in making the sale, then the law assumed simply an agreement to pay him what those services were reasonably worth. The small amount found by the verdict of the jury shows that they were governed by the charge of the judge in the matter, and that they did not find a verdict on the basis of commissions. There being, upon both the making of the agreement, as stated, and also upon the performance of that agreement by the plaintiff, sufficient evidence to entitle the plaintiff to go to the jury, we cannot disturb their verdict, even if we had the inclination to do so.

Objections were made by the defendants to certain questions asked by plaintiff's counsel upon the cross-examination of Mr. Cranage, one of the defendants' witnesses, in reference to a conversation with the plaintiff about the amount of pine upon the land, and also as to whether the $500 given to the plaintiff by Pitts & Cranage was a present, and was to be returned upon certain conditions. Objection was also made by the defendants to the question put to the plaintiff as to whether or not, in the talk with Mr. Cranage about the time this suit was begun, Mr. Cranage had said that he knew nothing that would help or hurt either side, only he knew that the Eddys ought to pay well for it; that it was the worst deal that they ever had; but which objections were overruled, and the testimony received.

If there was error in the ruling of the court upon these propositions in relation to the admission of this testimony, we think it was error without prejudice. The verdict of the jury would seem to indicate they were not prejudiced by anything that Mr. Cranage had said in reference to the

question. And as to whether the payment by Pitts & Cranage to the plaintiff of $500 was a present, or was paid under an agreement made by them for his services, we deem it immaterial. If the defendants are liable at all, it is upon their agreement to pay the plaintiff for his services if he made a sale of this land at $90,000. Nothing was left to his discretion. He had nothing to do with the price. He had simply to find a purchaser willing to give the price asked, and it can be of no importance whatever to the defendants whether or not those purchasers also paid the plaintiff for any services he may have rendered them. As was said in *Ranney v. Donovan*, 78 Mich. 318:

"A broker who simply brings the parties together, and has no hand in the negotiations between them, they making their own bargain without his aid or interference, can legally receive compensation from both of them, although each was ignorant of his employment by the other."

All that the plaintiff was to do was to find a purchaser at a certain sum fixed and agreed upon. Neither his efforts nor judgment were to be employed to get a greater price. When he did this, and the sale brought about by him as middleman was consummated, he was entitled to a reasonable compensation for his services, if the jury believed his version of what the contract was, as they evidently did do. If the plaintiff made any misstatements to Pitts & Cranage in reference to the amount of pine on the land, or to its quality, and thereby induced them to pay the sum asked for it by the defendants, certainly the defendants cannot complain; nor can they be heard to say that, because Pitts & Cranage paid or gave plaintiff $500 for services performed by him in bringing about the purchase, therefore they are relieved from paying him, if they agreed to do so. He was simply acting as a go-between to bring the buyers and sellers together, to make their own bargain.

This is all he did do, and either or both parties, in such a case, would be legally bound to pay such sum as was agreed upon for the services rendered.

We do not find any prejudicial error in the case.

The judgment will be affirmed, with costs of this Court to the plaintiff.

The other Justices concurred.

94 106
99 329

94 106
115 359

94 106
139 442

94 106
142 2525

94 106
144 1518

94 106
145 1592

94 106
d152 306
c152 307
153 116

JOHN D. MAXTED v. SMITH W. FOWLER.

Sale—Warranty—Representations as to value—Caveat emptor—Damages—Evidence—Costs.

1. Where a vendor knows that the vendee is ignorant of the value of the property, and is relying upon his representation as to such value, and such representation does not take the form of a mere expression of opinion, and is in the nature of a statement of fact, the rule of *caveat emptor* does not necessarily apply; citing *Picard v. McCormick*, 11 Mich. 68; *Manning v. Albee*, 11 Allen, 520; *Lawton v. Kittredge*, 30 N. H. 500; *Bradley v. Poole*, 98 Mass. 169; *Miller v. Barber*, 66 N. Y. 558; *Gerhard v. Bates*, 20 Eng. Law. & Eq. 129.

2. A representation by the owner of mining stock to a proposed purchaser, who is unacquainted with mining property, that the stock is readily selling at one dollar per share, is a representation of a fact upon which the purchaser has a right to rely.

3. In a suit by a vendee for breach of warranty as to the value of mining stock purchased by him, his right of recovery will not be affected by proof of his retention of the stock and employment by the mining company to assist in developing the mine.

4. Testimony tending to show that plaintiff's work in constructing a mill was not well done cannot be rebutted by proof of his ability as a carpenter and joiner, coupled with the opinion of the witness that plaintiff is a first-class man in every respect.

5. The proper measure of damages in a suit for a breach of warranty on the sale of mining stock, which is not shown to be absolutely worthless, is the difference between the market value of the stock as represented and what it was in fact worth at the time of its transfer to the plaintiff.
6. The cost for printing the record in this case is limited to 200 pages, which it is held would have fairly presented all the questions the Court have been called upon to consider.

Error to Manistee. (Judkins, J.) Argued October 26, 1892. Decided December 22, 1892.

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

Cahill & Ostrander, for appellant, contended:

1. *Assumpsit* will not lie for representations of value upon the theory that they amount to a warranty; citing *Picard v. McCormick*, 11 Mich. 68.
2. Representations as to quality, quantity, extent, timber, location, distance from market, etc., relate to known or ascertainable facts, which might render the property different in substance from what the purchaser was justified in believing it to be, and may be relied upon; citing *Starkweather v. Benjamin*, 32 Mich. 305; *Wright v. Wright*, 37 Id. 55; *Match v. Hunt*, 38 Id. 1; *Baughman v. Gould*, 45 Id. 481; *Jackson v. Armstrong*, 50 Id. 65; *Holcomb v. Noble*, 69 Id. 396; but no case will be found where a recovery has been permitted for statements as to the value of property, present or prospective, however erroneous, unless fraud and deceit formed the basis of the action or defense; except in such cases, the rule *caveat emptor* applies; citing *Swimm v. Bush*, 23 Mich. 99; *Kost v. Bender*, 25 Id. 515; *Beebe v. Knapp*, 28 Id. 53.

Niskern & Withey, for plaintiff, contended:

1. If defendant made untrue representations of value or richness, or of any other material character, and plaintiff relied upon them, he is liable; citing *Holcomb v. Noble*, 69 Mich. 396; *Van Hoesen v. Cameron*, 54 Id. 609; *Jackson v. Armstrong*, 50 Id. 65; *Baughman v. Gould*, 45 Id. 481; *Match v. Hunt*, 38 Id. 1; *Wright v. Wright*, 37 Id. 55; *Starkweather v. Benjamin*, 32 Id. 305; *Galloway v. Holmes*, 1 Doug. 339; *Pierce v. Drake*, 15 Johns. 475.

2. An action on the case may be maintained for false representations on the sale of property, whereby the plaintiff was deceived and defrauded, even though the vendor was not aware of their falsity when he made them; and such representations may be treated as warranties, and *assumpsit* brought, at the option of the vendee; citing *Stone v. Covell*, 29 Mich. 359; *Hawkins v. Pemberton*, 51 N. Y. 198; *Wheeler v. Reed*, 36 Ill. 81; *Henshaw v. Robins*, 9 Metc. 83; *Burge v. Stroberg*, 42 Ga. 88; and as the declaration in either case must set out the facts, there must necessarily be considerable similarity; citing *Carter v. Glass*, 44 Mich. 154.

MONTGOMERY, J. The plaintiff brought an action to recover damages for a breach of warranty alleged to have been made by defendant on an exchange of property owned by plaintiff for stock in a mining corporation transferred to him by the defendant. On a trial before a jury in the Manistee circuit a judgment was rendered for $1,657.50. From this judgment defendant appeals.

The plaintiff's testimony tended to show that he exchanged property in Manistee, valued at $1,800, for mining stock, which, at 75 cents per share, amounted to $1,300, and $500 in cash; that the defendant exhibited specimens which he claimed came from the mine of the company, and assured plaintiff that he (defendant) was going to make a rich man of him, and that the stock was then selling for $1 per share, but that, as the company desired to engage plaintiff's services, and to have him interested, he would let him have the stock at 75 cents; that he (defendant) would make the stock worth $2 a share inside of six months. The mine owned by the corporation was not developed, consisted of little more than an excavation, and the plaintiff testified that he was wholly unacquainted with mining property, and of this the defendant was advised. The circuit judge charged the jury:

"If the jury find that the defendant represented to the plaintiff that the stock was worth a dollar a share, and that he would make it worth two dollars a share, and that

the plaintiff relied upon and acted upon this representation, and turned out his property for the $500 and the stock, and if the jury also find that the stock was utterly worthless, the plaintiff will be entitled to recover."

Defendant's first contention is that these representations of value are not such as a purchaser has a right to rely upon. He invokes the rule that any purchaser must expect that the vendor will seek to enhance his wares, and must disregard the vendor's statements as to value. This is undoubtedly the general rule, but it is subject to exceptions. Where the defendant knows that the plaintiff is wholly ignorant of the value of the property, and knows that he is relying upon the defendant's representation, and such representation does not take the form of a mere expression of opinion, and is in the nature of a statement of fact, the rule of *caveat emptor* does not necessarily apply. *Picard v. McCormick,* 11 Mich. 68; *Manning v. Albee,* 11 Allen, 520; *Lawton v. Kittredge,* 30 N. H. 500; *Bradley v. Poole,* 98 Mass. 169; *Miller v. Barber,* 66 N. Y. 558; *Gerhard v. Bates,* 20 Eng. Law & Eq. 129. We think, under the circumstances of this case, that the plaintiff had the right to rely upon the defendant's statement that the stock was readily selling at a dollar a share. This was a statement of fact which the testimony shows to be untrue, and it cannot be doubted that such a statement would have a material influence upon the purchaser.

In *Medbury v. Watson,* 6 Metc. 259, an action was maintained for false and fraudulent representations as to the price paid by a third person for the property in question.

In *Manning v. Albee, supra,* it was said:

"In the case now before us the plaintiff offered to show that he was induced to part with his goods by the false and fraudulent representations of French and the defendant, not only as to the value of the bonds offered by French to secure the note given by him for the goods,

but also as to the sale of such bonds in the market at a certain price, appearing by a published list of sales of stocks and securities, which they exhibited to him, to have actually taken place. This last representation was one which the plaintiff is not shown to have had equal means of knowing the truth or untruth of, and on which he might, without imputation of negligence, rely, and, upon discovering it to be false and fraudulent, maintain an action."

In *Miller v. Barber*, a representation that a patent owned by the company was of great value, and that certain other persons were owners of stock, was held to have been such a representation as the purchaser had a right to rely upon.

In *Lawton v. Kittredge*, a representation that certain stock "is good property or investment, and is about to make a dividend," is held to be a false representation when untrue, and where the person taking the stock objected to receiving it on account of his doubt or ignorance as to its value.

In *Bradley v. Poole*, representations that a corporate property is valuable, and one of the best properties in Colorado, when in fact the company is a bubble company, are held to raise a question of fraud for the jury to pass upon.

We think that a representation as to the market value of stock of this character is a representation of a fact which bears upon the question of the actual value, and there was no error in so instructing the jury.

But it is said that, inasmuch as the plaintiff retained this stock, and went into the employ of the company in the effort to make the stock valuable and his adventure profitable by developing the mining property, he cannot, the adventure failing, recover the value of his property upon the ground that the representations upon which he purchased were untrue. Undoubtedly this contention is sound if it be intended to be limited to asserting the doctrine that, after thus participating in the management

of the corporation, and holding stock some months, the plaintiff would not be permitted to rescind his contract with the defendant; but that is not the nature of the present action; it is a suit upon the warranty, and, if he has shown the warranty, he has a choice of remedies, either to rescind the contract or to sue and recover damages for the breach.

The defendant offered testimony which tended to show that the plaintiff, in constructing a mill which was on the mining property, had not done the work well. The plaintiff, in rebuttal, was permitted to call a witness, who testified that he was acquainted with the plaintiff, and had occasion to know of his capacity and ability as a carpenter and joiner, and, against the objection of defendant, was allowed to testify that he considered him a first-class man in every respect. This was error. Testimony that the mill in question was not well constructed did not necessarily involve the question of plaintiff's capacity or ability as a carpenter or millwright.

One G. Peden testified to having seen the plaintiff intoxicated while in Arkansas. The plaintiff, in rebuttal, was permitted to introduce a certificate or recommendation purporting to be signed by Peden, which was introduced and read to the jury, as follows:

"*To whom it may concern:*

"CRYSTAL SPRINGS, ARKANSAS, February 8, 1888.

"We, the citizens of Crystal Springs, Aakansas, having seen a letter written in Manistee, Michigan, which states that one S. W. Fowler, of Manistee, Michigan, has been circulating false reports about Mr. J. D. Maxted, formerly of Manistee, Michigan, and now of Crystal Springs, Arkansas, we will say that, if Mr. Maxted has ever been discharged by the Accident Ore Mining Company, we can see no reason why, unless it was a plan set by one S. W. Fowler to beat him out of his wages, for Mr. Maxted is not a drinking man in any sense of the word, and to charge him thus is unjust and untrue. Mr. Maxted has shown himself to be a perfect gentleman ever since he has

been here, and has also proved himself capable of doing any business intrusted to him; and we, as citizens of Crystal Springs, Arkansas, in justice to Mr. Maxted, will and do say that the charge against him by one S. W. Fowler is unjust."

Signed, among others, by G. Peden.

This paper was not shown the witness Peden on cross-examination, nor was he given any opportunity to explain it when it was offered for the purpose of contradicting his statement that he had seen Maxted intoxicated. In addition to the general objection that it was immaterial and incompetent, it was objected that, even if admissible, whatever related to the drinking was all that should be read to the jury. This objection was overruled, and the letter read in evidence. On a subsequent motion the letter was stricken out because the letter relating to the conduct of Mr. Fowler was not produced. It would have been difficult to frame an instrument which was better calculated to prejudice the defendant's case than was this. It was clearly not admissible, and we cannot say that it did not have its effect in prejudicing the jury against the defendant. It was a direct attack upon his character which was libelous if untrue, introduced an issue wholly foreign to the case, and which the defendant could not be expected to meet, and the fact that it was afterwards stricken out is not conclusive that the impression did not remain with the jury. It is incredible that the purpose of plaintiff's counsel could have been other than to prejudice the jury.

One other assignment of error only will be referred to. On the subject of damages the circuit judge charged the jury:

"If it [the stock] was entirely worthless, as claimed here, then, if the plaintiff recovers at all, he will recover the whole amount of his claim at your hands. There can be no recoupment in this case of the defendant against the plaintiff for any claim raised upon that head. The claim

cannot be sustained in this suit, for in fact there is no basis for it under the evidence."

And again:

"In case you find for the plaintiff, it will be for the full amount, with interest at six per cent. In case you find for the defendant, it will be, 'No cause of action.'"

The proper rule for damages would be the difference between the market value of the stock as it was represented to be and what it was worth in fact, and this would have reference to the time when the stock was transferred to the plaintiff. We think the testimony in the case failed to show conclusively that the stock was absolutely of no value at the time this transfer was made, and therefore the question of its value should have been submitted to the jury.

For the errors pointed out the judgment will be reversed, and a new trial ordered.

The record contains 342 pages, includes all the orders made in the case and all the testimony, which was unnecessary; and not only this, but the testimony is given precisely as it appears in the stenographer's minutes, not even omitting the certificate of the stenographer. This practice has been often condemned. We think a record of 200 pages at the most would have fairly presented all the questions which we have been called upon to consider, and the costs for printing will be limited to that number of pages.

McGRATH, C. J., LONG and DURAND, JJ., concurred. GRANT, J., concurred in the result.

94 114
94 119
94 114
104 96
94 114
107 216

CHARLES HATT v. THE EVENING NEWS ASSOCIATION.

[See *post*, 119.]

Libel and slander—Damages.

1. Any printed publication, the natural result of which is to bring ridicule or contempt upon the plaintiff, is, if untrue, libelous; citing *Tryon v. Evening News*, 39 Mich. 636.
2. Where, in a suit for libel, it appears that information of the falsity of the statements contained in the article was brought home to the reporter of the defendant newspaper before the article was published, the jury may properly award exemplary damages.

Error to Wayne. (Brevoort, J.) Argued October 26, 1892. Decided December 22, 1892.

Case for libel. Defendant brings error. Affirmed. The facts are stated in the opinion.

Dickinson, Thurber & Stevenson, for appellant.

Edmund Joncas and *James A. Randall,* for plaintiff.

MONTGOMERY, J. This is an action on the case for libel. The publication complained of is the following:

"SCOOPED HIS COUSIN!

"WILLIAM HATT MARRIES CHARLES HATT'S INTENDED.

"THE JILTED MAN'S WEDDING TO HAVE OCCURRED "TO-NIGHT.

"*Justice Phelan Officiates at Noon To-day, and William Hatt and Annie Hack start for Toledo until the Storm Blows Over. Charles Hatt a Clerk at Mabley & Co's.*

"A triumph of youth over middle age to-day resulted

in one of the most amusing incidents in real life that has occurred in this city in many a day. The affair borders very strongly on the realms of fiction, and at the same time shows the benefits of hustling.

"Charles Hatt is a clerk in Mabley & Co.'s clothing department, and is 44 years old. For some years he has been an admirer of Annie Hack, the 22 year old daughter of John V. Hack, a painter living at 224 Sherman street. Annie is a very pretty blonde, with short hair, which curls closely, and gives her a dashing air.

"William S. Hatt is 24 years old, also a clerk, and is the son of William Hatt. He has been in the south for some months, but returned a short time ago, and proceeded to renew his acquaintance with the fair Annie. He then learned that during his absence she had engaged herself to his older cousin, Charles. But he was not daunted by a little thing like that, and laid fast and furious siege to her heart. Charles, in the mean time, had his wedding set for this evening at his boarding place on Lafayette avenue, and had engaged a clergyman to solemnize his marriage to Annie. He also employed a florist to decorate the house in fine style, and had arranged for a two-weeks vacation.

"Last night William called on Annie, and a couple of moments later Charles drew up in a coupe. William appeared to give way to his older cousin, but was hugging himself over a little scheme that he thought would take the wind out of Charles' sails in great shape. The cause of his good feeling was disclosed about 12:30 to-day, when he and Annie entered the county clerk's office, glancing anxiously behind them. William asked for a marriage license as quick as possible. 'We have only an hour to head them off,' he remarked. He was asked who, but only chuckled to himself, and said to Annie, 'We'll beat them, sure.' Annie betrayed all the nervousness that William concealed by his bravado, and was fearful that something might happen. As the license clerk was at dinner, Deputy County Clerk Marshall made out the document in short order, and William asked where they could go and get married quick. The News directed them to Justice Phelan, who made them one in short order, and was about to claim his privilege of kissing the bride, when William put his arm around her, drew her to him, and gave her a resounding smack, saying: 'There, we've beat him, and now we have 10 minutes to catch the Toledo

boat.' He stated that they would stay in Toledo overnight to let the storm blow over, and give Charles 24 hours to smother his disappointment. While the justice was making out the certificate, William could not remain still, so great was his joy at having outwitted his cousin and captured the darling Annie. She, however, had got over her nervousness, as the danger of any interference was past, and willingly agreed to wait while her husband took the justice and the reporter to the Normandie for some cigars. She also joked a little on Willie's exuberance of spirits, and the fact that she only changed the last two letters of her name.

"Charles Hatt, of Mabley's, says that Wm. S. Hatt is no relation of his, and that he does not intend to get married, as he is not even in love. He also says that when he does get married he will open the champagne, and invite the reporters to have a good time."

1. It is contended that the article in question is not libelous. It is the settled law of this State that any printed publication, the natural result of which is to bring ridicule or contempt upon the plaintiff, is, if untrue, libelous. *Tryon v. Evening News*, 39 Mich. 636; Odgers, Lib. & S. 21; Starkie, Sland. & L. 157; Newell, Defam. 34.

Was the article in question calculated to bring ridicule or contempt upon the plaintiff? We think this question must be answered in the affirmative. The article deals with the most sacred relation in life, and the purpose to hold the plaintiff up to ridicule is, we think, apparent. Were the test applied which prevails in some jurisdictions, namely, whether the article was such as might reasonably, according to our natural passions, be considered as provoking a breach of the peace, we are not prepared to say that this publication would not fall within it. It is charged in this article, first, that the plaintiff was not only engaged to the young lady referred to, but that the wedding was set for the evening when the publication was made, and that the man to whom she was in fact married was a cousin of the plaintiff. The article contains a statement

that the plaintiff denied both the alleged relationship to William Hatt and the alleged engagement. This amounted to charging the plaintiff with uttering a falsehood. In *Tryon v. Evening News, supra,* it was held that a publication which charged the plaintiff, a reporter, with violating confidence, was libelous.

2. Defendant's counsel complain of the rulings of the court in receiving testimony, the general tenor of which was (to quote from counsels' brief)—

"To show that the plaintiff was a man of extreme sensitiveness; that his feelings were deeply hurt by the remarks made by friends to him, which of themselves appear to have been entirely innocent; but, as the result of the comments of his friends, he was humiliated in his own estimation, and rendered sick and unfit to attend to his work. * * * Where the plaintiff relies upon the libelous character of the publication from its face, no evidence of special damage, or other damage except such as the law would presume would follow from the publication of the article, is admissible, unless claimed in the pleadings."

Respectable authority certainly can be found supporting this contention. Were the question a new one in this State, we should seriously doubt the correctness of the holding below. In Newell on Defamation (page 779) it is said:

"The general rule, as stated by Starkie, is that no evidence of special damage is admissible unless it be averred in the declaration, whether the special damage be the gist of the action or be used as matter of aggravation, the words being in themselves actionable. But it has been said that greater certainty is requisite where the special damage is the gist of the action than where it is merely laid by way of aggravation."

The allegation in the present case is that plaintiff—

"Hath been and now is greatly injured in his good name, fame, and credit, and brought into public scandal, humiliation, ridicule, and disgrace, and he hath suffered

much annoyance, and incurred public derision, sarcasm, and contempt, and hath otherwise been greatly injured."

In *Burt v. McBain*, 29 Mich. 260, the words spoken imputed to the plaintiff a want of chastity. The plaintiff was permitted to show that because of the slander she was excluded from society, and was affected in mind and health. This was held not to be error, although the declaration did not claim special damages. The Court say:

"These results are the natural, and we might almost say the inevitable, results of such a slander of a virtuous young woman, and they might be shown without setting them out in the declaration. * * * It is to be borne in mind that our statute makes the imputation of a want of chastity in a female actionable *per se*, so that the necessity for an averment of special damages in order to show a cause of action is not requisite here, as it otherwise would be; and some decisions to which we were referred, which were made in states where no such statute exists, are for this reason not applicable."

It is difficult to distinguish that case from the present. The rule there laid down is that, under a declaration which sets out a libel which is actionable *per se*, it is not necessary, in order to introduce evidence of so-called special damages, to show that the results which naturally flow from the publication did in fact appear.

3. Error is assigned upon the charge of the court, for the reason that under it the jury were permitted to award exemplary damages. There was no error in this instruction, as the evidence showed that information of the falsity of the statements contained in the article was brought home to the reporter before the article was published.

Complaint is also made of the following instruction:

"That the reporter of the News, Mr. Stewart, had knowledge, prior to the publication of the article, that the article was untrue, and that he could easily ascertain, and did ascertain, that it was untrue, and the negligence of the Evening News to ascertain was culpable, which neg-

lect the jury have a right to consider in assessing the damages in this case."

The ground of complaint is that the instruction quoted is contradictory of itself, and confusing. It is urged that it is not true that it can be said that the defendant was chargeable with negligence in not ascertaining that the article was untrue, when in the same instruction it is stated that it had ascertained and knew that it was untrue. The defendant could not have been prejudiced by this error, as the undisputed testimony showed that the article was published after notice of its falsity.

The judgment should be affirmed, with costs.

The other Justices concurred.

---

94 119
103 57

94 119
s54NW 766
130 298

CHARLES HATT v. THE EVENING NEWS ASSOCIATION.

[See *ante*, 114.]

Libel and slander—Pleading—Special damages—Evidence.

In an action for libel for publishing an article charging that the plaintiff was engaged to a young lady, and had the wedding set for the evening on which the article was published, and that another man, to whom she had been married on the same day, was a cousin of the plaintiff, and that plaintiff denied both the engagement and alleged relationship, testimony offered for the purpose of showing that plaintiff's associates ridiculed him, and that he left his employment in consequence, is inadmissible under an allegation that plaintiff "has been and now is greatly injured in his good name, fame, and credit, and brought into public scandal, humiliation, ridicule, and disgrace, and has suffered much annoyance, and incurred public derision, sarcasm, and contempt, and has otherwise been greatly injured."

Rehearing, upon application of defendant, of case reported

ante, 114. Submitted March 7, 1893. Judgment reversed April 7, 1893.

MONTGOMERY, J. A rehearing has been had in this case on the question of whether there was error in receiving the testimony offered to show special damages. In the former opinion it was said: "Were the question a new one in this State, we should seriously doubt the correctness of the holding below;" but the Court, deeming the case of *Burt v. McBain*, 29 Mich. 260, controlling, sustained the ruling. It is now strenuously insisted that the doctrine of that case was misapplied, or at least extended.

Upon careful re-examination of the question, we feel constrained to reverse our former holding. In *Burt v. McBain* the evidence offered was to the effect that plaintiff was excluded from society, and affected in her health. This was held admissible, but it would appear to have been on the ground that it was a necessary result of such a slander as was uttered. We confess it would seem to us more logical if the jury had been permitted to infer that this necessary result followed than to admit testimony of what must necessarily be inferred without proof; but testimony was admitted, and this is what makes the distinction between that case and the one at bar difficult. We are convinced that the testimony given in this case included matters not within the necessary consequences of the wrong, and to this extent the former ruling went beyond that in *Burt v. McBain*. The testimony offered for the purpose of showing that plaintiff's associates ridiculed him, and that he left his employment temporarily in consequence, we think should not have been received.

In Newell on Defamation (page 779) it is said:

"The general rule, as stated by Starkie, is that no evidence of special damage is admissible unless it be averred

in the declaration, whether the special damage be the gist of the action or be used as matter of aggravation, the words being in themselves actionable. But it has been said that greater certainty is requisite where the special damage is the gist of the action than where it is merely laid by way of aggravation."

In Sutherland on Damages (volume 3, p. 660) it is said:

"If the defamed party suffers a particular injury, which the jury would not be entitled to consider as the necessary result of the actionable publication, but which is a natural and proximate consequence of it, it may be made a subject of additional compensation. * * * And the special damages which must be shown in such cases may be alleged and proved, besides the necessary or general damages, in the class of cases which have been considered; and they cannot otherwise be recovered."

See, also, as bearing on the question of averring special damages, *Joslin v. Ice Co.*, 50 Mich. 516; *Fuller v. Bowker*, 11 Id. 204; *Mich. Cent. R. R. Co. v. Burrows*, 33 Id. 6; *Powers v. Irish*, 23 Id. 429; *Shaw v. Hoffman*, 21 Id. 151; *Brink v. Freoff*, 44 Id. 69.

In other respects we adhere to our former decision.

For the error in receiving the testimony indicated, the case will be reversed, and a new trial ordered. The defendant will recover costs of hearing in this Court, but no costs will be awarded on this rehearing.

McGRATH, LONG, and GRANT, JJ., concurred. HOOKER, C. J., did not sit.

GEORGE RUSSELL v. JOHN RUSSELL AND HARRIET RUSSELL.

94 122
f121 172

Specific performance.

A father and mother agreed orally with their son that if he would return home, and build a house and settle down upon 40 acres of land owned by the father, they would convey the land to him. And it is held that equity will enforce such an agreement if clearly established by the testimony, and the son has actually entered upon the occupancy of the land, and performed on his part; citing *Welch v. Whelpley*, 62 Mich. 15.

Appeal from Newaygo. (Palmer, J.) Argued October 27, 1892. Decided December 22, 1892.

Bill to compel the specific performance of an oral agreement for the conveyance of land. Defendants appeal. Decree affirmed. The facts are stated in the opinion.

Dumon & Cogger, for complainant.

F. A. Mann, for defendants.

MONTGOMERY, J. The bill in this case was filed to obtain the specific performance of an oral agreement claimed to have been made by the defendants, who are father and mother of complainant, whereby they agreed, in substance, that if the complainant, who was at the time residing in Canada, would return and build a house upon, and settle down upon, the 40 acres of land in question, the defendants would convey to him the land. The complainant was the owner of a wild 40 near by. The defendant John Russell owned 160 acres, the 40 in question being across the road from the main portion of his land, and opposite his dwelling-house.

The questions involved are questions of fact. It was

determined in *Welch v. Whelpley*, 62 Mich. 15, that such a contract as this, if clearly established by the testimony, and the complainant had actually entered into the occupancy of the land, and performed on his part, would be enforced in equity. In the present case the testimony is conflicting. The complainant and his wife both testified that such an agreement was made on the part of defendants. The defendants deny having made the arrangement, but claim that complainant was permitted to build the house upon the premises, and live there without rent so long as he desired.

We are convinced that the complainant has established his case by a preponderance of testimony. It appears from the testimony that the value of the 40 was inconsiderable, —the testimony showing, about $300; that the complainant entered upon the land, and in fact built a house worth $600 or $700, and began clearing and improving the land. The defendants admitted in their testimony that there was a talk about complainant having a deed of the land. Mrs. Russell testified:

"One evening George and I were sitting in the kitchen, and he said, 'Mother, I want a deed of that 40 across the road before I begin to build a house.' I said I had not got a deed of it. He said, 'Well, it's yours, any way.' I said if he had a deed some one would get it away from him,—Mr. Bullman or some one else."

She further testified:

"One evening, afterwards, I had a conversation with George, after my husband and Jimmy had gone to bed. George said: 'Mother, I want a deed of that 40. I don't want to go on and build and clear up some on it without a deed, because you could turn me off, if you had a mind to, without anything.' I made answer that he could go on and build, and he would not be turned off without anything. I said, 'It may be yours some time.' I think that was all that was said at that time.

"*Q.* Whether at this time he had commenced getting any material to build the house?

"*A.* I think he had commenced getting the material."

Complainant testified that, in addition to the assurances that he would not be turned off without anything, both defendants assured him that he should have a deed.

Defendant John Russell testified, in answer to the question:

"Do you know anything about why he came to build a house on the 40 across the road from your house, instead of building it on his own 40?

"*A.* All the reason I know is, I suppose he had rather live there. He never said anything to me about it."

It is incredible that the defendants should not have both understood that complainant was building this house in the expectation that the property was to become his. Indeed, the testimony of Mrs. Russell shows this, and at the same time shows that her husband is not altogether frank in his statements. The probabilties are all with the complainant. It is unlikely that he would have gone to the expense of building a dwelling upon the land, which was considerably in excess of the value of the bare land, if there had been no agreement that he should have the conveyance. This view is strengthened by the fact that the testimony of defendants, as well as of complainant, shows that he was awake to the importance of having his rights evidenced by a written conveyance.

The decree will be affirmed, with costs.

The other Justices concurred.

94 125
98 335
94 125
116 148
94 125
138 553

THE FIRST NATIONAL BANK OF KALAMAZOO v. HENRY GUNTERMANN.

Chattel mortgage—Failure to file—Validity as against creditors.

An unfiled *bona fide* chattel mortgage is valid as against creditors whose claims accrued prior to its execution, but not as against creditors who became such during the time between the execution of the mortgage and its filing, without knowledge of its existence; citing *Littauer v. Houck*, 92 Mich. 162; *Brown v. Brabb*, 67 Id. 17.

Error to Bay. (Cobb, J.) Argued October 27, 1892. Decided December 22, 1892.

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

T. A. E. & J. C. Weadock, for appellant.

Osborn & Mills (*Simonson, Gillett & Courtright*, of counsel), for plaintiff.

GRANT, J. One William H. Cobb, being indebted to the plaintiff in the sum of $7,000, on October 17, 1890, executed to plaintiff a chattel mortgage to secure that amount. Cobb resided in Kalamazoo, but the property mortgaged was in Bay City, where he carried on business. By mistake the mortgage was on the same day filed with the recorder of Bay City, instead of at Kalamazoo, where the law required it to be filed to operate as a notice to creditors. January 7, 1891, plaintiff took possession under its mortgage.

January 8 the Commercial Bank of Bay City sued out a writ of attachment, and placed it in the hands of the defendant sheriff for execution, who levied upon and took

possession of the property here in dispute. Plaintiff brought this action of trover to recover the value. It is conceded that plaintiff's mortgage was taken in good faith to secure a *bona fide* indebtedness.

The attachment suit was brought on a note for $700, dated October 4, 1890, given by Cobb to the plaintiff in the attachment suit, and on a draft for $174.10, dated October 16, 1890, drawn by the Connersville Furniture Manufacturing Company, with bill of lading attached, upon Cobb. This draft was presented to one H. E. Cobb, who signed the name of W. H. Cobb to an acceptance written thereon November 3, 1890, which acceptance made the draft payable at the Commercial Bank.

It is the settled law of this State that an unfiled *bona fide* chattel mortgage, given by a debtor to a creditor, is good as against those creditors whose claims accrued prior to the execution of the mortgage, but that such mortgage is not good as against those creditors whose debts were created during the time between the execution of the mortgage and its filing, and who had no knowledge of the existence of the mortgage. *Littauer v. Houck,* 92 Mich. 162; *Brown v. Brabb,* 67 Id. 17. So far as the note for $700 is concerned, this case falls clearly within those decisions, and the mortgage must be held to have precedence.

The Commercial Bank was informed in December, prior to its attachment suit, of the plaintiff's mortgage. The draft for $174.10 was sent to the Commercial Bank for collection. It is questionable whether the defendant proved that H. E. Cobb was the lawful agent of W. H. Cobb to accept this draft, under How. Stat. § 1583. But it is unnecessary to determine this question. Under this record the Commercial Bank was not the owner of the draft. The Connersville Furniture Manufacturing Company extended no credit to Cobb. He had no right to receive

the bill of lading or the goods shipped to him except upon payment of the draft. The bank had no authority to extend credit. It violated instructions in so doing. The manufacturing company cannot now take advantage of the wrongful act of the bank in violating its instructions. As to this claim, the Commercial Bank could only maintain its attachment suit on the ground that it was the collecting agent of the manufacturing company, and there is no evidence upon the record to show any ratification of the act of the bank in surrendering the bill of lading, and thereby delivering the goods contrary to instructions. Certainly one who does not intend to and has not extended credit to a debtor cannot claim that he is prejudiced by a mortgage which is not filed.

The record does not show that the bank paid the draft. If paid after the bank had information of the existence of plaintiff's mortgage, it could not recover. If it claimed the right to recover upon this basis, it should have shown that it paid the draft before receiving information of the existence of the mortgage.

The court below directed a verdict for the plaintiff, and the judgment entered thereupon is affirmed.

The other Justices concurred.

---

94 127
111 424

94 127
128 304

94 127
140 2257

WILLIAM H. SLADE AND EDWIN KELTON v. CHARLES LEE.

Sale—When title passes.

1. Under a contract for the purchase at an agreed price per thousand feet of all of certain grades of lumber which the vendor can manufacture from a specified class of logs, which lumber

is to be paid for after its inspection by an inspector agreed upon by the parties, and its shipment, such inspection, in the absence of evidence showing a contrary intention by the parties, is a condition precedent to the passing of title.

2. In view of the conflict of testimony as to the contract of sale; of the manner in which the vendees treated the lumber after it was piled; what they said in regard to its ownership; the payment by them of $2,000 upon it; their direction to the vendor to ship the unburned though damaged lumber; and all of the other surrounding circumstances,—the question whether the title to the lumber passed before its inspection should have been left to the jury.

Error to Saginaw. (Gage, J.) Submitted on briefs October 27, 1892. Decided December 22, 1892.

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

Harris & Kendrick, for appellant.

O. F. Wisner, for plaintiffs.

GRANT, J. Plaintiffs were lumber dealers at Columbus, Ohio. The defendant owned a saw-mill in Saginaw, Mich., where he was engaged in the manufacture of lumber. In April, 1887, plaintiff Kelton was at defendant's mill, and, on behalf of his firm, made a contract with defendant for the purchase of some lumber of a certain grade and quality, to be manufactured by the defendant during the following season. The lumber was manufactured, and piled, according to contract, alongside the railroad track in the defendant's yard, ready for shipment. Plaintiffs made a partial payment upon the purchase price. Before the lumber was shipped, it was consumed by fire without any fault on the part of the defendant. After the fire, plaintiffs brought this suit to recover the amount so paid, less the price of certain lumber which they had received. The circuit court directed a verdict for the plaintiffs, upon the ground that the title to the lumber at the time of the fire was in

the defendant, and that, consequently, the loss must fall upon him. The contract was an oral one, but no question arises under the statute of frauds.

In determining the correctness of this instruction by the court, we must first ascertain the contract under the defendant's proofs. His proofs show it to be substantially as follows: He agreed to get out all the 2½ and 3-inch selects and uppers that he could cut out of a certain class of logs that season for $40 per thousand. He agreed to pile the lumber on the inside dock, next to the railroad track. It was agreed that an inspector by the name of Randall should inspect it, and plaintiffs were to pay for it in 60 days after shipment. It was to be shipped as ordered by plaintiffs, and defendant was to load it on the cars at his own expense. Each was to pay one-half the cost of inspection. When shipped, defendant was to draw a draft for the price of the lumber shipped, due in 60 days. Plaintiffs agreed that the lumber should be taken away within 60 or 90 days after it was cut. The lumber was cut and piled in December, 1887. Defendant notified plaintiffs that the lumber was ready for shipment. They did not order it shipped, and it remained in defendant's yard in four piles until August 7, 1888, when it was destroyed by fire.

The defendant also gave evidence tending to show that he requested and urged the plaintiffs to take the lumber away on at least two occasions long before the fire, and that they had promised to do so; that plaintiff Kelton was once present when the lumber was being sawed and piled, and found some fault with two planks, which he claimed were not properly sawed, and that the millwright said he would take care that no more were sawed in that manner; that plaintiff Kelton was also present at the mill on other occasions, saw the lumber, and found no fault with it;

that on one of these occasions he asked the millwright if he was cutting all the 2½ and 3 inch stock there was in the logs; that Kelton requested defendant to cover up the piles, which he did; that Kelton spoke of the lumber as his; that some of the lumber was not entirely consumed; that after the fire Kelton went to defendant's yard, and ordered what was not entirely consumed put upon the cars, and shipped to him, which was done; that the four piles were estimated to contain about 134,000 feet, of which 2,000 or 3,000 might not have been up to the grade of selects and uppers.

The above is a substantial statement of the defendant's version of the contract, and of the facts and circumstances connected therewith which are claimed to throw light on the transaction, and show the intent of the parties as to the title.

The position of the defendant is that the question of whether the title passed was, under the circumstances, one of fact for the jury, and not of law for the court, to determine; while plaintiffs contend that inspection was necessary to determine the amount, quality, and value, and was therefore a condition precedent to passing title.

Plaintiffs' counsel cites and relies upon the following decisions in this Court: *Lingham v. Eggleston*, 27 Mich. 324; *Hahn v. Fredericks*, 30 Id. 223; *Wagar v. Farrin*, 71 Id. 370; *Blodgett v. Hovey*, 91 Id. 571.

Defendant's counsel cite and rely upon the following decisions: *Byles v. Colier*, 54 Mich. 1; *Jenkinson v. Monroe*, 61 Id. 454; *Colwell v. Iron Co.*, 36 Id. 51; *Whitcomb v. Whitney*, 24 Id. 486; *Sandler v. Bresnaham*, 53 Id. 567; *Carpenter v. Graham*, 42 Id. 193; *Wagar v. Railroad Co.*, 79 Id. 648; *Lobdell v. Horton*, 71 Id. 681.

Counsel for both parties cite many authorities outside our own State, but our own decisions upon this class of

cases are so numerous, and the principles involved are so fully discussed and settled, that a reference to them is unnecessary. In the cases above cited, as well as others, this Court has consistently adhered to the principles enunciated in *Whitcomb v. Whitney*, 24 Mich. 486, and *Lingham v. Eggleston*, 27 Id. 324. If there is any apparent conflict between these cases and others since decided, it has arisen from the diversity of facts in each case.

Under the contract in the present case plaintiffs and defendant had agreed upon an inspector. His inspection as to quality and quantity was conclusive upon the parties, unless fraud or mistake were shown. The inspector, in the exercise of his judgment, could reject any of the lumber which defendant had piled in his yard, as not up to the quality agreed upon. As to the lumber so rejected, no title passed. Until such inspection was had, therefore, it was impossible to determine the amount and price to be paid. Whether the whole amount manufactured and piled was included in the sale depended on the inspection.

In *Wagar v. Farrin*, 71 Mich. 370, a case somewhat analogous to the present one, the lumber sold was to be cut in specified grades at specified prices. The contract was for 6,000,000, which was to be cut as fast as possible, and cross-piled. It was there said:

"No one could tell in advance what lumber would be finally accepted as belonging to any class, or entirely rejected, as was possible among the lowest grades. Defendant could not, under the contract, be compelled to pay except a certain sum for grades ascertained by inspection. When inspection became impossible, it became equally impossible to fix prices. If the lumber had not been burned, its value could have been reached."

This language is applicable to the present case, for inspection has become impossible, and estimates must be resorted to to determine the amount. Under the contract as claimed by the defendant the presumption is that the

title did not pass, because there was still something left to be done by the mutual consent of both parties to determine the quantity and value. If, therefore, there were nothing else in the case for the consideration of the court except the contract, and the fact that defendant had manufactured and piled the lumber which he considered to be of the quality specified, the instruction of the court in directing a verdict would be correct. It remains, therefore, to consider whether there is anything in the facts and circumstances surrounding the transaction to justify a finding that the parties intended a transfer of title. If there is, then the question should have been left to the jury, under proper instructions by the court.

It is true that defendant, under his evidence, had fulfilled his part of the contract in manufacturing and piling the lumber, and that there was nothing more for him to do until plaintiffs had directed the inspection and shipment. But this was not conclusive upon the plaintiffs, and did not alone operate to transfer the title. Plaintiffs were not to be bound by the defendant's judgment, but by the judgment of a third person, upon whom both had agreed. Upon his judgment alone depended the amount of lumber plaintiffs were to receive, and the amount of money defendant was to receive in payment. We confess that there is some difficulty in determining the question, but, where different minds may reasonably draw different conclusions from the evidence, the question becomes one for the jury. The parties in this case do not entirely agree as to the contract, and some of the testimony on behalf of the defendant in regard to the facts and circumstances is also controverted. The manner in which plaintiffs treated the lumber after it was piled; what they said in regard to its ownership; the fact that after it was piled they paid $2,000 upon it; that they ordered defendant to ship what was left from the fire, although it was injured; that they were noti-

fied to take it away, and promised to do so; and all the other circumstances surrounding the transaction,—are sufficient, in our judgment, to make the transfer of title a question of fact for the determination of the jury.

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

The other Justices concurred.

94 133
s58NW 918
133 s191

JULIUS C. HASSE AND CHARLES H. DINGS v. THE AMERICAN EXPRESS COMPANY.

Common carriers—Liability as warehousemen—Goods expressed C. O. D.

1. Where goods are expressed C. O. D., the liability of the express company as a common carrier terminates upon the safe carriage of the goods to their place of destination, notice to the consignee of their arrival, and an offer to deliver upon payment of the amount charged against them.
2. In case the consignee is not ready to receive and pay for the goods, it is the duty of the company to safely store and care for them, and to hold them for a reasonable time to enable the consignee to make such payment, and to notify the consignor, and the liability of the company meanwhile is that of a warehouseman.
3. Plaintiffs expressed three packages of goods C. O. D., and on their arrival at their place of destination two of the packages were taken to the houses of the consignees, who were absent, but who afterwards called at the office of the express company, and requested it to hold the goods for six days, when they would receive and pay for them. A notice was mailed to the third consignee, whose place of residence was unknown to the company, but he never responded to the notice. The goods were safely stored in the company's warehouse, and notice sent to plaintiffs of what had been done. The goods were destroyed by fire, without the fault of the company, on the evening of the

day the notices were mailed to plaintiffs, and before they were received by them. And it is held that the defendant is not liable for the loss of the goods.

Case made from Wayne. (Hosmer, J.) Argued November 1, 1892. Decided December 22, 1892.

Assumpsit. Defendant assigns error. Judgment reversed, and one entered here for defendant. The facts are stated in the opinion.

H. C. Wisner, for appellant.

Henry A. Chaney, for plaintiffs.

GRANT, J. June 8, 1891, plaintiffs, who are clothiers in the city of Dotroit, delivered a parcel of clothing to the defendant for carriage to Marquette, Mich., addressed to one McMillan, marked "C. O. D. $30.00." On June 10 they delivered another parcel, addressed to one Wick, Marquette, "C. O. D. $35.00." June 16 they delivered another package, addressed to one Hart, Marquette, "C. O. D. $62.00." Each of these packages reached Marquette on the day following its receipt by the defendant. Its agent at Marquette, immediately on receipt of the first two packages, took them to the residences of McMillan and Wick in Marquette for delivery upon payment of the amounts to be collected. They were traveling men, and were not at home. Hart was unknown to defendant's agent, and had no residence in Marquette. Defendant's agent thereupon sent a notice by mail to Hart at Marquette of the arrival of the package. These packages were then safely stored in the defendant's warehouse. June 19 McMillan and Wick went to defendant's office in Marquette, and each notified its agent to hold the package addressed to him until June 25, when he would pay the amount, and take the same. Hart never appeared in answer to the

notice sent to him. June 19 defendant's agent at Marquette mailed three notices to plaintiffs at Detroit, notifying them that the first two packages remained in the office unpaid, for the reason that each party said he would take it about the 25th, and that the last package remained in the office unpaid, for the reason that the consignee was unknown to defendant, and that the notice sent to him by mail failed to bring him. These notices were received by the plaintiffs June 20. On the night of June 19 defendant's storehouse was destroyed by fire, without fault upon its part, and these parcels sent by plaintiffs were destroyed. Plaintiffs sued the defendant as a common carrier, and verdict was directed in their favor by the court.

The defendant's contract as common carrier was to safely carry the goods to their destination, to notify the consignees of their arrival, and to offer delivery upon payment of the amounts. This duty it had fully performed, and with such performance its liability as a common carrier terminated. Its further duty was to safely store and care for the goods, hold them a reasonable time to enable the consignees to pay, if they were not ready to pay immediately, and then to notify the consignors. The liability meanwhile was that of warehouseman. Hutch. Carr. § 392; *Weed v. Barney,* 45 N. Y. 344; *Zinn v. Steamboat Co.,* 49 Id. 442; *Express Co. v. Darnell,* 31 Ind. 20; *Marshall v. Express Co.,* 7 Wis. 1.

In *Weed v. Barney, supra,* the goods were sent C. O. D., arrived at their destination March 17, the consignees were promptly notified, and promised to take and pay for them, and the goods remained in the storehouse until April 16, when they were destroyed by an explosion, without the fault of the defendants. No notice had meanwhile been given to the consignor. It was held that no notice was essential.

It is a matter of common knowledge that those sending goods by express with instruction to collect their value before delivery expect express companies to retain them in order to give the consignees an opportunity to pay for and take the goods. Consignors so sending goods understand that the goods must be deposited in the storehouses of these companies. There is no reason, under such circumstances, in holding these companies to the strict liability of common carriers. We think that under the agreed facts in this case the defendant is not liable.

Judgment reversed, and judgment entered here for the defendant, with costs of both courts.

The other Justices concurred.

94 136
s108 106
94 136
115 253

HARRY LADD v. DAVID BROWN.

Statute of frauds—Estoppel—Landlord and tenant—Consideration.

1. A parol agreement with a tenant from year to year, that if he sows wheat he may reoccupy the leased premises after the expiration of the tenancy for the purpose of harvesting the wheat, is enforceable, if founded upon a sufficient consideration.
2. Where a tenant agrees to leave crops upon the ground corresponding to those which were growing at the time he took possession, an agreement with the landlord that if he sows such crops he may come back and harvest them after the expiration of the tenancy is without consideration.

Error to Jackson. (Peck, J.) Submitted on briefs November 4, 1892. Decided December 22, 1892.

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

Thomas A. Wilson, for appellant.

Blair & Wilson, for defendant, contended:

1. Under How. Stat. § 5955, it was competent for the defendant to occupy the premises as he did, paying therefor a money rent agreed upon by the parties, and adjudged by the probate judge with their assent; citing *Loomis v. Armstrong*, 63 Mich. 364, 365.
2. If defendant was occupying as administrator under the statute cited, he was under no obligation to put in a crop for others to reap. If he was occupying under the terms of the original lease, as sworn to by the plaintiff, he could have held the premises for another year, as he told plaintiff he would unless he could have the crop. It was competent for plaintiff to waive the provision in the original lease that a crop should be left, if he saw fit to do so; citing 7 Amer. & Eng. Enc. Law, p. 32, § 7.
3. The jury have found that the defendant would not have plowed the land or put in the grain except for the plaintiff's promise that he should have the crop without trouble from him, and that when plaintiff made the promise he expected defendant would rely and act upon it. Again, the defendant, as tenant from year to year, had the undoubted right to hold the premises for another year, and told plaintiff that he would not move away unless he could have the wheat, to which the plaintiff replied that of course he could have the wheat, and he moved off, leaving his binder with which to cut the grain. A mere statement of the facts shows the materiality of this evidence, and its sufficiency, if believed, to justify a verdict for defendant. The circuit judge very properly left this question (which was the only one in the case) to the jury, and their verdict should not be disturbed; citing *Truesdail v. Ward*, 24 Mich. 117; *Faxton v. Faxon;* 28 Id. 159; *Mizner v. Kussell*, 29 Id. 229; *Peake v. Thomas*, 39 Id. 584; *Vanneter v. Crossman*, 42 Id. 465; *Heyn v. O'Hagen*, 60 Id. 150; *Dickerson v. Colgrove*, 100 U. S. 578.

MONTGOMERY, J. The defendant leased a farm in Norvell township, Jackson county, of one George Ladd, under an agreement to pay 5 per cent. of the valuation as annual rental. After some years of occupancy by defendant, George Ladd died, in May, 1887, leaving as his heirs at law the plaintiff and one Alice M. Ladd, a minor child of

another son. The defendant was appointed administrator of the estate of George Ladd, and continued to occupy the premises in 1887 and 1888. In rendering his account as administrator, he accounted for the rental of the farm, and charged himself $280. This sum was fixed by the probate judge after a hearing. In 1888 he sowed 12 acres of wheat and 16 acres of rye. He left the place before April 1, 1889, and plaintiff took possession. Defendant afterwards went on the premises, and reaped the crop. Plaintiff brings replevin.

The plaintiff's testimony tended to show that when the defendant took possession it was agreed on his part with George Ladd that the defendant would at the end of his term leave on the ground the same quantity of wheat as was then growing,—about 25 acres.

Defendant testified that in the fall of 1888, before he put in the wheat in question,—

"I told him I would not think of putting in any wheat unless I had the right to come back and harvest it after I left the place. If I could have that privilege to come back and harvest it—I told him if we were going to have any trouble I would not think of putting in the wheat. He said he did not think there would be any trouble, and that he owned one-half of the place, and would probably own the rest before the wheat was harvested, and there would be no trouble. This was in front of plaintiff's house. He asked me if I had plowed any, and I told him no, I didn't know as I should, and that brought up the question about sowing the wheat. That talk was, I think, along in the forepart of August. I plowed after that. He knew I was plowing and sowing the ground."

The circuit judge charged that—

"If you find that the defendant, Brown, in substance said to Mr. Ladd, the plaintiff, 'I will not put in the crops unless I can harvest and take them off,' and Mr. Ladd, in reply, said, in substance, 'There will be no trouble about that; I own one-half of the land, and expect to purchase the other half;' and if you further find that when Mr. Ladd made that statement he expected Mr.

Brown to rely upon it and act upon it in putting in the crops; and if you also find that Mr. Brown did so rely upon it and act upon it, and would not have put in the crops except for such statement by Mr. Ladd,—now, in that condition of facts, Mr. Ladd cannot insist upon having the crops, and your verdict should be for the defendant. If, on the other hand, the evidence does not establish such a condition of facts, Mr. Ladd, the plaintiff, is entitled to your verdict."

We think there was error in ignoring the testimony offered by the plaintiff tending to show that the defendant was legally bound to do what he claims to have done under the plaintiff's assurances. To so apply the doctrine of estoppel as to render an agreement, otherwise void for want of consideration, valid and binding, is to accomplish by indirection what cannot be done directly. The doctrine of estoppel is applied to prevent injustice, not to relieve parties from the obligations of their contracts; and the conduct of the party claimed to have been estopped must have been such as to have misled the party setting up the estoppel into a course to his prejudice, or induced him to do what he otherwise would not have done. *Burdick v. Michael*, 32 Mich. 246. In this case, if the defendant was induced to do no more than he had, before the alleged promises of plaintiff, undertaken upon sufficient consideration to do, it cannot be said that he was misled to his prejudice, and induced to do what he otherwise would not have done, unless it was to his prejudice to fulfill his contract, which is of course not true. 3 Amer. & Eng. Enc. Law, p. 834, and cases cited in note 4.

It is claimed by the appellant that, as the growing wheat was an interest in real estate, an estoppel could not be created by parol. We do not consider that the case presents this question. It was competent for the plaintiff to assent to an occupancy of the land for a period of less than one year by parol, and this is the effect of the agree-

ment, as testified to by defendant; and, if such agreement had been made upon sufficient consideration, we do not doubt that it could be enforced. In this case, if the testimony offered by the plaintiff tending to show that there was an agreement on the part of defendant to leave crops upon the ground corresponding to those which were growing at the time he took possession is true, there was no consideration for the engagement alleged to have been made by the plaintiff, and the jury should have been so instructed.

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

The other Justices concurred.

94 140
102 125
94 140
103 408
94 140
126 453

GEORGE N. POTTER ET AL. v. GILBERT W. LEE.

Sale—Option to return goods—Acceptance—Breach of warranty.

Where a number of cheeses are purchased by sample, with the right to return them if, after the lapse of 10 days in which to examine them, the vendee determines to do so, and complaint is made to him within the 10 days of the quality of some of the cheeses, which are returned to him, but he continues making sales for 16 days thereafter without notice to the vendor, he must be considered as having accepted the cheeses, and cannot set up a warranty and its breach; citing *Farrington v. Smith*, 77 Mich. 550; *Childs v. O'Donnell*, 84 Id. 533.

Error to Wayne. (Reilly, J.) Argued November 16, 1892. Decided December 22, 1892.

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

Charles W. Casgrain and *Charles S. McDonald,* for appellant.

Philip T. Van Zile and *Frank E. Robson,* for plaintiffs.

LONG, J. Plaintiffs brought *assumpsit* in the Wayne circuit court on the common counts. In their bill of particulars they claimed for the price and value of 169 cheeses, weighing 7,253 pounds, at 7½ cents per pound, amounting to $543.98.

Defendant gave notice under his plea of the general issue that the plaintiffs falsely and fraudulently represented that the cheeses were good and merchantable, were not strong, and would not crumble when cut; that between 18 and 20 only were made during the month of July, 1890, and the balance were made during August of that year, and that the entire lot was equal, if not superior, to the samples which were exhibited; that he (the defendant) relied upon such warranty in making the purchase; that the same were not equal to the samples, and that such representations were false, and that the cheeses were of an inferior quality, were made from inferior ingredients, were strong, and would crumble when cut, were unmerchantable, and of no value; and that he sustained loss thereon, and to his business, etc., which he would recoup on the trial.

The case was tried before a jury, and the plaintiffs had verdict and judgment for $585.66. Defendant brings error.

On the trial the plaintiffs produced as a witness John Potter, who was the agent of the plaintiffs in making the sale to the defendant. His version of the sale and what the contract was is that on the 24th day of September, 1890, he called upon the defendant at his place of business in Detroit, and endeavored to sell him a quantity of cheese, which he had at the Detroit, Grand Haven & Milwaukee depot in Detroit. He did not sell it on the

first visit to defendant. He called upon others, and on the next day made a sale to the defendant. He took 15 cheeses as samples to defendant's store. Three or four were taken into the store, and examined by the defendant with a trier. Defendant asked what he wanted for them, and he said 8 cents. Defendant would not pay that price, and offered 7½ cents, and the bargain was closed at that price. The cheeses were each marked plainly on the outside with the date they were made. Mr. Potter testified that no representations were made as to the cheeses being good and marketable, or that those at the depot were as good as the samples, but that he stated that they were made in July and August. He also testified that in selecting the samples he took some of July and some of August make, and without an effort to select the best.

The defendant testified that he tried three of the cheeses with a trier, and found them good. He asked how many of the whole lot were made in July, and Potter answered 15 or 20, and the rest in August. After examining the three, he asked Potter if the cheese would crumble when cut; if they would, he would not give a cent per pound. Potter said that merchants at Potterville had used them with perfect satisfaction. Defendant then said to Potter:

"'If that lot of cheese is as you represent it, and will not crumble, and is as good as these three samples, I will take it all, and pay you seven and one-half cents per pound for it.' Potter said he would take that price, and wanted a check for the amount. I told him: 'That may be all right; we have got plenty of money to pay it, but we don't pay quite as prompt as that. You are a stranger to me, and I have seen only 10 boxes of these cheese, and I don't know what is in the car. If in the course of 10 days we find this cheese as you represent it, we will pay for them, taking one per cent., which is customary.' Mr. Potter then left for home."

The last part of this arrangement is substantially agreed to by Mr. Potter. He says that defendant wanted 1 per

cent. off, or to take 30 days to pay it in, and he gave him the 30-days time. Nothing has ever been paid.

Defendant took the cheeses from the depot, sold some, and says that in less than 10 days parties to whom he shipped some of them refused to pay, and wrote letters rejecting them. He introduced testimony tending to show that he attempted to make sales; that the cheeses would crumble when cut; that they came back upon his hands, as they were not equal to the sample; and that it had injured his business to a great extent. He testified further that he wrote a letter to plaintiffs on October 21, which was the first notification he gave them of the quality or condition of the cheeses, and the first refusal to pay for them. He states in his letter that the 15 cheeses shown as samples were readily sold, and that no fault was found with them; but claim is made that some 40 were shipped to Mt. Clemens, and all but 5 or 6 returned; that others were afterwards returned by parties to whom he had shipped them. Plaintiffs were asked to take the balance away. Much testimony was given to which it is not necessary to refer.

The errors relied upon relate principally to the refusal of the court to give certain of defendant's requests to charge, and to the charge as given. Claim is also made that the court was in error in refusing to permit the defendant to show the loss of profits on resale caused by breach of warranty, and the effect such breach had upon his business and trade. The court charged the jury that if they found that the defendant remained silent for some 26 days after the cheeses were purchased, without complaining that those delivered were not such in quality as those purchased, and if they found that cheeses were perishable property, defendant could not, after that lapse of time, rescind his contract, and their verdict must be for the plaintiffs for the price the cheeses were sold for; and, further, the court

directed the jury that the failure to notify the plaintiffs must be considered as an acceptance of the property at the price agreed upon.

We need not state the several requests to charge, as, from the view we take of the case, the court, under the testimony of the defendant himself, should have directed the verdict in favor of the plaintiffs. Defendant admits that he said to Mr. Potter, plaintiffs' agent:

"You are a stranger to me, and I have seen only 10 boxes of these cheese, and I don't know what is in the car. *If in the course of 10 days we find this cheese as you represent it, we will pay for them.*"

The arrangement, in effect, was that he was to have 10 days to examine the cheeses, and, if found as represented, he was to pay for them, and, if not found as represented, he might return them. Potter does not dispute this arrangement. It is therefore evident, even if a warranty was made by Potter as to the quality of the cheese in the car, and not examined at the time by the defendant, that the defendant did not rely upon it, but preferred to make an examination for himself, and was to have the 10 days in which to do it. If he did not make such examination, it was his own fault. He says the cheeses were brought to his store. He had therefore every opportunity to make an examination. He was told by Mr. Potter that they were made in July and August, but claims that Potter told him that only 15 or 20 were made in July, and the rest in August. When they were brought to the store, he could readily see what quantity was made in each month from the marks upon the boxes. He claims that complaint was made of some that he sold even before the 10 days elapsed, and yet he gave the plaintiffs no notice of these facts for 26 days after the purchase, knowing, as it is shown, that the cheeses were perishable property. He continued selling right along after the 10 days elapsed and

up to the time he finally refused payment. It appears that there was no contract of warranty upon which he relied, but rather an agreement for 10 days' time to examine and determine whether or not he would keep them. He failed to return them within the 10 days, and, under the admitted facts, he must be considered as having accepted them, and cannot be heard to set up the defense of warranty and breach. *Farrington v. Smith*, 77 Mich. 550; *Childs v. O'Donnell*, 84 Id. 533; *Lee v. Bangs*, 43 Minn. 23 (44 N. W. Rep. 671); *Rosenfield v. Swenson*, 45 Id. 190 (47 N. W. Rep. 718).

In *Reed v. Randall*, 29 N. Y. 363, the court, in speaking of an article found to be unmerchantable, said:

"The latter [the vendee] is not bound to receive and pay for a thing that he has not agreed to purchase; but if the thing purchased is found on examination to be unsound, or not to answer the order given for it, he must immediately return it to the vendor, or give him notice to take it back, and thereby rescind the contract, or he will be presumed to have acquiesced in its quality."

In the present case the defendant admits that he had some of the cheese returned within 10 days after its purchase, yet he kept on selling for 16 days thereafter, without notice to the sellers. In this view of the case, whatever technical errors may have been committed on the trial are of no importance, as the right result has been reached.

Judgment is affirmed, with costs.

The other Justices concurred.

94 146
97 126

94 146
121 219

94 146
d123 409

94 146
140 360

94 146
141 1 20
142 335

94 146
146 5154

94 146
153 2111

94 146
d157 1256

FRANK A. RETAN v. THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY.

Railroad companies—Negligence—Defective walk across track at street crossing—Contributory negligence—Excessive damages.

1. Where a railroad company, acting under a notification from the common council of a village, constructs a sidewalk across its right of way at a street crossing, and for years assumes to keep the walk in repair, it becomes its duty to keep the walk in a reasonably safe condition for public travel; citing *Stewart v. Railway Co*, 89 Mich. 315.
2. The testimony is held sufficient to authorize a finding by the jury that, though the defendant had no actual notice of the hole in the walk in which plaintiff's foot was caught, it had existed long enough to charge the defendant with such knowledge.
3. The question of plaintiff's contributory negligence in returning to the crossing in face of the approaching train, which was nearly 600 feet away when he stepped upon the track, is held to have been properly left to the jury.
4. It cannot be said that a person traveling along a way must at all times look where he steps or be charged with negligence as matter of law, it being a question for the jury under all of the testimony.
5. A judgment for $30,000 in a negligence case, as compensation for the pain and suffering endured by the plaintiff, and the loss to him for the remainder of his life of both feet, will not be reversed upon the ground that the damages awarded are excessive.

Error to Lenawee. (Lane, J.) Argued November 15, 1892. Decided December 22, 1892.

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

C. E. Weaver (*George C. Greene* and *O. G. Getzen-Danner*, of counsel), for appellant, contended:

1. If defendant constructed the crossing in the way and manner in general use by and among prudent railway men and companies, it had fulfilled its whole duty in that regard, so far as such construction was concerned; citing *Railroad Co. v. Coleman*, 28 Mich. 448; *Railroad Co. v. Judson*, 34 Id. 506; *Railroad Co. v. Huntley*, 38 Id. 537; *Mitchell v. Railway Co.*, 51 Id. 239; *Hagan v. Railroad Co.*, 86 Id. 615; and reasonable safety is all that the law requires; citing *Harris v. Township of Clinton*, 64 Mich. 457; *Shippy v. Village of Au Sable*, 65 Id. 501; *Lombar v. Village of East Tawas*, 86 Id. 14; *Lafflin v. Railroad Co.*, 106 N. Y. 136; *Loftus v. Ferry Co.*, 84 Id. 455; *Burke v. Witherbee*, 98 Id. 562; *City of Indianapolis v. Cook*, 99 Ind. 10.

2. In an action like the present, there can be no recovery if the plaintiff's negligence contributed in any way to the injury complained of; citing *Pennsylvania Co. v. Gallentine*, 77 Ind. 322, and authorities cited on page 329; and negligence consists in the omission or commission of some act which a reasonable and careful man would or would not do; citing *Howe v. Young*, 16 Ind. 312.

3. A city is not an insurer against accidents upon its streets and sidewalks. It is simply required to keep its streets and sidewalks in a reasonably safe condition for persons traveling in the usual modes by day and night, and *using ordinary care*. A man may stumble and fall anywhere, in a house or in a street, but because he happens to fall in the street it by no means follows that the city is responsible for the injury he receives. There are slight inequalities in sidewalks, and other trifling defects and obstructions, against which one may possibly strike his foot and fall, but if injury can be avoided by the use of such care and caution as every reasonably prudent person ought to exercise for his own safety, the city will not be liable; citing *Higert v. City of Greencastle*, 43 Ind. 574; *Raymond v. City of Lowell*, 6 Cush. 524; *Cornman v. Railway Co.*, 4 Hurl. & N. 781; *City of Aurora v. Pulfer*, 56 Ill. 270; *Ring v. City of Cohoes*, 77 N. Y. 83; *Macomber v. City of Taunton*, 100 Mass. 255; Dill. Mun. Corp. § 1017.

4. The defendant, having constructed this crossing in the same manner as other prudent men and railway companies, if liable at all, is only liable for failure to keep it in reasonably proper repair, and the burden of proof is upon the plaintiff to show:

a—That the walk was so much out of repair as to be dangerous to pedestrians using due care.

b—That defendant had actual notice of this dangerous defect long enough before the accident to have made the necessary repairs, or that it had existed for so long a time, and been so conspicuous, that the defendant ought to have known of it and repaired it.

5. We apprehend that the same rules would apply to these questions as against railroads as are applied in actions against municipalities, which are not required to keep their sidewalks in a perfect condition, but are liable only when the same are not reasonably safe, no liability attaching because of latent defects, unless the structure is of such a character that a failure to examine would in itself be negligence; and the defect must be such as to suggest unsafety; citing *Lombar v. Village of East Tawas*, 86 Mich. 14; *Tice v. Bay City*, 84 Id. 461.

6. In support of the claim for a reversal on the ground that the damages awarded are excessive, counsel cited *Heddles v. Railway Co.*, 74 Wis. 239; *Railroad Co. v. Young*, 83 Ga. 512; *Spaulding v. Railroad Co.*, 12 L. R. A. 698; *Smith v. Railway Co.*, 84 Ga. 698; *Railway Co. v. Barker*, 39 Ark. 491; *Railroad Co. v. Moore*, 31 Kan. 197; *Brown v. Railway Co.*, 7 Utah, 288; *Massadillo Railway Co.*, 89 Tenn. 661.

Watts, Bean & Smith and *L. R. Pierson*, for plaintiff.

LONG, J. Plaintiff recovered a judgment against the defendant for $30,000 damages for negligent injuries. The negligence complained of was in allowing a sidewalk which crosses defendant's main track, and extends along the side of a public street in the village of Hudson, to become out of repair, and dangerous to public travel, and by means of which the plaintiff's foot was caught and fastened in said walk between one of the planks and one of the rails of defendant's track, and while being so held one of defendant's trains of cars ran over him, cutting off both his feet.

The main track of defendant's road, extending easterly and westerly, crosses Main street in that village at a very acute angle. A sidewalk 6 feet wide has been maintained on the north side of Main street for some distance for over 30 years by the owners of the abutting property, and by the village at the street crossings. The defendant com-

pany has maintained this walk over its right of way since 1868. In that year the village council, by resolution, directed the building of a sidewalk on the north side of Main street between Tiffin and High streets, and notified the defendant to build that portion across its right of way, which it did, and has ever since maintained it. The planks of the walk inside the railroad tracks run parallel with the rails. Crossing the track at such an acute angle, the extreme length of the plank sidewalk is about 27 feet, though the walk is only 6 feet wide. The planks are laid away from either rail from 2 to 2¼ inches, to allow the flanges of the car wheels to pass between them and the rails. The plank in the walk next the south rail had become split at the west end, so that a piece had been torn out, leaving an open space between the rail and the plank 3⅝ inches wide at the end, extending 14 inches along the plank, and narrowing down to 2 or 2¼ inches.

On January 3, 1891, the plaintiff, while passing along this walk, dropped his mitten near the center of the planking between the rails. He passed beyond the rails about 25 feet, when, missing the mitten, he retraced his steps to get it, and, arriving at the west end of the planking, he turned and saw the fast mail train of defendant approaching from the west. As he turned towards the west, his foot, which was resting upon the south rail of the defendant's track, slipped off, and was caught in this space left by the broken plank. He tried to extricate his foot, and, finding he could not do so, he signaled the train to stop. The train was then at or near what is called the "Stone Bridge," about 584 feet away, and running, as the engineer testifies, about 12 miles an hour, but gaining speed. The engineer, as soon as he saw the plaintiff was caught, made every possible effort to stop the train, but was unable to do so until the engine and tender had run over the plaintiff, and cut off the left foot above the ankle and crushed

the right one. Both feet were subsequently amputated; the left one near the knee, and the right forward of the heel.

It appears that the plaintiff saw the train coming before he crossed the track the first time, and knew what train it was. He was accustomed to see this train every day. As he left High street on his route west, and as he reached the track, he could see west upon the track several hundred feet distant; and as he crossed over, the train was some 800 feet distant from the crossing. Plaintiff was born and brought up in the village, and had lived there nearly all his life, and had been accustomed to pass along this walk; but he says he had never noticed its condition or this defect. When stopping and turning to look at the approaching train, he did not notice where he put his foot, but says it must have been on the rail, and from there slipped into this hole. This walk between the rails had been twice renewed, the last time about seven years before the accident. The testimony shows that the hole in this plank had been there from six to nine months, and that several other persons, prior to plaintiff's injury, had their feet caught in the same hole, and some of them had considerable difficulty in extricating them.

The declaration charges the breach of duty as follows:

"But the defendant, disregarding its said duty in that behalf, on the day last aforesaid, and for a long time, to wit, three months prior thereto, carelessly and negligently permitted and allowed said sidewalk where it crossed the track of said defendant to become decayed, broken, and out of repair, and one of the planks adjoining and next to the south rail of said track, and between the two rails of said railroad track, to become split and broken, so that there was a space and opening between the said rail and said plank large enough to receive a man's shoe and foot, and into which a person walking along said walk and across said track was liable to step and be thrown down, and the foot fastened and injured; and which said hole had been

left by defendant to remain and be unrepaired and in a dangerous condition for a long space of time, to wit, sixty days, prior to the 3d of January, 1891."

1. It is claimed that, under the charter of the defendant company and the general railroad laws of the State, no duty is cast upon the defendant company to construct or maintain a sidewalk across a public street, either in a township, village, or city.

While it is true that neither the charter of the defendant company nor the general railroad laws of the State provide in express terms for the building of a sidewalk, as such, across any public street, yet it is provided by the defendant's charter that whenever the company shall construct its road across a public highway it shall restore it "to its former state, or in a sufficient manner not unnecessarily to impair its usefulness." In the present case, however, we need not discuss or consider that question. The defendant company, acting under the notification of the common council of the village, did construct the crossing there, and for years has assumed the duty of keeping it in repair. By this act it invited people to pass over it, and it has thus become its duty to keep it in a reasonably safe condition for public travel. As was said in *Stewart v. Railway Co.*, 89 Mich. 315, 328:

"It was a structure built upon its own land, and, by its nature and use, was a continual invitation to those lawfully having a right to cross from one side to the other at that place to enter upon it, and cross there; and so long as this invitation, thus impliedly given to such persons, continued, it was the duty of the defendant, independently of any contract, to see to it that it was safe for the purposes implied by the invitation."

This principle is supported by abundant authority. *Nichols' Adm'r v. Railroad Co.*, 83 Va. 99 (5 S. E. Rep. 171).

The same principle was involved in the case of *Cross v. Railway Co.*, 69 Mich. 363, and the cases there cited.

In *Spooner v. Railroad Co.*, 115 N. Y. 22 (21 N. E. Rep. 696), the court held the defendant company liable for the injury upon the ground that it had assumed the duty of maintaining the crossing.

2. It is claimed that there was no such defect in the planking between the rails as to make the defendant liable. The action is not based upon the faulty construction of the crossing, but in permitting it to become defective, in that a hole was permitted to remain for a long space of time unrepaired. In the construction a space was left for the flanges of the car wheels to pass along the side of the rail. No negligence is claimed on that ground, but that, when the plank became broken and split off sufficient to admit a person's foot, it was not reasonably safe. It was admitted on the trial by the track hands of the defendant company that, if the plank had been examined, the defect would readily have been seen. No claim was made that any such examination had been made for a long space of time, and no particular examination for the last six years prior to the injury, except such as could be made by the track hands passing over the crossing on a hand-car. Some of defendant's witnesses—and especially the road-master—testified that the planking next the rail would be nearly used up by the passing trains in about six months, and yet no inspection of the walk is claimed to have been made, except that above stated by the track hands. There was abundant evidence on the trial that the defect existed, and that the defendant company, by the least care, would have discovered it.

3. Error is assigned upon the refusal of the court to give several requests to charge. The questions so raised are fully disposed of in what has already been said. The

court submitted the question of defendant's negligence to the jury as follows:

"Before the plaintiff is entitled to a verdict at your hands here, he must convince you by a preponderance of the evidence—you must be convinced by a preponderance of the evidence in the case—that the company were negligent in permitting this walk to be in the condition which it was in at the time the accident occurred; that that negligence was the direct cause of the injury which the plaintiff claims to have suffered; and that he himself (the plaintiff) was not negligent in such a way as to contribute himself to the injury which occurred. I say you must be satisfied, before a verdict can be rendered for the plaintiff, of each and all of these propositions. Your first inquiry will naturally be as to whether the defendant was negligent in permitting this walk to be in the condition in which it was; and upon that question you are instructed that the company are bound to exercise that degree of care in the construction and operation of this road as is common to railway companies; that degree of care which, in view of the circumstances, would be required by prudent management. If this defect, which is charged in the plaintiff's declaration,—and which is only that the company permitted this hole to be there next to the rail, as has been described,—if this defect were such a one as that ordinary care on the part of the railroad company would not discover it, and they had no knowledge of it, then there would not be, in the law, negligence such as that the defendant would be held responsible in this action. On the other hand, if it was such a defect, if the defect was the cause of the injury, and was such a one as that by careful and prudent management on the part of the company it should have been discovered, then there was negligence in the company in permitting the place to be there, whether they had actual knowledge or not.

"The railroad company are not insurers; the law does not require that they be insurers against accidents, or against injuries being received by persons and individuals who may come upon their property, or in the vicinity of it. There is danger necessarily incident to the business of managing and operating a railroad company, which all persons are bound to take cognizance of, such as are naturally incident to it; but the law requires that, as I have said, the company shall have in mind the nature of

the business which they are carrying on, and shall take such precautions as the nature of it and the perils which are incident to it would seem to require,—the ordinary care and prudence which railway management and experience has generally shown are proper. If, then, the company were not negligent in permitting this defect to be in this walk, under these instructions, they are not responsible. If they were,—if they failed to perform the duty which I have stated to you was put upon them under the law,—and failed to exercise that degree of care and prudence which is common in prudent railway management, then there would be negligence."

This was a fair submission of these questions to the jury under the evidence in the case.

4. It is claimed that the defendant had no notice of the defect. The testimony shows that the defect had existed for several months; that many persons had noticed it, and several persons, prior to that time, had been caught in the same way at that place, and in the same hole. This testimony was all before the jury, and from which they may well have found that, though the company had no actual notice of the defect, it was its duty to have known it, and that it would have known it had it exercised any care. It was competent to show that others were caught in the same hole prior to the time of plaintiff's injuries. *Lombar v. Village of East Tawas*, 86 Mich. 14.

5. It is claimed that the plaintiff was guilty of contributory negligence in returning to the crossing in the face of the approaching train, and especially as he testified that he did not look where he stepped. Several requests to charge were submitted to the court upon this claim, and refused. The court, under the general charge, left that as a question of fact for the determination of the jury, and, as we think, very properly. It appeared that at the time he stepped upon the track the train was nearly 600 feet away. He had seen the train pass there every day for years, and knew the rate of speed it was going. He would

undoubtedly have had plenty of time to have passed over and got his mitten, had it not been for the defect, for which the defendant was solely in fault. We cannot say as matter of law that his conduct was such as to charge him with negligence. It is not like the case of one who attempts to cross a railroad track with a team in the face of an approaching train. A very careful and prudent person might have attempted the same thing. It was not a peril voluntarily and unnecessarily assumed, within the meaning of the cases cited by counsel, but an act which under the testimony the jury had a right to pass upon, and determine whether it was negligent or not. Nor can it be said as matter of law that the plaintiff was negligent in not looking where he stepped. He had a right to believe that the crossing was safe. He had passed over it a great many times, and had not had his attention called to this defect. It was a way provided by the defendant for him and others of the public to pass, and it cannot be said that a person traveling along a way must at all times look where he steps or be charged with being negligent. It was a question for the jury.

6. It is claimed further that the jury were influenced in awarding so large a verdict by the language of plaintiff's counsel, used in the closing argument. The following portion of such argument is selected, and error assigned upon it:

"If you find, gentlemen of the jury, that this defendant ought to pay this boy, I hope you will not quibble over the amount. The good Lord knows that he cannot have too much; and yet, gentlemen, as has already been said before you, we do not want you to give such an amount that it might shock the common sense of the community and people generally; but we want enough, and it is for your judgment, and yours only, as to how much that shall be. Nobody else has a right to interfere. Ah, gentlemen, nobody else will interfere."

When taken in connection with the other portion of the argument, which is set out in the record, we think counsel cannot claim that anything improper was said, even if the portion of which complaint is made can be said to be improper. Counsel, continuing his remarks to the jury upon that subject, said:

"Disabuse yourselves from sympathy; disabuse yourselves from any feeling that you want to do for him,—whether it is right or wrong,—if it is possible that you have any such feeling. Come down to the law and the facts as the court will give them to you. Let it strike where it will. If it leave this poor boy where he is, under the evidence, then so be it. But don't give him a pittance. Don't give him what, in proportion to the injury he has suffered, would be no compensation. We want such an amount as this brother right here will recognize as a fair and just verdict. Give such a verdict as you believe Clement E. Weaver himself would give, were he one of you."

It is not claimed that there was any misstatement of fact or law, and certainly the language would not have a tendency to inflame the minds of the jurors against the corporation. They were told to disabuse their minds from all sympathy, and to give such an amount as would not shock the common sense of men generally; and to this was added the request to give such a verdict as the attorney of the defendant company would give if he were on the jury. It is true that there may have been an appearance of frankness and fairness on the part of counsel, used as a cover while he was attempting to arouse the sympathy of the jury for the plaintiff's condition; but we are not prepared to say that the language was so far prejudicial as to call for a reversal of the judgment. Counsel must have some latitude in the argument of cases; and, while we have reversed cases for intemperate language of counsel, where it plainly appeared that it was used for the purpose of arousing the passions or prejudices of the

jury, which must necessarily prejudice the opposite party, we see nothing in these remarks which should call for any such rule.

7. We have examined this record, and have been unable to find any error in the proceedings. We have not felt called upon to discuss all the assignments of error, but have examined them with that care which the large amount involved demands.

One other point demands attention. It is claimed that the amount of damages is excessive. Not having found any error in the proceedings, or anything improper upon the trial tending to prejudice the defendant's rights, or inflame the jury and thereby prejudice them against the defendant, we cannot disturb the verdict on the ground solely that it is greater in amount than we think should have been given. *Hunn v. Railroad Co.*, 78 Mich. 529; *Richmond v. Railway Co.*, 87 Id. 392; *Stuyvesant v. Wilcox*, 92 Id. 233.

I am not prepared to say, however, that cases might not arise where, even under our former rulings, we would be justified in considering that question. If the verdict were such as to shock the common sense and judgment of mankind, it might call for a different rule, and the Court might be justified in overturning it. But that is not so in this case. The jury have taken into consideration the pain and suffering this plaintiff has endured, and the loss to him for the remainder of his years of both feet. The verdict may be large, but the jury alone had the right to determine it.

The judgment must be affirmed, with costs.

The other Justices concurred.

The Wilkin Manufacturing Company v. The H. M. Loud & Sons Lumber Company.

94 158
126 299

Contract by correspondence—Meeting of minds of parties—Breach of warranty—Recoupment.

1. Where the minds of the parties to a proposed contract for the sale of machinery negotiated by correspondence never meet as to the time and terms of payment of the purchase price, no valid contract for such sale is made; citing *Johnson v. Stephenson*, 26 Mich. 63; *Wardell v. Williams*, 62 Id. 50; *Whiteford v. Hitchcock*, 74 Id. 208; *Bowen v. McCarthy*, 85 Id. 26.
2. Where in such a case the vendor sues for the balance due on the machinery, which has been delivered to the vendee, and the vendee is permitted to recoup damages on account of the failure of the vendor to perform the claimed contract, and to make good the warranties therein contained, the vendee is not in a position to assign error upon the charge of the court upon the latter branch of the case.

Error to Iosco. (Simpson, J.) Argued November 16, 1892. Decided December 22, 1892.

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

Main J. Connine, for appellant.

Pierce & Philbrick (*O. E. M'Cutcheon,* of counsel), for plaintiff.

Long, J. Plaintiff brought suit for the claimed balance due it from the defendant for certain mill machinery, amounting to $1,944.38. On the trial plaintiff had verdict and judgment for an amount considerably less than the amount claimed. Defendant brings error.

Plaintiff, to make its case, on the trial produced the

items of machinery furnished, and proved their value, as an admission of the defendant as to the indebtedness.

The defendant, with its plea of the general issue, gave notice that the machinery was purchased under a special contract, by the terms of which the plaintiff was to manufacture and deliver to defendant two band saw-mills complete, with all appliances, etc., connected therewith, the same to be the best made, and was to furnish a competent man to set them up, and further warranted them to be well built, according to the latest improvements, and that they would cut first-class lumber in a first-class manner to the amount of 100,000 feet each per day of 20 hours; that plaintiff failed and neglected to send an experienced man to set the mills up, and that they were so unskillfully put up that they cut poor lumber, and would not cut 100,000 feet each per day, and did not run properly, but broke, thereby causing great delay and expense; also that the plaintiff did not send the said mills and machinery within the time agreed upon and fixed for the delivery, to the damage of defendant, which it would recoup on the trial.

Defendant introduced in evidence what it claimed to be the contract of warranty. This contract, if any was made, consists of certain letters and telegrams passing between the parties, as follows:

"MILWAUKEE, WIS., Dec. 26, 1888.

"LOUD & SONS,

"Oscoda, Mich.

"*Gentlemen:* We propose to furnish you with two of our right and left hand eclipse band mills, all complete, except foundation, bolts, and belts, equipped as follows: To be used with heavy iron-frame foundation, with iron brackets to carry the lower shaft, sawyer's lever and connections in front or behind. Number of saws, fifteen. Gauge, ten inches wide, and forty-nine and 6-10ths feet long. Pitch of teeth, one and ¼. Kind of guides to be used, roller guides. Shipping weight, approximate. Price $3,000, f.

o. b. Milwaukee, Wis. We agree to furnish a competent man to adjust and start this band mill, and we fully guarantee this machine as to material, workmanship, and general performance.

"Very respectfully,
"THE WILKIN MFG. CO.
"By THEODORE V. WILKIN, V. P."

"WILKIN MFG. COMPANY,
"Milwaukee, Wis.

"*Gentlemen:* We accept your proposition in full, and you will please enter our order for the band mill, etc., as specified in the above proposition, and ship said machinery addressed to us, addressed at Oscoda, State of Michigan, via the best route, on or before February 15, 1889, for which we agree to pay you as follows: $1,500 on receipt of bill of lading, and $1,500 in four months —— days after receipt of machinery, provided said machinery comes up to your representations. We further agree to insure said machinery to the amount of unpaid account, loss, if any, payable to the Wilkin Mfg. Company, as their interest may appear, and policy delivered to them within ten days after receipt of said machinery.

"We further guarantee the above mills to be the heaviest mills made, and they will cut as much lumber, or more, and do it as perfectly, as any mill now on the market.

"We accept the above proposition in full.
"[Signed] ————."

On the margin is written, "Changed to conform to our letter."

"OSCODA, MICH., Dec. 28, '88.

"The WILKIN MFG. COMPANY,
"Milwaukee, Wis.

"*Gentlemen:* We accept the terms quoted us by J. W. Brown of 5¼ cents per pound, finished weight, for all the mill machinery shown on blue print No. 1, a list of which we herewith inclose, the shipment to be made not later than February 15, 1889, all to be first-class stock and finish. We also accept your offer to furnish us two band mills, one right and one left hand, as per your proposition of December 26, including guaranty, but with roller guides. We will make payments as follows: One-half the entire in four months, and one-half in six months, from the time

of shipment, giving notes therefor, with interest at six per cent. after three months from shipment.

"Yours, etc.,
"THE H. M. LOUD & SONS LUMBER CO.
"By H. M. LOUD, Pres."

"MILWAUKEE, WIS., Jan. 4, 1889.
"Messrs. H. M. LOUD & SONS,
"Oscoda, Mich.

"*Gentlemen:* As telegraphed, we write about the terms in the contract. It is not usual at the price per pound work to make terms other than cash, and at 5¼ cents per pound we simply make nothing on the work; besides, the price of $3,000 on those band mills is about $200 lower than we ought to have received. Therefore half the entire amount in four months, and one-half in six months, from the date of shipment, in notes bearing interest at the rate of six per cent. after three months, is too much to ask, and we hope you will grant the arrangement for payments as follows: One-half at date of shipment, in four-months note, interest bearing at six per cent., first for the machinery and second for the band mills; that is, we can negotiate settlement for the last half the machinery exclusive of band mills,—separate the last half the band mills. The only material difference, we ask interest from date of shipment, which really we are entitled to, aside from the considerations of prices as referred to, and to get the paper for us as soon after shipment as possible, which will accommodate us without cost to you. Our bank refuses six-months paper except at eight per cent. On four months and under we pay seven per cent. Kindly write us if the foregoing will be satisfactory.

"Respectfully,
"THE WILKIN MFG. CO.
"Per JOHN W. MORRIS."

It appears from this correspondence that the plaintiff wrote the proposition of December 26, 1888, and mailed it to defendant, inclosing with it the acceptance in blank for the defendant to sign and return. Instead of signing this acceptance, the defendant wrote upon the margin of it, "Changed to conform to our letter." Defendant then wrote a letter, not of acceptance in full of the plaintiff's

proposition, but one changing the times and terms of payment. In answer to this, the plaintiff wired that it had entered the order, but adding, "See letter." This is followed by a letter on the next day, suggesting different times and terms of payment then proposed by defendant. This last letter was never answered by the defendant, so far as disclosed by the record, and the time of payment never agreed upon.

The mills and machinery were shipped, but not until some time in March, and the mill was not put up in running order until some time in the summer. Defendant had considerable trouble with it, and it was not until July that it worked satisfactorily. In July the defendant wrote the plaintiff as follows:

"OSCODA, MICH., July 24, 1889.

"WILKIN MFG. CO.,
"Milwaukee, Wis.

"*Gentlemen:* Mr. J. S. Curry asked for our acceptance of the band mills, which we are quite willing to grant, as the mills are now working very satisfactorily. This does not waive the question of damage by loss of time, expenses, etc., on account of the mills not having been furnished in time, or adjusted and properly started in the early running of the mill.

"Yours truly,
"THE H. M. LOUD & SONS LUMBER CO.
"BY H. M. LOUD, Pres."

The court charged substantially that this last letter constituted an acceptance, and a waiver of all claims for damages except such as were expressly reserved in the notice. The court also charged:

"If this defendant was injured because the plaintiff did not fulfill its agreement there in the delivery of the property agreed to be delivered in time, and by reason of the failure of the mill to correspond to their guaranty,—and this is one of them, 'That the machine as to material and workmanship and general performance,' and they guarantee

it as to that, and that both mills will be the heaviest and strongest mills made, and that they will cut as much lumber or more, and do it as perfectly, as any other mill in the market,—I say, if they have failed in the contract, the defendant, for any other injury or damage it has suffered, would have a right to keep it back in this action. And you see what the rule means. That means this: That if they had a mill which was not up to the standard of what had been represented and that it was agreed to give them, by allowing them to keep these damages, that would simply be paying them that much less for it, and that would not be paying for a mill that was as good as the other. * * * So, in this case, if you should find that the plaintiff did not fulfill their contract, and if you should find that the defendant proved that, and that thereby they had suffered damage, that by the nonfulfillment of this contract on the part of the plaintiff the defendant had been injured, and that it had been delayed and had lost time, and that by want of having a competent man there they had suffered injury, and by the improper manufacture of their lumber, or by breakage of their property, and that it was caused by the plaintiff's failure to do this and fulfill its contract, they would have the right to have it offset in this action to the amount you may find it to be."

Many of the errors assigned relate to the charge of the court. If either party has a right to complain of the charge, most certainly it is not the defendant. It was permitted to go to the jury upon the question of the nonfulfillment of the contract of warranty claimed to be contained in the original contract between the parties, to show what damages it had sustained, not only by the failure to ship in time, but by the failure of the mill to comply with the terms of the claimed contract under which the mills and machinery were purchased.

The court, we think, was in error in holding that any contract was made between the parties, or that the minds of the parties ever met; but this error is not prejudicial to the rights of the defendant. Bishop on Contracts (sections 322, 323) lays down the rule:

"If one makes to another an offer, verbal or written, direct, by letter or by telegram, of a sort implying nothing to be done except to assent or decline, and the latter accepts it, adding no qualification, there is thus constituted a mutual consent to the same thing at the same time; in other words, a contract. And the question of the sufficiency of the transaction to work this result is of law for the court. On the other hand, though there is an acceptance, if it is not to the exact thing offered, or if it is accompanied by any conditions or reservations, however slight, in time or otherwise, no contract is made. It is so, for example, where new terms are introduced; they constitute an offer on the other side, and leave the question open."

In a note to *Eskridge v. Glover*, 26 Amer. Dec. 349, it is said:

"If the acceptance do attach any new condition or fall short of the terms proposed, it is not only insufficient as an acceptance, but is also a rejection of the proposal, and a termination of the liability of the proposer to be bound by a subsequent acceptance conforming to the terms of his proposal."

These rules have been frequently applied in this Court. *Johnson v. Stephenson*, 26 Mich. 63; *Wardell v. Williams*, 62 Id. 50; *Whiteford v. Hitchcock*, 74 Id. 208; *Bowen v. McCarthy*, 85 Id. 26.

It is evident from the correspondence that the minds of the parties never met, in the present case, upon the terms of the offer proposed by the plaintiff, or the counter proposition of the defendant. The mills and machinery were, however, accepted and put in place by the defendant, the plaintiff furnishing a man, under whose supervision it was done; and on the trial the defendant was allowed to and did recoup quite an amount of damages for failure to perform the claimed contract, and to make good the warranties contained therein. The plaintiff, however, has not appealed. We see no reason why the defendant should

claim error in this record. It has got more than it was entitled to at the hands of the trial court.

The judgment must be affirmed, with costs.

The other Justices concurred.

94 165
111 69

THE PEOPLE, EX. REL. THE ATTORNEY GENERAL, v. LOUIS E. HOWLETT.

Schools and school-districts—County commissioner of schools—Qualifications for office—Quo warranto.

Section 3 of Act No. 147, Laws of 1891, which provides that no person shall be eligible to the office of county commissioner of schools who shall not be a graduate in the literary department of some reputable college, university, or state normal school, or hold a State teacher's certificate, or who shall not have held a first-grade certificate within two years next preceding the time of his or her election, or shall [not] have held the office of county commissioner under the act, is construed as follows:

a—A high school is not a "college," within the meaning of the act.

b—A person holding a special first-grade certificate not granted at one of the regular public examinations provided for in Act No. 266, Laws of 1887, and Act No. 147, Laws of 1891, or who holds a first-grade certificate granted to him without an examination, or who receives such a certificate upon a public examination after his election, is not eligible to the office of county commissioner of schools.

c—Holding the office of secretary of the board of examiners under Act No. 266, Laws of 1887, is not a compliance with the provision, "or shall have held the office of county commissioner under this act."

Error to Livingston. (Person, J.) Argued November 17, 1892. Decided December 22, 1892.

Information in the nature of *quo warranto* to test the right of respondent to hold the office of county commissioner of schools for Livingston county. Judgment of ouster affirmed. The facts are stated in the opinion.

William P. Van Winkle, for respondent.

A. A. Ellis, Attorney General *(Luke S. Montague,* of counsel), for the people.

LONG, J. This is a proceeding by *quo warranto* to inquire into the right of the respondent to hold the office of county commissioner of schools for Livingston county. The cause was heard in the circuit court of that county, findings of fact and law made, and judgment of ouster entered. The case is here to review the action of the trial court.

It appears from the findings of fact that the respondent, at the time this proceeding was commenced, was exercising the duties of county commissioner of schools for Livingston county, under the provisions of Act No. 147, Laws of 1891, by virtue of an election by the board of supervisors held June 24, 1891, and that he entered upon the duties of the office on the fourth Tuesday of August following. The sole question is upon the eligibility of the respondent. The court found that he was 21 years of age, of good moral character, learning, and ability to instruct and govern a school, and that he had taught, prior to his election, at least one year, with ability and success; that in 1887 he graduated from the Howell Union School, receiving a graduating diploma, which entitled him to admission to various courses in the Michigan University without further examination; that all branches of study required for a first-grade certificate were included in his course at the Howell Union School; that prior to his election he had also graduated from the law department of

the Michigan University, and was a member of the bar of Livingston county, and was also secretary of the board of school examiners of that county; that he held, at the time of his election, a certificate issued by the board of school examiners of Washtenaw county, purporting to be a "special first-grade certificate," but such certificate did not purport to be a regular first-grade certificate, nor was it issued or dated at any of the regular public examinations provided by law; that after his election, and prior to the commencement of his term of office, the board of county school examiners of Washtenaw county issued and delivered to him a teacher's first-grade certificate, in due form of law, and regular upon its face, signed by the secretary and chairman of such board, and which bears the date of August 7, 1891, but that the respondent was not present at the examination, though the board, from personal acquaintance with him, were satisfied that in all respects he was qualified to hold such certificate, and it was issued in good faith, but not delivered to respondent until four weeks later; that since the filing of the information in this case, the board of school examiners of Macomb county, on March 3, 1892, issued to him a teacher's first-grade certificate in due form of law; that this was upon examination of the respondent at a regular meeting of the board, though he was not a resident of that county at the time, and not intending to teach in that county. It was found, however, by the court below that, at the time of his election, the respondent was not a graduate of the literary department of any reputable college, university, or state normal school (unless the high school department of the Howell Union School could be called a "college"); that he did not hold a State teacher's certificate; that he had not held a first-grade certificate within two years next preceding the time of his election; that he had not held the office of county commissioner under Act No. 147, Laws of

1891; and that there were more than 50 schools in said county subject to the supervision of the county commissioner at the time.

From these facts the court concluded, as matter of law,—

1. That said special first-grade certificate was not authorized by law, and was void.
2. That the Legislature did not intend to include union or graded schools within the term "reputable college."
3. That the acquisition of a first-grade certificate after election does not come within the meaning of the plain language of the statute, which expressly says that such certificate, to be available, must have been had at some period within two years next preceding the election.
4. That, under the terms of the statute, the respondent is not eligible to the office.
5. That, being ineligible by express terms of law, there is no room for the court to consider questions of public policy or public good.

Section 4 of article 13 of the Constitution leaves the matter of the government of the primary schools of the State to the Legislature, by providing that it shall establish a system whereby schools shall be kept, without charge for tuition, at least three months in each year, in every school-district in the State. The office of county commissioner of schools is not one of the offices enumerated in the Constitution; but, under the general power of the Legislature conferred by the Constitution, undoubtedly that body has the right in arranging the school system to make such regulations for the government thereof as its wisdom shall dictate. The act of 1891 provides for the election of a county commissioner of schools by the board of supervisors of each county. Section 3 of that act provides that—

"No person shall be eligible to the office of county commissioner of schools who shall not be a graduate in the literary department of some reputable college, university, or State normal school, or hold a State teacher's certificate, or who shall not have held a first-grade certificate within

two years next preceding the time of his or her election, or shall have held the office of county commissioner under this act."

The Legislature, having the power under the Constitution, to provide for a county commissioner of schools, had the right to fix and determine the qualifications of the incumbent of the office within reasonable limits; and it cannot be said that the qualifications required by the act are unreasonable. Our primary school system is the pride of the State, and the legislative intent, as shown by the act, was to keep up the standard of teachers to be employed therein, by requiring certain educational qualifications in the persons whose duty it is to examine the teachers to be employed, and determine their fitness for the work intrusted to them.

It is contended by counsel that respondent did possess the qualifications required by the act, in that—

1. He was a graduate of the Howell High School.
2. He held a special first-grade certificate from the board of examiners of Washtenaw county; and there was also issued to him a first-grade certificate by the board of examiners of Washtenaw county, dated August 7, 1891, and also one from the board of examiners of Macomb county, March 3, 1892.
3. He was the secretary of the board of school examiners of Livingston county at the time of his election.

We think that he has not shown the necessary qualifications to hold the office required by the act.

1. His graduation from the Howell High School does not confer upon him what the act requires. It is not a "college," within the meaning of the act. That term must be taken in its popular sense and well-understood meaning. High schools are now established in all the principal cities and larger villages of the State, and had become well known as such before the passage of the act in question; and certainly the Legislature never intended

by the language employed to class such schools as colleges.

2. The certificates held by him as a teacher did not confer upon him the necessary qualifications to hold the office. The special first-grade certificate, and the only one held by him at the time of his election, was void, for the reason that first-grade certificates can only be granted on the first Thursday of March and of August of each year, under the provisions of Act No. 266, Laws of 1887, and Act No. 147, Laws of 1891. It was said by this Court in *Lee v. School-Dist.*, 71 Mich. 361:

"These special first-grade certificates *are to bridge over* the time between the commencement of a school and the next meeting of the board of examiners, and not for the purpose of making persons eligible to office."

Under these acts a special certificate is granted and valid only to teach in a specified district; and first-grade certificates can be granted only at the regular public examinations provided for in these acts,—that is, on the first Thursday of March and of August of each year.

3. The second certificate issued to the respondent, it appears by the finding of the court, was not upon any examination taken by him. He was not present at any examination. The board agreed to issue a certificate, and did issue it, as bearing date of August 7, 1891; but it was not delivered to the respondent until four weeks afterwards, and after his election, and after he had entered upon the duties of his office. We think this certificate is also void. It is the intent of these acts that any person desirous of teaching in our public schools shall present himself or herself before the board of examiners on one of the days specified in the acts, there to submit to an examination, and, if found to be qualified, then to receive a certificate in the proper grade. The Legislature has provided this method for ascertaining the qualifications of teachers, and a certificate issued to one who has not taken an examina-

tion at all, and whose qualifications are not ascertained upon an examination, is not such a certificate as the law provides for.

4. The third certificate was issued March 3, 1892, upon a public examination had at the time the law provides for the meeting of the board, and is in due form of law, and it is conceded that it is now held by the respondent, unrevoked; but the statute provides that no person shall be eligible to the office "who shall not have held a first-grade certificate within two years next preceding the time of his or her election." It is contended by respondent that there being no person who claims the office, and his eligibility being now established, he should not be ousted. The limitation, however, upon the right to hold the office is plainly fixed by this statute. He must have held a first-grade certificate at some period of time within the two years next preceding his election. This he did not have.

5. The fact that he had been secretary of the board of examiners under the act of 1887 did not make him eligible. It was not the intent of the Legislature to make one holding that position eligible to the office. The provision of the act, "or shall have held the office of county commissioner under this act," clearly implies one who in the future may be a candidate for the office under the act, and have held that office under the act at some time prior thereto.

We think the court below was right, under the circumstances, in entering judgment of ouster. The judgment must be affirmed, with costs.

The other Justices concurred.

94 172
124 420

94 172
125 468

MALCOLM MCDONALD v. GEORGE L. MALTZ.

[See 78 Mich. 685.]

Real-estate brokers—Agent for both parties—Commissions.

1. This case was reversed on the former hearing upon the sole ground that a part of the contract relied upon by plaintiff was void under the statute of frauds, and the question now raised was not discussed or passed upon.
2. A land broker who negotiates a sale under an arrangement with the purchaser, which is unknown to the land-owner, that he is to have a commission on the sale, and who also receives a commission from the land-owner, which fact he conceals from the purchaser, cannot recover the agreed commission, it appearing that both parties relied to some extent upon his judgment as to the amount of timber on the land, and its value.[1]

Error to Cheboygan. (Pailthorp, J.) Argued November 18, 1892. Decided December 22, 1892.

Assumpsit. Plaintiff brings error. Affirmed. The facts are stated in the opinion, and in 78 Mich. 685.

J. D. Turnbull, for appellant.

W. E. Depew (McKnight, Humphrey & Grant, of counsel), for defendant.

LONG, J. This case was in this Court at the October term, 1889, and is reported in 78 Mich. 685, when the judgment was reversed, and a new trial ordered. The cause has again been tried, and, under the direction of the court, judgment entered in favor of the defendant.

The facts are fully set out in the former opinion, and do not materially differ from those appearing in the

[1] See *Montross v. Eddy, ante,* 100.

present record. The plaintiff had been acting as the agent of Charles L. Ortman at different times in the sale of land. He met Ortman in Detroit, and commenced negotiations with him for the sale of certain lands, out of which commissions are claimed from the defendant in the present case. Ortman asked $27,000 for them. After going over the lands with Ortman's agent, he convinced Ortman that they were worth $17,000 only, and Ortman agreed that he might sell them at that figure on commission. After some talk with defendant about these lands, a bargain was closed by which defendant agreed to take them at the figures fixed by plaintiff, and at which Ortman agreed they might be sold. This suit is brought to recover from the defendant commissions which plaintiff claims he agreed to pay. The agreement, as plaintiff claims it, was that for certain tracts he was to receive $1,000 commission, and for the balance of it defendant was to purchase for him two 40-acre tracts of land from Mr. Pack, which were of the value of about $200.

When the case was in this Court upon the former hearing, it was held that the agreement claimed by plaintiff, that the defendant was to purchase for him these two 40-acre tracts, was void, under the statute of frauds. That question was there disposed of, and need not be discussed here. It is claimed by plaintiff, however, that the question of his right to recover the claimed commission of $1,000 was also passed upon and settled in favor of his contention. On the other hand, it is claimed by the defendant that the question of the commissions, aside from the deed of the two 40-acre tracts, was not necessarily passed upon, and was not at all discussed, in that case. It appears from the former opinion that the case was reversed, when here before, upon the sole ground that a part of the contract relied upon by plaintiff was void under the statute

of frauds; the other questions now raised not being discussed or passed upon.

From the showing before us in the present record, it appears that the plaintiff did not disclose to Mr. Ortman that he was getting from defendant any commission, and that Ortman paid him a commission of $525. Plaintiff says that, in his talk with defendant, he was to get the land at as low a figure as possible, if defendant went in with him, and he was to have for his share the $1,000 and the deed of the two 40's. He also testifies that defendant asked him how much commission he was getting out of that, and he told defendant that was his business, and not the defendant's. At that time he had a letter from Ortman in reference to the lands, and showed it to the defendant, but turned down the part of it relating to commissions, so that defendant could not see it. From the whole record it appears that the plaintiff was not only receiving commissions from Ortman, which was unknown to defendant, but was also, at the same time, making a bargain for an interest in the land and for commissions from the defendant. He was making representations to Ortman that the land was not worth the amount which he (Ortman) claimed, and at the same time representing to the defendant that it was worth more than they were paying for it. It is evident from the facts shown that the defendant, as well as Ortman, was relying to some extent upon plaintiff's judgment as to the value of the lands. He was acting as the agent of Ortman in their sale, and at the same time making a bargain with defendant for their purchase, and asking commissions from him, without disclosing his relations with Ortman, from whom he was also getting a commission.

The facts appearing in the record, and undisputed, bring the case out of the rule laid down in *Ranney v.*

Donovan, 78 Mich. 318, 329, and cases there cited. There the plaintiff was simply the go-between or middleman, and the Court put his right to recover expressly upon the ground that no confidence was reposed in him by either party that he would exert his skill and judgment to get the land at a lower price, or sell it for a larger sum. All he did was to bring the buyer and seller together, and they made their own bargain.

In *Scribner v. Collar,* 40 Mich. 375, the plaintiff, as agent, was retained by different persons on commission to negotiate sales or exchanges of their property, and he brought about an exchange between two of them, neither knowing he was acting for the other. The action was brought to recover commissions. It was said:

"The opinion has been expressed that where the person is employed merely as a middleman to bring persons together, and has no duty in negotiation, and has not employed his skill, his knowledge, or his influence, he may lawfully claim pay from both parties. *Rupp v. Sampson,* 16 Gray, 398; *Siegel v. Gould,* 7 Lans. 177. No doubt such cases may occur, but their exceptional character should appear clearly before they should be exempted from the general principle. * * * But the cases are nearly, if not quite, uniform, that where the double employment exists, and is not known, no recovery can be had against the party kept in ignorance; and the result is not made to turn upon the presence or absence of designed duplicity and fraud, but is a consequence of established policy."

It is not necessary to rest the present case upon the question of public policy alone, as it is evident that the parties upon both sides were placing some reliance upon the judgment and skill of plaintiff as to the amount of timber upon the land, and its value. Under such circumstances, good faith to the defendant required that the agent should disclose fully to him his relations with Mr. Ortman. *Moore v. Mandlebaum,* 8 Mich. 443; *Everhart v. Searle,* 71 Penn. St. 259; *Bell v. McConnell,* 37 Ohio St.

399; *Cottom v. Holliday,* 59 Ill. 179; *Meyer v. Hanchett,* 39 Wis. 423; *Collins v. McClurg,* 1 Colo. App. 348; *Oscanyan v. Arms Co.,* 103 U. S. 271.

The judgment must be affirmed, with costs.

The other Justices concurred.

THE BAY CITY BANK v. ARCHIBALD G. LINDSAY, SURVIVOR, ETC.

Banks and banking—Payment of draft for another—Privity of contract.

Where the only authority given to a bank to pay a draft is the oral agreement of the drawer made with the acceptors that he will take care of a sight draft drawn by them on him in favor of the bank for the amount of the first draft, there is no such privity of contract between the drawer and the bank as will entitle the bank to recover the money paid on the first draft under a count for money paid for the use of the drawer.

Error to Wayne. (Hosmer, J.) Submitted on briefs November 18, 1892. Decided December 22, 1892.

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

McDonell & Hall (*Cowles & Jerome,* of counsel), for appellant.

DeForest Paine, for defendant.

MONTGOMERY, J. The plaintiff declared on the common counts, and furnished a bill of particulars which limited its demand to a claim for $2,000 paid E. J. Vance & Co. on December 15, 1890, for the firm of Lindsay &

Gamble, and at their request, to take up the draft hereinafter referred to. The other item in the bill is the liability of defendant on the draft, a copy of which was served with the declaration. The draft in question was dated September 12, 1890, was drawn by Lindsay & Gamble on E. J. Vance & Co., payable to the order of the drawers, and was accepted by E. J. Vance & Co., payable at the Bay City Bank. It was indorsed as follows: "Pay E. W. Leech & Co. or order, Lindsay & Gamble; E. W. Leech & Co." (in blank); and also: "Pay to the order of W. O. Cliff, cashier, for collection, for account of the Peninsular Savings Bank, Detroit, Mich. J. B. Moore, Cashier."

The case rested upon the testimony adduced by the plaintiff, which tended to show that the defendant's firm, at the date of the transactions in question, consisted of A. G. Lindsay and Patrick M. Gamble, since deceased; that Gamble was a member of all three firms,—of Lindsay & Gamble, E. J. Vance & Co., and E. W. Leech & Co.; that on the day of maturity of the draft, it was presented for payment at the Bay City Bank; that payment was refused, for the reason that there were no funds of E. J. Vance & Co. in hand to pay with; that during the day the attention of the bookkeeper of E. J. Vance & Co., Mr. Butts, was directed to the subject by the cashier of the plaintiff. For a statement of what followed, we quote from the testimony given by Mr. Butts on the trial:

"I went to the bank, and told Mr. Young, the cashier of the Bay City Bank, that it was paper that Lindsay & Gamble should pay, and that I would have to make a draft back on them to pay it with. Mr. Young said he would take a demand draft or a sight draft, if I would call up Lindsay & Gamble, and have Mr. Lindsay say that he would take care of it. I then went to our office, and called up Mr. Lindsay, and reminded him of this paper

coming due that they should pay. I asked him if he would take care of a demand draft, if I should make it, and he said, 'On demand is a pretty short time;' he hardly thought he would be able to take care of it. He asked me if I could not make it for a few days' time. I think he mentioned 10 days. I told him I hardly thought the bank would want to use a paper of that time, but, if I could make it at sight, that would give him three days' time to pay it. 'Well,' he says, 'do the best you can.' I then went to the bank, and told the cashier that Lindsay & Gamble would take care of a sight draft. The bank officer said, 'All right;' that they would take it in payment of this paper.

"*Q.* That paid the paper.

"*A.* Yes, sir."

The circuit judge directed a verdict for defendant, and plaintiff brings error.

1. It is first insisted that the draft should not be treated as paid, but should be held good in the hands of the bank; and it is claimed that the case falls within that class in which it is held that payment by an indorser or other party to commercial paper, who, as between himself and the other parties to such paper, stands in the position of surety, does not necessarily render the paper *functus officio*, but that it may be again put afloat by the indorser. Daniel, Neg. Inst. § 1238, and cases cited. We think, however, the testimony in this case does not show an attempt on the part of Vance & Co. so to treat this paper. This draft, when presented, had a limited indorsement, and the undoubted intention on the part of Vance & Co. was to pay and retire it, and the bank, in terms, accepted a sight draft, and agreed to make payment, and did in fact make payment. There was no intention on the part of either Vance & Co. or the officers of the bank that title should vest in the plaintiff. This is made further conclusively to appear by the fact that the bank charged the amount of the draft in question to the account of

Vance & Co., and credited the proceeds of the sight draft, and afterwards fixed the liability of Vance & Co. by protesting the sight draft. It is unnecessary, therefore, to decide whether Vance & Co. had the right to reissue the draft after payment by them, as no attempt to do so is shown. The circuit judge was right in holding that the draft was paid, and that no recovery could be had thereon.

2. The question of defendant's liability, under the money count, for money paid for his use, is more difficult of determination. The plaintiff's contention is that the transaction amounted to a payment by the bank of $2,000 upon a demand upon which the defendant was liable previously, and which it was the defendant's duty to pay, and which the bank did in fact pay at his request; and it is said that the fact that the defendant agreed to accept a draft for the amount, and that such agreement is void under How. Stat. § 1583, does not change the relations of the parties; that the right of action was complete when the money was advanced. There is much force in this contention. Indeed, it seems to us unanswerable, if it can be held that the transaction in question established any privity between the defendant and the bank. But a careful examination of the testimony discloses the fact that the defendant did not authorize Butts to speak for him. There is nothing in Butts' testimony which discloses that he was directed to ask any other than Vance & Co. to make payment of this draft. The testimony further shows that the plaintiff in fact accepted the sight draft of Vance & Co. on defendant, and credited this to the account of Vance & Co., and charged the time draft to them. Vance & Co. were liable to the bank, and the defendant was liable to Vance & Co. There is, therefore, this additional difficulty standing in the way of plaintiff's recovery here: Not only was the agreement to accept oral, but it was made to Vance & Co., and no authority to bind

defendant was given, except an oral promise to accept the sight draft.

It follows that there was no such privity of contract between the plaintiff and defendant as entitles the plaintiff to recover.

Judgment is affirmed, with costs.

The other Justices concurred.

94 180
e136 290

THE AUDITOR GENERAL v. SARAH WILLIAMS.

Indians—Grant of land in severalty—Restriction against alienation—Authority of State to tax.

1. Land patented to a "not-so-competent Indian," under a treaty prohibiting its alienation by the patentee without the consent of the government, which provision is incorporated in the patent, is not subject to taxation.
2. Under a patent to a "not-so-competent Indian," in which the power of alienation is suspended except with the consent of the Secretary of the Interior, the patentee has a right to the use, occupancy, and enjoyment of the land, but has not the right to alienate it, either by direct or indirect means.

Appeal from Isabella. (Hart, J.) Argued November 17, 1892. Decided December 22, 1892.

Petition for the sale of lands delinquent for taxes under Act No. 195, Laws of 1889. Petitioner appeals. Decree affirmed. The facts are stated in the opinion.

H. A. Sanford, Prosecuting Attorney, for appellant, contended:

1. Under the treaty of 1855, the tribal relation, except so far as necessary for the purpose of carrying into effect the provisions of the treaty, was dissolved, and since said treaty Indians have

been citizens of Michigan under section 1, article 7, of the Constitution; and as soon as the tribal relation is surrendered, the State acquires jurisdiction; citing *Love v. Pamplin*, 21 Fed. Rep. 755; *The Kansas Indians*, 5 Wall. 737.

2. The land was severed from the public domain by the treaty, and when the patent was issued it came within the jurisdiction of the State; citing Cooley, Tax'n, 60; and property of every description under the jurisdiction of a state is subject to state taxation; citing *Carroll v. Perry*, 4 McLean, 25; *Investment Co. v. Parrish*, 24 Fed. Rep. 197; *Edgington v. Cook*, 32 Neb. 551; 1 Kent, Comm. 426; Cooley, Tax'n, 56; and this is true of both legal and equitable estates; citing *Astrom v. Hammond*, 3 McLean, 107; and public land, the legal title to which remains in the United States, but which equitably belongs to private owners who are entitled to a patent, is taxable by state authority; citing *Railroad Co. v. Comstock*, 71 Wis. 88.

3. The fact that the Indian may use the tax sales as a means of alienating his land can have no effect upon the right to tax the land; citing *Robertson v. Commissioner*, 44 Mich. 274.

4. No property is beyond the reach of the taxing power unless put beyond it designedly, and by an unequivocal act of the sovereign power; citing *Robertson v. Commissioner*, 44 Mich. 276; *Church v. Philadelphia*, 24 How. 302; *Gilman v. Sheboygan*, 2 Black, 513; *Bank v. Billings*, 4 Pet. 514; *U. S. v. Ward*, 1 Woolw. 17; *The Kansas Indians*, 5 Wall. 737; *Indianapolis v. McLean*, 8 Ind. 328; Cooley, Tax'n, 54, 66.

T. F. Shepard, U. S. Attorney, and *I. A. Fancher*, for defendant.

DURAND, J. The petition was filed in this case by the Auditor General under section 52, Act No. 195, Laws of 1889, praying for a decree in favor of the State of Michigan against certain lands in Isabella county for the taxes of 1889, among which lands are those of the defendant, being the S. W. ¼ of the S. E. ¼ of section 24, in township 15 N., range 4 W. The defendant, who is an Indian woman of the Chippewas of the Saginaw, Swan Creek, and Black River Indians, filed her objections to the tax, claiming that her land was not taxable, for the reason that it was patented to her on February 9, 1885, under and by

virtue of the treaties of August 2, 1855, and October 18, 1864, between the United States and the Chippewas of Saginaw, Swan Creek, and Black River, in which patent she was denominated as a "not so competent," and which contained a clause "that the land shall never be sold or alienated to any person or persons whomsoever, without the consent of the Secretary of the Interior for the time being." It is admitted that she is the patentee under such patent, and that the Secretary has not removed the disability of "not so competent," mentioned therein; that he has not authorized the alienation of the land; that she has not applied to him for the removal of such disability; and that this land is a part of the lands set apart by the United States for the Indians, under the treaties referred to.

The treaty of October 18, 1864, among other things, contains the following:

"So soon as practicable after the ratification of this treaty, the agent for the said Indians shall make out a list of all those persons who have heretofore made selections of lands under the treaty of August 2, 1855, aforesaid, and of those who may be entitled to selections under the provisions of this treaty, and he shall divide the persons enumerated in said list into two classes, viz., 'competent' and 'those not so competent.' Those who are intelligent, and have sufficient education and are qualified by business habits to prudently manage their affairs, shall be set down as 'competents,' and those who are uneducated, or unqualified in other respects to prudently manage their affairs, or who are of idle, wandering, or dissolute habits, and all orphans, shall be set down as 'those not so competent.' The United States agrees to issue patents to all persons entitled to selections under this treaty as follows, viz.: To those belonging to the class denominated 'competents,' patents shall be issued in fee-simple; but to those belonging to the class of those 'not so competent;' the patent shall contain a provision that the land shall never be sold or alienated to any person or persons whomsoever, without the consent of the Secretary of the Interior for the time being."

The act of Congress of July 13, 1787, entitled "An ordinance for the government of the territory of the United States northwest of the River Ohio," provides that the states which may afterwards be formed therein—

"Shall never interfere with her primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the *bona fide* purchasers. No tax shall be imposed on lands the property of the United States."

This clause of the ordinance of 1787 was retained and embodied in the fifth proposition of the act of Congress of June 15, 1836, providing for the admission of the State of Michigan into the Union; and one of the conditions imposed by this portion of the act was—

"That the legislature of the said State, by virtue of the powers conferred upon it by the convention which framed the Constitution of the said State, shall provide by an ordinance, irrevocable without the consent of the United States, that the said State shall never interfere with the primary disposal of the soil within the same by the United States, nor with any regulations Congress may find necessary for securing the title in such soil to the *bona fide* purchasers thereof, and that no tax shall be imposed on lands the property of the United States."

The assent to these propositions by the Legislature of Michigan was given in an act passed by it and approved July 25, 1836, an excerpt from which reads as follows:

"For the purposes of complying with the conditions in the proviso to the fifth proposition contained in the above-recited act, and by virtue of the powers conferred upon the said Legislature of said State by the convention aforesaid, the following ordinance is declared to be irrevocable without the consent of the United States:

"'*Be it ordained by the Senate and House of Representatives of the State of Michigan*, that the said State shall never interfere with the primary disposal of the soil within the same by the United States, nor with any regulations Congress may find necessary for securing the title in such

soil to the *bona fide* purchasers thereof; and that no tax shall be imposed on land the property of the United States.'"

This compact, thus solemnly entered into between the United States and the State of Michigan, after much discussion, and after important concessions made upon both sides, must be recognized as of the very highest character, and a full and honest compliance with the spirit as well as the letter of its terms is demanded. So far as we have been able to discover, this State has never by legislative action attempted to ignore any portion of the obligations imposed by the clause referred to, nor to put a narrow or illiberal construction upon it; and, so far as taxation is concerned, it has by express enactment exempted all public property of the United States from State taxation. In view of the several acts and ordinances referred to, it will be conceded that, at the time the defendant obtained her patent, the land mentioned in it was not subject to State taxation; and the question now presented is whether the United States by that instrument disposed of all its control and interest in the land to the patentee, or whether the condition against alienation is such a regulation as the State has a right to ignore or interfere with, when the scope and effect of the above-mentioned compact is given consideration. If so, there can be no doubt of the right of the State to impose taxes upon it; but if, on the other hand, the restriction against alienation contained in the patent is in pursuance of a regulation which the government had authority to make in the exercise of its watchful care for the Indian to whom the conveyance was made, then the land would not be amenable to taxation, for the reason that the State, by the legislation quoted, is bound never to interfere with the primary disposition of the soil within the same by the United States, nor with any regulation necessary for securing the title in such soil to the

bona fide purchasers thereof. That the restriction against alienation contained in the patent is reasonable, and one which the government had a right to reserve when making a primary disposition of the land to Indians of the class known as "those not so competent," we have no doubt; and it may well be inferred that this right was understood by the high contracting parties to the compact relating to the admission of Michigan into the Union to have been inherent in the United States, and one which states subsequently established within the limits of the Northwest Territory would be bound in honor to maintain, for it is provided in article 3 of the ordinance of 1787 that—

"The utmost good faith shall always be observed towards the Indians. Their lands and property shall never be taken from them without their consent, and in their property rights and liberty they never shall be invaded or disturbed unless in just and lawful wars, authorized by Congress; but laws founded in justice and humanity shall from time to time be made for preventing wrongs being done to them."

In the case of *Goodell v. Jackson,* 20 Johns. 715, Chancellor Kent says that in the early days of the republic the government watched with great anxiety over the property of the Indians intrusted to its care, whether owned by tribes or families or individuals. If it was Indian property in land, it had a right to protection from us against our own people. And the Supreme Court of the United States in *U. S. v. Kagama,* 118 U. S. 375 (6 Sup. Ct. Rep. 1109), asserted—as they have practically done in many other cases—that the Indians are wards of the nation, and under the paternal superintendence of the government. It was in the faithful observance of this duty that the government made a distinction between the Indians, denominating some as "competent" and others as "those not so competent," and, in order to protect the latter

class from their own folly, inexperience, and weakness, as well as to guard them against the schemes of designing men, it placed a restriction against the alienation of the interest in the land conveyed by the patent.

It is contended that, while this restriction is a proper exercise of power for the protection of the helpless class in whose behalf it is exercised, and while it is effectual to prevent the patentee from making a disposition of the land, unless authorized by the Secretary of the Interior to do so, yet the alienation can be accomplished through the machinery of State taxation. If this be so, the whole purpose and object of the restriction will count for nothing; for by neglecting to pay the tax assessed against the land, either through his own lack of capacity to comprehend that his land may be taken away from him by a tax sale if he does not pay, or because he may be advised by interested parties not to pay it, so that the same result may be accomplished, the alienation which the government, by the restriction placed in the patent, has sought to avoid, is as certainly effected as though made by a deed given by the Indian under his own hand, and he would thus be able to perform by indirection that which he could not directly do.

The case of *Pennock v. Commissioners*, 103 U. S. 44, is unlike this, for the reason that in that case there was no restriction against alienation, and, although the patentee was an Indian, and kept up her relation with the confederate tribes of the Sacs and Foxes, of which she was a member, the court held that, inasmuch as her title was absolute, the land was subject to taxation under the laws of Kansas; and in rendering the opinion Mr. Justice Field says that under her patent she took, "not an imperfect title, to be held under the guardianship of the Secretary of the Interior, to be disposed of only to the United States under regulations to be prescribed by him, but a

title carrying with it absolute ownership, with a right of free disposition at her will;" and it was therefore held that under those circumstances her property had come under the control of the state, and was subject to its laws, entitled to its protection, and bound to bear a portion of its burdens. For the reasons stated the same rule could not apply as was applied in the case of the *Kansas Indians*, reported in 5 Wall. 737, where it was held that the state of Kansas has no right to tax land held in severalty by individual Indians of the Shawnee, Wea, and Miami tribes under patents issued to them by virtue of treaties made with those tribes respectively in 1854. The tribal organization of those tribes had to a certain extent been broken in upon by intercourse with the whites, in the midst of whom the Indians were, and by their enjoyment to some extent of the social and other advantages of the white people. The patents issued in severalty to individual members of the Shawnee and Wea tribes, like the one in this case, contained a restriction against alienation, unless with the consent of the Secretary of the Interior, and those issued to the Miamis also contained the same restriction, and, in addition, a provision exempting the lands from levy, sale, execution, and forfeiture. Although the facts were somewhat different in each case, because the treaties with those tribes were not all alike, yet Mr. Justice Davis held that in all three cases the land was exempt from state taxation. In doing so he says:

"It is insisted, as the guaranties of the treaty of 1831 are not in express words reaffirmed in the treaty of 1854, they are therefore abrogated, and that the division of the Indian territory into separate estates so changes the *status* of the Indians that the property of those who hold in severalty is liable to state taxation. It is conceded that those who hold in common cannot be taxed. If such are the effects of this treaty, they were evidently not in the contemplation of one of the parties to it, and it could never have been intended by the government to make a

distinction in favor of the Indians who held in common, and against those who held in severalty."

Enlarged rules of construction are adopted in reference to Indian treaties; and in speaking of these rules in *Worcester v. Georgia*, 6 Pet. 582, it was said:

"The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered only in the latter sense."

While the circumstances are somewhat different in each case, yet a careful reading of the cases referred to will show that the courts have been zealous in sustaining the efforts put forth by the government to prevent its "non-competent" Indian wards from being deprived of the land granted to them in severalty, either through their own volition, through process of law, or by state taxation. While the question of whether or not the existence of a tribal organization is of importance was discussed in the case of the *Kansas Indians, supra*, yet we do not consider that in any sense a controlling question here; and, if it were so, it may well be held that, in reference to the subject now being considered, that condition exists so far as this Indian defendant is concerned, for by the sixth article of the treaty of 1855, referred to, the tribal organization of the Indians is retained so far as may be necessary to give effect to the provisions of that treaty.

It is not necessary to determine here the exact extent of the title conveyed by this patent, nor what the rights of those who may inherit it from the patentee may be at some time hereafter, nor whether or not this class of Indians are citizens of the State, with the right to exercise the elective franchise. All these are questions outside of what we deem to be material to an adjudication of the rights of the parties in this case.

It is only necessary to say that under this patent from the United States the patentee has a right to the use, occupancy, and enjoyment of the land, but has not the right to alienate it, either by direct or indirect means. The power to alienate is suspended, and the government has reserved the right to say when and how an alienation may be effected. This is one of the rights the government has authority to insist upon when, in the exercise of a humane guardianship and watchful care of "non-competent" Indians, it prohibits the alienation of the land conveyed to that class in severalty; and, having done so, it has a right to insist that such alienation shall not be brought about by the execution of state tax laws. A concession of the right to effect an alienation in the manner contended for would, as we conceive it, be in direct violation of the ordinance of the Legislature of this State of July 25, 1836, which contains an agreement that this State shall never interfere with the primary disposal of the soil within the same by the United States, nor with any regulations Congress may find necessary for securing the title in such soil to the *bona fide* purchasers thereof, and that no tax shall be imposed on land the property of the United States; and which provision, by the same act, is declared to be irrevocable without the consent of the United States.

We agree with the learned circuit judge that the land in question was not subject to taxation at the time of its assessment in 1889.

It follows that the decree made by him must be affirmed.

The other Justices concurred.

94 190
116 436
94 190
121 667
94 190
123 532
123 537
94 190
s53NW1058
129 184
129 186
94 190
s53NW1058
132 312

THE AUDITOR GENERAL v. CHARLES H. PRESCOTT ET AL.

Taxes—Intentional omission of property from roll.

The intentional omission from the tax roll of a township of $800,000 worth of personal property taxable therein, and the assessment of the real estate of the township at one-fourth of its cash value, will invalidate the State and county taxes levied upon the lands of a tax-payer in other townships in the same county, which were assessed at their cash value; citing *Walsh v. King*, 74 Mich. 350; *Solomon v. Township of Oscoda*, 77 Id. 365; *Auditor General v. Jenkinson*, 90 Id. 523.

Appeal from Iosco. (Simpson, J.) Submitted on briefs November 17, 1892. Decided December 22, 1892.

Petition for the sale of lands delinquent for taxes under Act No. 195, Laws of 1889. Defendants appeal. Decree reversed. The facts are stated in the opinion.

N. C. Hartingh, for appellants.

M. J. Connine, Prosecuting Attorney, for petitioner.

MONTGOMERY, J. This is an appeal from a decree made against the lands of the defendants, on the petition of the Auditor General for a sale of lands in Iosco county, for taxes levied in the year 1889 on lands owned by the defendants in that county.

The lands of the defendants are situated in the townships of Sherman, Alabaster, Reno, Grant, Tawas, and Thompson. The evidence in the case shows that there was purposely omitted from the tax roll of the township of Oscoda about $800,000 worth of personal property, lumber, logs, and salt, which property was taxable in that township, and also that the real estate of the last-named township was assessed at one-fourth of its cash value. It

appears by the concession of the prosecuting attorney, representing the petitioner, that the lands of the defendants were assessed at their full cash value. The objections were to the county and State taxes only, the township taxes not being in controversy.

There was a very plain, clear, and willful violation of the law by the assessing officers, and in a manner affecting prejudicially the interests of the defendants; and there is no sufficient *data* upon which the equitable amount due from the defendants for taxes can be ascertained. The questions involved have been fully considered and decided in the cases of *Walsh v. King,* 74 Mich. 350; *Auditor General v. Jenkinson,* 90 Id. 523; and *Solomon v. Township of Oscoda,* 77 Id. 365.

The decree of the court below will be reversed, and the State and county taxes, amounting to $449.30, and the collection charges of $1 on each description, amounting to $168, will be held not a proper charge against the descriptions of land owned by defendants. The defendants are also entitled to recover their costs of this Court.

The other Justices concurred.

GEORGE C. CODD AND HENRY PLASS v. MARY C. SEITZ. 94 191 / 140 2444

Real-estate brokers—Action for commissions—Pleading—Husband and wife—Discontinuance—Evidence.

1. Where, upon the trial of a suit brought against a husband and wife to recover commissions claimed to have been earned in negotiating a sale of real estate owned by the wife, it appears that if any liability exists it is that of the wife alone, the court may allow the plaintiff to discontinue as to the husband, and

proceed against the wife, and to that end make the necessary amendments to his declaration.[1]

2. Circuit Court Rule No. 71, which provides that when an action *ex contractu* is brought against several persons the plaintiff may, at any time before the final submission of the cause, be allowed to discontinue as against any of the defendants, and proceed thereafter in like manner as if the action had been originally brought against the remaining defendants, does not authorize the plaintiff to proceed and take judgment against a joint obligor, or against more than one and less than all upon a joint and several obligation; citing *Winslow v. Herrick*, 9 Mich. 380; *Anderson v. Robinson*, 38 Id. 407; *Cook v. Perry*, 43 Id. 623; *Munn v. Haynes*, 46 Id. 140.

3. In this case there was evidence properly submitted to the jury tending to establish the liability of the wife, and she is concluded upon this question by their verdict.

Error to Wayne. (Hosmer, J.) Submitted on briefs November 18, 1892. Decided December 22, 1892.

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

John Miner, for appellant.

Griffin, Warner & Hunt, for plaintiffs.

DURAND, J. This action was brought by the plaintiffs against two defendants, who are husband and wife, to recover for certain commissions claimed to have been earned by them in negotiating the sale of certain real estate owned by the defendant Mary C. Seitz. Upon the trial, after the introduction of the proof, the court held that there was no evidence of a joint promise, and permitted the plaintiffs, against objection, to discontinue the suit as against the defendant John H. Seitz, and an amendment of the pleadings in that respect; whereupon the case was submitted to the jury, who found a verdict for the plaintiffs against the remaining defendant.

[1] See *Post v. Shafer*, 63 Mich. 85.

Error is claimed upon two grounds:

1. That the court erred in permitting the discontinuance stated.

2. That there was no evidence upon which the court could legally submit the case to the jury as to the employment of the plaintiffs by the defendant Mary C. Seitz, either personally, or by her lawfully authorized agent.

There was no error in allowing the discontinuance. Circuit Court Rule No. 71 expressly provides that when an action founded on contract is brought against several persons the plaintiff may, at any time before the final submission of the cause, be allowed to discontinue as against any of the defendants, and proceed thereafter in like manner as if the action had been originally brought against the remaining defendants. While this cannot be done so as to enable the plaintiff to proceed and take a judgment against a joint obligor, or against more than one and less than all upon a joint and several obligation, under the rule laid down in *Winslow v. Herrick,* 9 Mich. 380; *Anderson v. Robinson,* 38 Id. 407; *Cook v. Perry,* 43 Id. 623; *Munn v. Haynes,* 46 Id. 140,—yet the same authorities allow the discontinuance under rule 71, referred to, when, as in this case, the plaintiff ascertains that he has sued more parties than he is entitled to recover against.

Neither do we agree with the defendant in her second contention, raised by the second and third assignments of error, which is that there was no evidence that the defendant ever gave her husband, John H. Seitz, authority to employ the plaintiffs to sell the land for her. We think there was testimony from which the jury might fairly find that to be the fact. There is testimony in the case which tends to show that plaintiffs had sold other land for Mr. and Mrs. Seitz in 1887; that at that time they left this property with the plaintiffs, as commission agents, to sell for them at the sum of $50,000; that the plaintiffs

tried to sell it; that the price on the land was increased, until finally an offer of $65,000 was obtained through plaintiffs' agency, which was reported to the defendant and her husband, and which each of them agreed to accept; that Mr. Seitz got an abstract of the land, and the purchaser placed some checks with the plaintiffs to bind the bargain; and that the deal proceeded until the time arrived for closing it up, when the defendant declined to sign the deed, and the transaction fell through. It is true that the defendant denies this, and insists that she never said that the $65,000 was satisfactory; that she never told the plaintiffs so; and that she never authorized her husband to do anything for her in reference to employing the plaintiffs. But there were some circumstances disclosed by the testimony from which the jury might legally infer that she did both, and these questions were all submitted to them, with all the evidence in the case, and they have found the facts against her. This concludes her upon that point, as the record shows that there was evidence from which the jury could find as they did.

We find no error in the record, and the judgment must be affirmed, with costs.

The other Justices concurred.

---

94 194
107 21

94 194
117 214

94 194
126 372

WILLIAM MAURER ET AL. v. CHARLES H. CLIFF, SUPERVISOR, ETC.

Taxes—Forest products—Property in transit—Omission of personalty from assessment roll—Mandamus.

1. A *mandamus* will not be granted to compel the assessment of taxable personal property, which has been omitted from the roll,

at a time when the owner will be deprived of the substantial right of a review of the assessment, either as to the amount, or, if the property is assessed elsewhere, the legality of that assessment.

2. Logs and lumber piled along a railroad track, awaiting the convenience of the owner or the facilities for shipment, are not *in transit*, within the meaning of the tax laws of 1885 and 1891, and are liable to assessment in the township where situate.

3. In such a case the fact of the existence of contracts to load the logs and lumber, or that some event has transpired to prevent shipment, or that it is the intention of the owner to ship in the near future, should have no weight with the supervisor.

Mandamus. Argued November 29, 1892. Denied December 1, and opinion filed December 22, 1892.

Relators applied for *mandamus* to compel respondent to list and assess certain personal property. The facts are stated in the opinion.

L. B. Fletcher and *Charles W. Nichols,* for relators.

Sharpe & Sharpe, for respondent.

McGRATH, C. J. This is an application to compel respondent, who is supervisor of Richland township, to list and assess the following personal property, which was situate as herein set forth at the date of assessment of property generally for the purposes of taxation:

a—Between six and seven million feet of round timber, which was cut and piled last winter, on skidways, along a branch of the Detroit, Bay City & Alpena Railroad, and which belonged to N. & B. Mills, of Marysville, Mich.

b—200,000 feet of sawed lumber, which was drawn and piled along said railroad track last winter, and capped for storage, and belonged to J. & G. K. Wentworth, of Bay City, Mich.

c—50,000 feet of sawed lumber, in same condition, owned by Alva Woods, of East Tawas.

d—About 150,000 feet of pine logs cut in the township

of Richland, and piled along said railroad track, and owned by W. Nesbitt, of Tawas City, Mich.

e—About 300,000 feet of hardwood logs piled along said railroad track, and owned by Austin & Co., of Bay City, Mich.

f—200 telegraph poles piled along said railroad track, and owned by George Eymer, of Prescott, Mich.

The answer sets forth—

1. That N. & B. Mills had not to exceed 5,000,000 feet of round timber cut and piled upon skidways along a branch of said railroad, as alleged; that, at the time of making the assessment, respondent presented to Barney Mills, one of said firm, a blank statement to be filled out, as to the amount of property owned by said firm in said township; that said Mills filled out such statement, and subscribed and swore to the same, and therein listed said timber as being in transit, and informed respondent that he intended shipping such timber as soon as practicable, and that it had been assessed to said firm at Marysville; that the following is a certificate of the supervisor of Port Huron township, showing such assessment there:

"PORT HURON, April 20, 1892.

"I hereby certify that I have assessed the firm of N. & B. Mills with 6,000,000 feet of logs in transit, and that said firm has been assessed as aforesaid for the past four years.

"C. A. BAILEY,
"Supervisor of Pt. Huron Twp."

That respondent relied on the statement of said Barney Mills that said logs were in transit, and were assessed to said firm at Marysville.

2. That, as to said 200,000 feet of sawed lumber, a part of the same was shipped prior to April 11, 1892, and said J. & G. K. Wentworth informed respondent that said firm intended shipping said lumber as soon as they could get cars, and respondent believed that said lumber would be at once shipped out of said township.

3. That, as to said 50,000 feet of lumber alleged to belong to Alva Woods, respondent was informed by one Sampson that said lumber belonged to him, and it was assessed to said Sampson.

4. That, as to the Nesbitt logs, Nesbitt was preparing to ship them out of the township, when they were attached by laborers who had performed labor upon them, and thus

detained until March 25, when Nesbitt contracted for their removal, and soon after they were shipped; but whether before or after the second Monday in April, respondent is unable to state.

5. That, as to said telegraph poles, they were assessed to George Eymer.

6. That, as to said hardwood logs, they were cut partly in the township of Logan, and partly in the township of Richland; that they were owned by one Ross, and not by Austin & Co.; that said Ross, on April 1, contracted with certain parties to load said logs upon the cars, but, owing to a claim of trespass for cutting the same, the railroad company refused to ship the same, and they were not shipped until about May 1; and said logs would have been shipped by the second Monday in April, except for such claim.

The tax law of 1869 provided that—

"All personal estate within this State, except in the cases where other provision is made by the third and eighth sections of this act, shall be assessed to the owner in the township where he shall be an inhabitant on the second Monday of May, and all resident real estate to the person occupying it on that day, unless the same shall be given in by some other person for assessment to him."

Under this statute, this Court determined the cases of *Putman v. Township of Fife Lake*, 45 Mich. 125, and *McCoy v. Anderson*, 47 Id. 502. In 1882 the law provided that—

"All goods and chattels situate in some township other than where the owner resides shall be assessed in the town where situate, and not elsewhere, if the owner or person having control thereof hires or occupies a store, mill, place for sale of property, shop, office, mine, farm, storage, manufactory, or warehouse therein, for use in connection with such goods and chattels."

In *Torrent v. Yager*, 52 Mich. 506, and *Monroe v. Greenhoe*, 54 Id. 9 (both decided in 1884), lumber was assessed in a township other than where the owners resided, where it was manufactured under contracts with the owners. It was held that the owners did not own or hire

the place where the lumber was piled, and did not keep any agent there who had a right to sell it; that, under an arrangement which contemplated bringing and piling the lumber for purposes of convenient shipment, the lumber could in no proper sense be regarded as in a place of storage occupied by the owners for use in connection with it. In the latter case, Mr. Justice CAMPBELL, speaking for the Court, says:

"Such an occupancy as the present does not differ in principle from the deposit of articles on the premises of carriers for carriage. And the fact that, in the continued moving and removing process, some of the lumber is not at once shipped in the order of its piling, can make no difference in determining the character of the transaction."

In *Manistique Lumbering Co. v. Witter*, 58 Mich. 625; *Manistique Lumbering Co. v. Griswold*, Id. 634; and *Hood v. Judkins*, 61 Id. 575,—the tax was assessed under the same statute.

In 1885, forest products—lumber, logs, timber, lath, pickets, shingles, posts, cordwood, tan-bark, telegraph and telephone poles, and railroad ties—were first enumerated in the statute, and the place for the taxation thereof was specifically pointed out. What is now the fourth subdivision of section 11 of Act No. 200, Laws of 1891, was substantially enacted by the Legislature of 1885. It reads as follows:

"Personal property of non-residents of the State, and all forest products owned by residents or non-residents or estates of deceased persons, shall be assessed to the owner or to the person having control thereof in the township or ward where the same may be, except that, where such property is in transit to some place within the State, it shall be assessed in such place: *Provided*, all forest products in transit on the second Monday in April, and thereafter found in the waters or streams of this State, or on the banks or shores of any lake, pond, or stream of this State, when the same is not at the place where it is to be manufactured, shall be held to have a place of destination at the sorting grounds

of the rafting and driving agents or booming company nearest the mouth of the stream, unless the contrary shall be made to appear by the owner or party having the same in charge: *Provided, further,* that all lumber, logs, timber, lath, pickets, shingles, posts, cordwood, tan-bark, telegraph or telephone poles, or railroad ties that may be piled or left in any yard, railroad reserve, or in any shed, shall not be deemed in transit, but shall be assessed to the owner thereof in the township or ward where the same may be situate at the time provided by law for taking such assessment."

It is quite evident from this history of the legislation of the State, and the decisions of this Court, that the Legislature intended by the statute of 1885 to reach this very class of property, and to avoid the difficulties arising under the old law respecting its assessment.

In *Hill v. Graham,* 72 Mich. 659, the owners had contracted with one Redy to cut and put afloat in the Munoskong river, and run and deliver at its mouth, all of their pine timber. The river passes through the township of Bruce, where the logs were assessed. On the second Monday in April, 1886, the supervisor of Bruce township found a small creek leading into the Monoskong piled full of logs; the pile extending back from the creek on dry land a distance of 100 yards. These logs had been cut during the winter of 1885–86 by Redy, under his contract, and the supervisor estimated the amount at 11,000,000 feet. The creek was frozen over, and the logs were not being run, although preparations were being made to run them when the creek should be in a condition to run them. The court instructed the jury as follows:

"The law also provides that logs, lumber, pickets, telegraph poles, ties, and other forest products, if piled or left in any yard, railroad reserve, shed, or any other place, shall not be deemed in transit, but are to be assessed to the owner in the township where they are found. Therefore, it becomes an important question in this case whether

or not logs were in transit. If they were, they were not liable to taxation in Bruce township, and the plaintiffs are entitled to your verdict. If they were not in transit, they would, under the undisputed evidence, be liable to taxation there.

"When we speak of 'goods in transit,' we mean on the way or passage, while going from one place or person to another, in the course of business or commercial dealings.

"So, if you find that on the second Monday of April, 1886, the plaintiffs were driving the logs, of which the logs in this suit formed a part, towards their destination, or were breaking the rollways and jams for that purpose, or were working upon them in the ordinary way, with a view of driving them towards their destination, or as many of them as the stage of water in the river would permit, then the logs would be in transit, and not liable to assessment in the township of Bruce for that year; and your verdict will be for the plaintiffs.

"But if you find from the evidence that the logs in question were not in the waters or streams in question,—were not actually started on their way or passage down it, but in unbroken piles, awaiting the breaking up of the river, or rise of water, or some future event, before starting,—the mere intent of the owners, unaccompanied by any acts showing their present purpose to drive the logs, would not justify you in regarding the property in transit."

This Court held that the instruction was as favorable to plaintiffs as they had a right to expect.

The Mills logs had been piled and left in a railroad reserve, and should have been listed in that township. The statute expressly says that property so piled and left shall not be deemed in transit, but shall be assessed to the owner thereof in the township or ward where the same may be situate. Lumber and logs are not usually left on railroad premises at such points, except for the very purpose of shipment. It is only as to property in transit that the destination is material, and it will be noticed that it is only as to the destination of such property that the contrary may be made to appear. The statute does not make

the intention of a party who has piled or left lumber in any yard or railroad reserve material. In *Hill v. Graham, supra,* the owners had contracted for the running of the logs, but the Court held that unless the owners were driving the logs towards their destination, or were breaking the rollways and jams for that purpose, or were working upon them in the ordinary way, with a view to driving them towards their destination, then the logs would not be in transit; that the mere intent of the owners, unaccompanied by any acts showing their present purpose to drive the logs, would not justify the jury in regarding the property as in transit. The certificate from the supervisor of Port Huron township does not necessarily refer to this property, and, even though it did, property should be assessed at the place fixed by the statute. The owner has no choice, and may move to correct at the place where illegally listed.

The Wentworth lumber, the Nesbitt logs, and the Austin & Co. logs should also have been listed. The fact that contracts had been made with parties to load the logs or lumber, or that some event had transpired to prevent shipment, or that it was the intention to ship in the near future, should have had no weight with the supervisor. The products had been left there, and had been there for some time, awaiting the convenience of the owners or the facilities for shipment, and they were not in transit, within the meaning of the statute.

As to the Woods lumber and the telegraph poles, the return shows that they had been assessed to the owners by the supervisor in that township.

A *mandamus* must, however, be denied, for the reason that the application comes too late. The placing of the property upon the assessment roll at this late day would deprive the parties of the substantial right of a review of the assessment, either as to the amount, or, if assessed else-

where, as to the legality of that assessment. The writ must therefore be denied, but without costs.

The other Justices concurred.

94 202
s53NW1054
130 133n

GEORGE LUTON v. JAMES E. SHARP AND MARY A. SOPER.

Attorney and client—Notice—Execution sale—Bona fide purchaser—Conclusiveness of officer's return.

1. While it is true that notice to the agent is notice to the principal, yet the knowledge of the principal cannot be imputed to the agent with respect to a matter in which the latter is acting in his own interest.
2. The return of a sheriff of the levy of an execution on real estate, for want of goods or chattels whereof the damages and costs could be made, cannot be questioned in an action of ejectment brought by a purchaser at the execution sale, for value and without notice, against a prior grantee of the execution debtor, whose deed was not recorded until after the sale.

Error to Newaygo. (Palmer, J.) Argued November 30, 1892. Decided December 22, 1892.

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

W. D. Fuller, for appellants.

E. L. Gray, for plaintiff.

MCGRATH, C. J. This is ejectment.

On April 9, 1890, Daniel E. Soper was the owner in fee of the lots in question, and on that date conveyed the same by warranty deed to Mary A. Soper, his wife, but

said deed was not recorded until May 11, 1891. On June 14, 1890, an execution in favor of plaintiff's assignor, and against the goods and chattels, lands and tenements, of Daniel E. Soper, was levied upon the right, title, and interest of said Soper in said lots, and on the same day a notice of levy was filed with the register of deeds, but at the time of the filing of said notice the execution creditor had no personal actual notice of the execution of said deed to Mary A. Soper. A sale was made September 5, 1890, and a certificate of sale issued to plaintiff's assignor. Plaintiff here was the attorney for the execution creditor in the suit in which the execution issued, and took an assignment of the certificate of sale on April 1, 1891, the consideration named therein being $520, and a sheriff's deed was afterwards executed to him. It is not claimed that plaintiff had notice of defendant's claim of ownership, or that he is not a purchaser for value. He testifies that he had no knowledge of defendant's claim until April 6, 1891, and defendant's deed was not recorded until May 11, 1891. The case was heard by the court, and plaintiff had judgment. The record presents no findings.

Defendants excepted to the refusal of the court to consider testimony offered by defendants tending to show (*a*) that the sheriff was notified that the property belonged to defendant Mary A. Soper, and (*b*) that Daniel E. Soper had personal property subject to execution sufficient to satisfy the judgment.

The statute (Act No. 227, Laws of 1889) provides that—

"No levy by execution on real estate, made after this act shall take effect, shall be valid against *bona fide* conveyances made subsequent to such levy, until a notice thereof, containing the names of the parties to the execution, a description of the premises levied upon, and the date of such levy, shall be filed by the officer making the same, in the office of the register of deeds of the county where the premises are situated, and such levy shall be a

lien thereon from the time when such notice shall be so deposited; and the lien thus obtained shall, from the filing of such notice, be valid against all prior grantees and [mortgagees] mortgages of whose claims the party interested shall not have actual nor constructive notice."

It is unnecessary to determine whether the knowledge of the sheriff who receives an execution is chargeable to the plaintiff in the execution, in whose interest the sheriff acts. Plaintiff here must be regarded as though the purchaser at the execution sale for value and without notice. While it is true that notice to the agent is notice to the principal, yet the knowledge of the principal cannot be imputed to the agent with respect to a matter in which the latter is acting in his own interest.

The return of the sheriff recites that defendant had no goods or chattels whereof the damages and costs could be made. The return cannot be questioned in this proceeding. Freem. Ex'ns, § 279.

The judgment is affirmed.

The other Justices concurred.

94 204
95 623

94 204
106 314

94 204
s108 247
109 617

94 204
119 168
119 566

94 204
146 607

CHARLES B. FENTON v. ANNA M. MILLER ET AL.

[See 76 Mich. 405.]

Deed—Recording—Presumption of delivery—Tenants in common—Adverse possession—Evidence.

1. The rule that the delivery of a deed is presumed from the fact of its being placed on record by the grantor applies to a case where the grantor, as register of deeds, records the deed, and remains in possession of the land conveyed; citing *Glaze v. Insurance Co.*, 87 Mich. 349; *Patrick v. Howard*, 47 Id. 40.

2. Until an heir who is in possession of the joint real estate has

done or said something which is unequivocal notice to his co-heirs that he claims the entire property as against them, there can be no ouster and no adverse possession.

3. The refusal of a guardian, who is in the possession of land owned by her wards as tenants in common with other heirs, to recognize the rights of such co-tenants in the land, a plea by the guardian of the general issue in an ejectment suit brought by the co-tenants on such refusal, and a plea by her of adverse possession to a bill for partition filed by the grantee of such co-tenants, amount to a total denial of the rights of such grantee, within the meaning of How. Stat. § 7812, which provides that, in an action of ejectment brought by one tenant in common against a co-tenant, the plaintiff must show an actual ouster by the defendant, or the commission of some other act amounting to a total denial of plaintiff's right as such co-tenant.
4. Where both parties fully understand the subject-matter in a controversy, an erroneous description of the property will not operate to defeat the effect of a written document.
5. Where, in an action of ejectment against a mother and her infant children, the mother is disqualified under the statute from testifying to a conversation with plaintiff's deceased grantor, such disability extends to her co-defendants, who would be benefited by such testimony.
6. A tenancy in common exists where two or more persons hold possession of lands and tenements at the same time, by several and distinct titles. The quantities of their estate may be different, their proportionate shares of the premises may be unequal, the modes of acquiring their titles may be unlike, and the only unity between them be that of possession; citing 1 Washb. Real Prop. 415.
7. Mere possession by one co-tenant is not sufficient to establish ouster and adverse possession, and especially where the co-tenants are brothers and sisters. Some clear, positive, and unequivocal act must be shown which amounts to an open denial of the co-tenants' rights; citing *Dubois v. Campau*, 28 Mich. 304.

Error to Mackinac. (Pailthorp, J.) Argued November 29 and 30, 1892. Decided December 22, 1892.

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

James McNamara (*Norris & Norris*, of counsel), for appellants.

Henry Hoffman (*C. R. Brown & Son*, of counsel), for plaintiff.

GRANT, J. On December 21, 1851, one Abraham Wendell died seised in fee of the entirety of the lands here in controversy. He left seven children, named George, Theodore, Eliza, William, James, Mary, and Josiah. At that time William, James, Mary, and Josiah were infants. James died in July, 1854, intestate. George died October, 1879, leaving a will, by which he conveyed his property to Theodore. Theodore was married in 1869, and died in November, 1879, leaving two children, the infant defendants in this case. Eliza was married to plaintiff in 1858, and died in January, 1885. Theodore, prior to the death of his father, had built a house upon the land at his own expense, which appears to have been regarded as personal property, and belonging to him. This house was occupied by the family as their homestead. After the death of the father, the children continued to live upon the land as one family, until 1869, except that Eliza left after her marriage to plaintiff.

April 15, 1854, George and Theodore executed a deed to Eliza conveying to her all of their, and each of their, undivided interest, right, and title, as well in possession as in expectancy, of, in, and to the land now in dispute. This deed was recorded April 18, 1854. On the same date Eliza executed a deed to George and Theodore of certain lands in Indiana. The consideration expressed in the deed to Eliza was $275. On August 23, 1853, Theodore executed to Eliza a bill of sale of the house, the consideration for which was expressed as one dollar, and the natural love and affection he had and bore

towards her, and for her better maintenance, support, and livelihood. December 14, 1881, William and his wife executed a deed to Eliza, in consideration of $500, conveying their undivided share of said property, and all their interest in the share of James, both in possession and expectancy, to the land in dispute. March 6, 1884, Eliza executed a deed to plaintiff, conveying her interest in this land.

It thus appears that by deed and heirship plaintiff had the record title to 13–21 of this land, and the infant defendants to 8–21, subject to their mother's right of dower.

Theodore, upon his marriage in 1869, moved into the house, and from that time until his death had the exclusive occupancy, and the defendants have occupied it since. Upon the death of Theodore, his widow, now the defendant Mrs. Miller, became administratrix of her husband's estate, and guardian of her children.

On March 5, 1880, William, Eliza, Mary, and Josiah joined in a notice directed to and served upon Anna M. Wendell to surrender and deliver up possession of "lot No. 12, on the connected plat of the village of Mackinac, designated and described as the 'Wendell Homestead,' and remove therefrom on the 6th day of June, 1880." She did not vacate, and on June 23, 1880, the four began an action of ejectment against her for possession of the undivided 20–21 of entire lot 12, which description covered more than the land in dispute, but included it. This case was put at issue by a plea of the general issue. This suit has never been tried, but is still pending and undetermined. After it was commenced, William, as already shown, conveyed his interest to Eliza. Josiah and Mary also afterwards released to the defendants their interest in this land in exchange for other land. It thus appears that none of the plaintiffs in that suit were longer interested in its prosecution, since they had all conveyed their interest.

November 23, 1886, plaintiff filed a bill in chancery for the partition of lot 12, in which suit the present defendants were also made defendants. To this bill the defendant Anna interposed a plea of adverse possession, and the other defendants, by their guardian, answered, simply submitting their rights and interests to the protection of the court. The case was submitted upon pleadings and proofs, and the court held that the proceedings must be stayed until the complainant had established his title at law, and that the defendants were entitled to have the question of ouster and adverse possession tried in a court of law. This decision of the court below was sustained by this Court. *Fenton v. Steere*, 76 Mich. 405. It was conceded in that case that complainant had established his co-tenancy and right to partition, unless his title was defeated by ouster and adverse possession.

Subsequent to that decree, and on September 17, 1890, plaintiff brought the present suit. The description of the premises in the original declaration in this case was the same as in the first ejectment suit and in the chancery suit. Upon the trial the plaintiff was permitted to amend his declaration by inserting a description by metes and bounds so as to cover the exact land in controversy, which was a part of lot 12, and to correspond with the proofs. Plaintiff was entitled to verdict and judgment upon his record title, unless defendants had shown an ouster and adverse possession for 15 years prior to bringing suit, provided he himself had shown an ouster within 15 years before bringing suit. Defendants claim that all the other heirs were ousted by Theodore in 1869, when he was married, and entered into possession of the premises, and the other heirs moved out, and that he was thereafter exclusively in possession under an asserted demand of the exclusive right thereto. On the other hand, plaintiff admits

the occupancy, but denies that it was adverse, or that Theodore ever claimed title.

1. Defendants first insist that the record of the deed from Theodore and George to Eliza was not evidence of its delivery, under the circumstances of this case. George was register of deeds, and Theodore was his deputy, at the time the deed was recorded. The deed was in the handwriting of Theodore, and the indorsement of the record upon the back of the deed was also in his handwriting. The court instructed the jury that the burden of proof as to delivery was upon the plaintiff; that the record of the deed by the grantors with the intent to pass title would be a sufficient delivery; that delivery is presumed from the record of a deed, and to avoid the effect of vesting title in the grantee the party questioning its delivery would be called upon by satisfactory evidence to explain away or rebut such presumption. The learned counsel for the defendants concede that this is the general rule, but insist that it does not apply where the grantor, as register of deeds, records it, and, after its record, continues in possession of the land conveyed. We think this point is expressly ruled against defendants in *Glaze v. Insurance Co.*, 87 Mich. 349. It was there held that, where a husband executed a deed to his wife, and recorded it without her knowledge, the record raised a presumption of delivery. See, also, *Patrick v. Howard*, 47 Mich. 40. Did it conclusively appear by the proofs that the grantors retained this deed in their possession, and had never actually delivered it to the grantee, a different question might arise. But there was other evidence on the part of the plaintiff tending to show a delivery to Eliza. This testimony was controverted by the defendants. This evidence was submitted to the jury, the court again instructing them that possession of the deed by Eliza would be

only *prima facie* evidence of title in her, and that they must determine the question of actual delivery from all the evidence on that point. The charge was correct, and was very full and fair.

2. The defendants gave evidence tending to show that Theodore, upon his marriage, wrote to his brothers and sisters, who were then living in the homestead, that he should bring his wife home with him, and desired that they should give him possession of the homestead, which, as above stated, they substantially did. This letter was not produced, and its contents were not controverted by others of the family. But, according to defendants' evidence, it did not contain any assertion that he was then owner of the land, or that he insisted or claimed any right hostile to theirs. Considering their ownership and relation, this letter, and the compliance of the other children with the request to leave, did not constitute an ouster. Heirs cannot in this manner be deprived of their ownership in land, the entirety of which has descended to them from their father. Until the heir so in possession has done or said something which is unequivocal notice to his co-heirs that he claims the entire property as against them, there can be no ouster and no adverse possession. There was a great deal of testimony bearing upon this question, and tending to support the claim put forth by each party. It is unnecessary to repeat it. The question was clearly one for the jury, and we are only concerned to determine whether any errors were committed upon the trial which operated to the prejudice of the defendants.

The theory upon which the case was submitted to the jury appears from the following portion of the charge:

"It was not necessary for Theodore Wendell to expressly state to this plaintiff's grantors that he did not intend to recognize their right to any portion of this property. If

his conduct was such as to show that it was his intention to no longer recognize their rights to participate in the management of that property, and the knowledge of it was brought home to them, and they should have known by his conduct that he was setting up a claim of exclusive ownership, that notice would be sufficient. A tenant in common cannot be ousted without knowing his title is disputed or his right of entry denied."

The charge was certainly as favorable to the defendants, upon this branch of the case, as the facts justified.

3. How. Stat. § 7812, in regard to ejectment, provides:

"If the action be brought by one or more tenants in common or joint tenants against their co-tenants, the plaintiff, in addition to all other evidence which he may be bound to give, shall be required to prove on the trial of the cause that the defendant actually ousted such plaintiff, or did some other act amounting to a total denial of his right as such co-tenant."

Under this statute the notice and demand for possession served upon defendant Anna, who was then in possession, and the guardian of her children, and her refusal to recognize the rights of plaintiff's grantors in the property, the plea to the first ejectment suit and to the chancery suit, each amounted to a total denial of the plaintiff's rights, and were evidence of ouster. *Bailey v. Bailey,* 36 Mich. 185; Tyler, Ej. 235; *Greer v. Tripp,* 56 Cal. 209; *Spect v. Gregg,* 51 Id. 198; *Noble v. McFarland,* 51 Ill. 226. The objection that the description of the property in the notice and the suits was "lot 12," and therefore that they were not competent evidence of ouster, is without force. The parties certainly understood the property claimed, and in the notice it is significant that the description was qualified by being "designated and described as the 'Wendell Homestead.'" The declaration and the bill would have been amended upon motion as a matter of course, and without costs. Where both parties fully understand the subject-matter in controversy, an erroneous description of

the property will not operate to defeat the effect of a written document.

4. Defendant Miller was asked by her counsel to state a conversation with Eliza, in which it is claimed that Eliza spoke to her about having Theodore put the homestead in her (Anna's) name. This testimony was excluded by the court as incompetent under 3 How. Stat. § 7545. Counsel concede that such testimony was properly excluded so far as the defendant Miller was concerned, since she is an opposite party within the statute, and the conversation was with plaintiff's assignor; but they insist that it should have been received on behalf of the infant defendants. We think the testimony was within the statute, and properly excluded. Whatever testimony was given by her inured to her own benefit, as well as to the benefit of her children. If one of her children had had a conversation with Mrs. Fenton, it would, under this contention, be admissible on behalf of the mother, though incompetent on behalf of the children. To admit it would be a clear evasion of the statute.

5. It is claimed that the deposition of Mary was erroneously excluded. She testified that during the last sickness of Mrs. Fenton, and about a month before she died, she said to witness that she wanted to have some property that was made over to her in her name to be conveyed to the rightful owners. She said that this referred to what was known as the "Bazaar Property," which had no connection with the land in controversy. It needs no argument to show that this part of the deposition was properly excluded. In response to a leading question by defendants' counsel, witness further said: "She [Eliza] said all the property had been put to her name, and she wanted to convey to the rightful owners; she would like to have it." Even if this conversation should be held to include the property in question, still it was made nine months after Mrs. Fen-

ton had deeded the land to plaintiff, and was therefore incompetent for the purpose of impeaching his title.

6. The next objection is to the exclusion of the record of six deeds which were executed between the various children of Abraham Wendell, but none of which relate to the property in question. The precise complaint appears to be that, although the record of these deeds in Mackinac county was a nullity, since the lands conveyed were not situated in that county, yet they should have been admitted, because the record of the deed from Eliza to George and Theodore was admitted, although the record was a nullity. No objection was made to the admission of the record of this deed, and we need not discuss whether its admission would have been proper under objection. But, aside from the question of the record of these six deeds, we are unable to see that they throw any light upon the controversy here, while it is certainly a natural inference that the deed from George and Theodore to Eliza was in consideration of the deed from her to them, and would also tend to rebut the claim of defendants that George and Theodore were at that time in financial distress, any therefore deeded this land to Eliza.

7. It is claimed that the court erred in admitting in evidence the bill of sale of the house, for the reason that no delivery thereof to Eliza was shown. This document had two witnesses, in whose presence it was stated to be "signed, sealed, and delivered." On its back was the following: "Bill of sale. Aug. —, 1853. Received for record August 23, 1853, at 3:06 p. m., and recorded in Liber ——." This indorsement was shown to be in the handwriting of Theodore. It appears to have been found among other papers in a safe which was used in common by George, Theodore, and William, and after all three were dead. This safe was in the store of William. George and Theodore had an office on the second floor over the

store. After the death of William, his widow found this bill of sale in the safe among other papers apparently belonging to Eliza, all of which she gave to Mr. Fenton. Considering the character of this instrument, the recitals it contained, the manner of its execution, and the indorsement upon the back, we think it was competent evidence for the jury to consider in the light of the other testimony. It was distinctly stated by plaintiff's counsel, when the instrument was offered, that they did not introduce it to prove title, and that they should not argue that they claimed title to the house. Its effect was limited to a contradiction of the claim made by the defendants, who had introduced the books and receipts left by Theodore to show that he built the house and therefore owned it.

8. The case was submitted to the jury upon the assumption that the parties were tenants in common of this land. We do not think the court erred in this respect. By the death of Abraham his children became tenants in common, each owning an undivided one-seventh interest. These interests were afterwards changed by death and by conveyance; but by these changes each continued to own an undivided interest. Each was entitled to possession jointly with his co-tenants. Their interests at all times possessed the attributes of a tenancy in common, which exists—

"Where two or more hold possession of lands or tenements at the same time, by several and distinct titles. The quantities of their estate may be different, their proportionate share of the premises may be unequal, the modes of acquiring these titles may be unlike, and the only unity between them be that of possession." 1 Washb. Real Prop. (4th ed.) 652 (*415).

Upon this theory the partition suit was tried, and was held in abeyance until the question of title by adverse possession should be determined at law.

9. After the commencement of the first ejectment suit, in 1880, two of the plaintiffs conveyed their interests to

the defendants, and one to Eliza, plaintiff's grantor, as already stated. This was a practical abandonment of that suit, and was evidently so regarded by the parties, as neither afterwards took any steps to bring the case to trial. But it is unnecessary here to determine the *status* of that case. The defendants did not plead it as a bar to the present action, and it therefore cannot now serve that purpose. Its only office in the present case is to show an ouster by the defendants.

10. The court was requested to direct a verdict for the defendants. The refusal to do so was correct. The only ground for such an instruction is the fact that Theodore was in the exclusive occupancy of the premises from 1869 to the time of his death, in 1879. But mere possession by one co-tenant is not sufficient to establish ouster and adverse possession, and especially where the co-tenants are brothers and sisters. Some clear, positive, and unequivocal act must be shown which amounts to an open denial of the co-tenant's rights. *Dubois v. Campau,* 28 Mich. 304, and note, 2d ed. Acquiescence by brothers and sisters in the possession of the homestead of their parents by another brother or sister, who is a tenant in common with them, is no evidence of ouster or adverse holding. Other acts must be shown which would characterize such holding as hostile to the others' rights, and which would rebut the presumption that he holds possession for the benefit of all. Upon such acts in this case there is a radical difference in the evidence, and upon these the jury have found for the plaintiff.

Judgment affirmed.

The other Justices concurred.

94	216
107	421
108	572
94	216
114	72
94	216
118	557
94	216
125	708
94	216
136	1206
94	216
142	4298
94	216
145	4398

The Township of Caledonia v. Edward Rose.

Taxes—Failure of board of review to meet—Validity of tax—Curative provisions of law—Jurisdiction.

1. The curative provisions of the tax law do not apply to jurisdictional defects in the tax proceedings.
2. The provision of the tax law requiring the board of review of a township to meet upon certain specified days for the purpose of reviewing and correcting the assessment roll is mandatory.
3. A tax-payer has the right to assume that the board of review will remain in session the full statutory time, and to arrange to be present on any day he may choose; and if, by reason of the failure of the board to perform this statutory duty, he is prevented from appearing and objecting to his assessment, the tax levied against him thereon is void.
4. The board of review is a tribunal provided by law, in which the tax-payer may appear to contest an unequal or excessive assessment; and his failure so to appear estops him from assailing the assessment afterwards; citing *Bank v. St. Joseph*, 46 Mich. 526; *Williams v. Saginaw*, 51 Id. 120; *Comstock v. Grand Rapids*, 54 Id. 641; *Lumber Co. v. Crystal Falls*, 60 Id. 510.
5. The question whether an assessment is excessive or not is not for the courts to try, the board of review being the only tribunal having jurisdiction of that question; citing *Williams v. Saginaw*, 51 Mich. 120.

Error to Shiawassee. (Newton, J.) Argued November 30, 1892. Decided December 22, 1892.

Assumpsit. Defendant brings error. Reversed, and judgment entered here for defendant. The facts are stated in the opinion.

Walter McBride, for appellant.

Selden S. Miner, for plaintiff.

GRANT, J. This suit was brought to recover a tax of $95.40 assessed against the defendant for the year 1890 upon an assessment of $15,000 personal estate. Verdict and judgment were for the plaintiff.

The board of review of the township met on the Tuesday next following the third Monday of May, continued in session for five consecutive days, and then adjourned *sine die*. It did not meet on the fourth Monday of May, as the statute requires. 3 How. Stat. § 11703. The circuit judge instructed the jury that, inasmuch as the board did not meet as the law required, plaintiff could not recover, unless they found as a matter of fact that defendant did own the full amount of the property in value spread upon the roll, in which case the assessment, though irregular, would not prejudice defendant's rights.

Defendant resided in the township, but was absent from the State during the week that the board was in session. He knew that the board was required to meet on the fourth Monday in May, and returned home Saturday night, in order to appear before the board of review the following Monday, and protest against his assessment. He went to the place of meeting on Monday, where he found the supervisor, who informed him that the board had adjourned. He then asked to have it reconvened, so that he might appear before it, and present his evidence against his assessment. The supervisor declined to reconvene the board.

The sole question of fact upon the trial was whether defendant owned the amount of property placed upon the roll. The testimony upon this question was conflicting, and the verdict of the jury is conclusive as to the fact. The sole question, therefore, is, did the failure of the board of review to meet at the required time vitiate the tax against the defendant? We think the question settled in favor of the defendant. Cooley, Tax'n (2d ed.), 366, 422, 748, 751; *Slaughter v. Louisville*, 89 Ky. 112 (8 S. W.

Rep. 917); *Woodman v. Auditor General,* 52 Mich. 28; *Avery v. East Saginaw,* 44 Id. 587. This board of review is a tribunal provided by law, in which the tax-payer may appear to contest an unequal or excessive assessment. Failing to appear there, he is estopped to assail the assessment afterwards. *Comstock v. Grand Rapids,* 54 Mich. 641; *Peninsula Iron & Lumber Co. v. Crystal Falls,* 60 Id. 510; *Williams v. Saginaw,* 51 Id. 120; *First National Bank v. St. Joseph,* 46 Id. 526.

It was held in *Williams v. Saginaw* that the question whether an assessment is excessive is not for the courts to try, but that the board of review is the only tribunal to try and determine that question. Defendant was therefore entitled to his "day in court" before that tribunal. The provision of the statute requiring the board to meet upon the days named is mandatory, and it cannot deprive the tax-payer of his hearing there, and thereby force him to a suit at law to obtain redress. Defendant was entitled to assume that the board would remain in session the full length of time provided by the statute, and to arrange to be present any day he chose.

But it is insisted that this case falls within the curative provisions of the statute, and that the verdict of the jury is conclusive that the defendant was not prejudiced by the action of the board. But, as already stated, the court obtained no jurisdiction to test this question. Jurisdictional defects are not covered by these provisions, which are found in 3 How. Stat. §§ 1170*i*4, 1170*i*5. Plaintiff cites in support of its contention, *Petrie Lumber Co. v. Collins,* 66 Mich. 64; *Hill v. Graham,* 72 Id. 660; *Michigan Dairy Co. v. McKinlay,* 70 Id. 574. In these cases the property was assessed to the right parties under a wrong name, and the property of the parties who were actually assessed was levied upon under the tax warrant. These cases have no bearing upon the present one.

Judgment must be reversed, and judgment entered here for the defendant, with the costs of both courts.

The other Justices concurred.

THOMAS KEATING v. THE MICHIGAN CENTRAL RAILROAD COMPANY.

Statute of limitations—Infancy—Appointment of next friend.

1. How. Stat. § 8713, which bars an action on the case unless commenced within six years after the cause of action accrues, does not commence to run as against an infant until he attains his majority.
2. The commencement of suit by an infant, by his next friend, will not set the statute of limitations in motion, so as to deprive him of its full benefit after he becomes of age.

Error to Ingham. (Person, J.) Argued November 30, 1892. Decided December 22, 1892.

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

Black & Dodge, for appellant.

R. A. Montgomery, for defendant.

LONG, J. This is an action for negligent injuries. Upon the stipulated facts, the trial court directed the verdict in favor of the defendant.

It appears that the injury occurred on July 13, 1876, when plaintiff was seven years old. On March 16, 1877, his father was appointed as next friend in a suit then about to be brought in the Ingham circuit court against the defendant for such injuries. The order appointing the

father next friend was made by one of the circuit court commissioners of that county. Suit was brought against the defendant company on that date by the plaintiff, by his next friend, for the injuries complained of in the declaration in this suit. That suit, on March 7, 1878, was brought on for trial, and, after the evidence on the part of the plaintiff was put in, he submitted to a nonsuit, with leave to move to set the same aside. In December, 1882, an order was entered discontinuing the suit. August 25, 1883, suit was again brought by the plaintiff, by his next friend, in the same court, for the same cause of action, and that suit discontinued, December 27, 1890. The present suit was brought within one year after the plaintiff became of age. Defendant pleads the statute of limitations.

How. Stat. § 8713, provides that—

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

"7. All actions on the case," etc.

It is provided by section 8718, in the same chapter, as follows:

"If any person entitled to bring any of the actions mentioned in this chapter shall, at the time when the cause of action accrues, be within the age of twenty-one years, insane, or imprisoned in the State prison, or absent from the United States and from the British provinces of North America, such person may bring the action within the times in this chapter respectively limited after the disability shall be removed," etc.

It is contended by defendant's counsel that the term "disability," used in this statute, means the disability to bring suit, and that, when the right to bring suit begins, the disability is removed; that infancy is not a disability, but an infant may be disabled from bringing suit; and that, when a guardian is appointed, the disability is removed, as

then the infant is in a position to bring and maintain his suit, and consequently then the statute begins to run. It is further contended that, if this position is not well taken, when the guardian actually brings suit the statute begins to run from the date the suit is commenced.

We cannot agree with this contention. It is evident that the disability mentioned in the statute can have no other meaning than the infancy of the party, and it is not removed until the full period of his nonage shall elapse. The rule is well stated in Wood on Limitations (section 238) as follows:

"Persons who have not attained the age of majority are infants, and, in those states where infancy is within the saving clause of the statute, the statute does not begin to run against him or her, even though he or she has a guardian who might sue the claim in question, nor even though other persons are jointly interested in the claim who are of full age, until he or she attains the age of majority. The fact that a guardian or the infant himself brings a suit before the disability is removed does not operate as a waiver of the saving clause in favor of the disability."

This rule is supported by *Kuchenbeiser v. Beckert,* 41 Ill. 179; *Frost v. Railroad Co.,* 64 N. H. 220 (9 Atl. Rep. 790); *Pierce v. Dustin,* 24 Id. 417; *Grimsby v. Hudnell,* 76 Ga. 378; *Bacon v. Gray,* 23 Miss. 143; *Jackson v. Ransom,* 10 Johns. 408; *Chandler v. Vilett,* 2 Saund. 120; *Seward v. Clark,* 67 Ind. 300; *Wright v. Miller,* 1 Sandf. Ch. 103. Under these authorities it is well settled that the disability of the plaintiff is not removed until he attains his majority.

The fact that suit was actually commenced in the name of the infant, by his next friend, did not set the statute in motion, so that any lapse of time would bar it short of the time fixed by the statute, which is six years after his majority.

The court below was in error.

Judgment must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

94 222
100 325

94 222
106 82

94 222
111 442

94 222
112 566

94 222
s54NW 40
131 408

94 222
139 355

THE TOWNSHIP OF CUMMING v. JOSEPH SCHICK ET AL.

Practice in Supreme Court—Findings of trial judge.

This case is ruled by *Haines v. Saviers*, 93 Mich. 440.

Error to Ogemaw. (Simpson, J.) Argued November 30, 1892. Decided December 22, 1892.

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

F. L. Snodgrass, for appellant.

Sharpe & Sharpe, for defendants.

MONTGOMERY, J. The record in this case contains the testimony offered on the trial and the judgment. No exceptions were taken to rulings on the trial, but it is sought to review the conclusion of the trial judge upon the whole testimony, though no findings of fact or of law were requested. Under these circumstances we cannot review the conclusions reached by the trial judge. We have no means of knowing definitely the grounds upon which the trial judge proceeded. The defeated party has not a right to a trial *de novo* in this Court. The case is ruled by *Haines v. Saviers*, 93 Mich. 440, and cases cited.

Judgment is affirmed, with costs.

The other Justices concurred.

94 223
106 517
94 223
138 1 56

WILLIAM C. BUSCH v. J. HUFF JONES ET AL.

[See 82 Mich. 315, 336.]

Set-off—Withdrawal of part of plaintiff's demand—Res judicata —Statute of limitations.

1. 3 How. Stat. § 7370*a*, which provides that where the defendant has given notice of set-off the plaintiff shall not be allowed to discontinue his suit or submit to a nonsuit, does not prevent the plaintiff from withdrawing certain items of his claim from the consideration of the court and jury.
2. Where in such a case the parties proceed to trial upon the remaining items of plaintiff's claim and the items of defendant's set-off, and a judgment is rendered in favor of the defendant, the items so withdrawn are not *res judicata*, but may be set off by the plaintiff in a suit pending against him in favor of the defendant at the time of such withdrawal, if a proper subject of set-off.
3. While the statute of limitations should be construed according to its terms, it is not proper to give it a construction so technical in its character as to deprive a party of a legal right, which the terms of his contract plainly give to him.
4. 3 How. Stat. § 7370*a*, which forbids a discontinuance or submission to a nonsuit by a plaintiff where the defendant has given notice of set-off, is construed as follows:

   a—The object of the statute is to enable the defendant to proceed and prove his set-off in the case begun against him, and not to permit the plaintiff, at his own convenience or desire, to discontinue the suit, and thus deprive the defendant of a right which he acquires as soon as he submits his demand by way of set-off to adjudication in said suit.

   b—This right is to be determined by the conditions existing at the time the notice of set-off is given; and, if at that time the defendant's demand is of such a character that it can be legally set off, he is entitled to remain in court in that suit until an adjudication is had upon said demand, and if he establishes it he is entitled to a judgment for all exceeding the claim the plaintiff may prove against him in the case, which right remains, regardless of the fact that the plaintiff proves or does not prove any claim against him, and regardless of

whether or not the plaintiff withdraws any portion of his claim from consideration in the case, or whether or not he offers any proof at all in his behalf.

Error to Wayne. (Hosmer, J.) Argued December 1, 1892. Decided December 22, 1892.

Assumpsit. Defendants bring error. Reversed. The facts are stated in the opinion, and in 82 Mich. 315, 336.

John D. Conely (George A. Wilcox, of counsel), for appellants.

Cowles & Jerome (W. L. Carpenter, of counsel), for plaintiff.

DURAND, J. This suit was begun by summons on December 24, 1890, to recover on a *supersedeas* bond executed by the defendants to the plaintiff, and in which bond the defendant Wilcox is the principal, and the other defendants are sureties. The defendants pleaded the general issue, and gave notice of set-off.

This bond was given by the defendant Wilcox and his sureties on the removal by him from the Wayne circuit to this Court of the case of *Busch v. Wilcox,* reported in 82 Mich. 315, 336. The action in that case was based upon an alleged fraud growing out of the misstatements of the agent of Wilcox in reference to the quantity and quality of certain pine timber which Busch, by the terms of a logging contract, then entered into, agreed to cut and haul for Wilcox. Busch recovered a judgment in that case for his damages, which was finally affirmed in this Court on December 5, 1890, at the sum of $5,000. The facts are very fully stated by Chief Justice CHAMPLIN in the case referred to, and only such facts will be stated here as may be necessary to a determination of the case made by this record.

During the pendency of the suit for fraud, and in 1887, Wilcox, who, on account of the legal objections which interposed, could not make the claim which he asserted against Busch available as a set-off in that case, brought his action against Busch in the Wayne circuit court, claiming for certain unliquidated damages growing out of the same logging contract, and also for certain overpayments made thereon during the winter and spring of 1884. Busch gave notice of set-off, covering certain items of damage growing out of his services in taking care of and towing the logs to Cheboygan. This latter case was thus at issue when the case now being considered was begun. Wilcox, desiring to make his claim for overpayments available as a set-off in the present case, furnished the particulars thereof under his notice, and, upon the objection of *auter action pendant* being made, attempted to discontinue the case of *Wilcox v. Busch*, referred to. This he was not permitted to do, on account of the prohibition contained in 3 How. Stat. § 7370*a*, which provides—

"That in any action hereafter commenced in this State, when the defendant has given notice of set-off, the plaintiff shall not be allowed to discontinue his suit, or submit to a nonsuit, without the consent of the defendant."

Thereupon Wilcox filed a withdrawal from that case of the items of overpayment, and thereafter the case proceeded to trial on the remaining items of Wilcox's claim, and upon the items of set-off pleaded by Busch; and a judgment was finally rendered therein, in favor of Busch, for the sum of $931; the circuit judge charging the jury in that case that as Wilcox had withdrawn the item of overpayment from the case, and transferred it to another case for adjustment, they could not consider that question. These items of overpayment were then urged by Wilcox as a set-off in this suit; the plaintiff objecting—*First*, that Wilcox

had no right to withdraw them from the case of *Wilcox v. Busch;* and, *second,* that the claim under or on account of them was barred by the statute of limitations. The circuit judge ruled against the objection on the first proposition; but in his charge to the jury, on the second proposition, he held that the claim was outlawed, and directed a verdict for the full amount of the bond sued upon, thus depriving the defendant Wilcox of all claim under the set-off pleaded. This is claimed as error.

We agree that the circuit judge was correct in his ruling that Wilcox had the right to withdraw his demand for over-payments from the suit of *Wilcox v. Busch.* This did not work a discontinuance of the suit. The object of the statute referred to is to enable the defendant to proceed and prove his set-off in the case begun against him, and not to permit the plaintiff in a suit, at his own convenience or desire, to discontinue it, and thus deprive the defendant of a right which he acquires as soon as he submits his demand by way of set-off to adjudication in a suit begun against him. This substantial right is to be determined by the conditions existing at the time the set-off is pleaded; and, if at that time the defendant's demand is of such a character that it can be legally employed as a set-off in the particular suit in which he pleads it as such, he is entitled to remain in court, in the same suit, until adjudication is had upon it, and if he establishes it he is entitled to a judgment for all exceeding the claim the plaintiff may prove against him in the case. And this right remains, regardless of the fact that the plaintiff proves or does not prove any claim against him, and regardless of whether or not plaintiff withdraws any portion of his claim from consideration in the case, or whether or not he offers any proof at all in his behalf. So long as the case itself stands, the right of the defendant to prove his set-off remains, and

the purpose of the statute is accomplished. This was done in the case referred to, and Busch recovered judgment for the amount of his set-off after Wilcox had withdrawn these items of overpayment from the consideration of both court and jury. This was all that he, as the defendant in that suit, had a right to claim; and the items of overpayment referred to having been withdrawn by Wilcox, as stated, it cannot be said that they should be treated as *res judicata.*

This brings us to the discussion of whether or not the circuit judge was right in holding that the items referred to were barred by the statute of limitations. It will be seen that all the claims and suits mentioned have grown out of the logging contract which was entered into by Busch and Wilcox in September, 1883. The contract provided that Busch was to cut into saw-logs, and put afloat in the waters of Lake Huron, all the pine timber upon certain lands described in a schedule attached to the contract, during the winter and spring of 1884, so that they might be sawed into lumber during the summer of 1884. If the weather or insurmountable obstacles prevented a full completion of the contract in that time, Busch was to have another year in which to complete it. For this work Wilcox was to pay Busch $4.25 per 1,000 feet, board measure, according to the rule and custom of scaling in Saginaw waters, to be scaled by a competent scaler to be agreed upon by the parties. Five thousand dollars of this sum was to be paid down, $5,000 was to be paid during the winter and spring of 1883 and 1884, and the balance, in full, was to be paid on the completion of the contract. Busch went to work under this contract, and cut, as was estimated, about 4,000,000 feet of the timber during that winter, and received from Wilcox, at different times down to April 15, 1884, the sum of $17,142.36. When the actual measurement was subsequently made, it was ascertained, as a matter of fact, that Busch had

cut only about 3,250,000 feet of logs, and that he had, therefore, received considerably more than $3,000 in excess of what he should have received for what he had done under the contract. The contract was never fully completed by Busch, and the actual amount of money which Wilcox had over-paid him was not ascertained definitely until the last of the lumber was shipped, which was in the early part of July, 1885. Plaintiff contends that the claim of Wilcox on account of these overpayments became due when the last payment was made, in April, 1884, or that it, at least, became due as early as October or November, 1884, when an estimate of the unmeasured lumber was made; and the circuit judge so charged the jury, and that, as that was more than six years before the commencement of this suit, the claim was barred by the statute of limitations.

We do not think that the circuit judge was right upon this proposition, under the evidence in the case. The contract provided for a scaler, but a scaler was never appointed, and there was evidence in the case that after the making of the contract the parties agreed upon another course which was to be taken in order to ascertain the amount of logs cut. The lumber of these logs was sawed at Packard Bros.' mill, in Cheboygan, and after it was sawed it was to be shipped to Noyes & Sawyer, of Buffalo, who were to have the lumber. Mr. Noyes testified upon this subject that he was interested in the logging contract, and gave some attention to the matter after the contract was made. He then says:

"I wanted some one in the woods to scale the logs, and I had written to Mr. Busch about it, and had talked to him about it. I was up there in March, and I then said to Mr. Busch, 'Are those logs all on the skid, so we can get at the ends of them, to scale them?' I said, 'It is very important that we should know how many there are.' He said: 'There is no use of going to the expense of

that. When the lumber is sawed and measured and shipped, we shall know how much there is of it, and I have agreed to take that measurement with Mr. Hall.'"

Mr. Hall was the agent of Wilcox, and acted for him in that capacity when the contract was made. If this testimony is true, Wilcox was entitled to wait until the lumber was shipped in order to ascertain definitely how much there was of it, and how the account stood between him and Busch in reference to it. When the last of the lumber was shipped, in July, 1885, the exact amount of it was first definitely fixed; and if, as a matter of fact, Busch agreed to take the measurement as fixed at the time of the shipment,—as this testimony tended to show that he did,—the statute of limitations did not begin to run until that date, either as to anything to which Busch might have been entitled for work done under the contract, or as to anything due to Wilcox on account of overpayments made by him for work done under the contract. The right to an accurate measurement of the lumber at a given time or at shipment is a substantial right, and one which it is quite necessary to observe, in order to show what either party may owe to the other under it. When freed from mere technicalities, it must be apparent that the ordinary business man would so understand it; and, while the statute of limitations should be construed according to its terms, it is not proper to give it a construction so technical in its character as to deprive a party of a legal right, which the terms of his contract plainly give to him.

As the case must go back for a new trial, we purposely refrain from commenting upon the other testimony given upon each side in relation to the subject discussed. It is sufficient to say that under the evidence in the case the circuit judge erred in holding that the defendants' items of set-off were outlawed. The case should have been sub-

mitted to the jury in accordance with the general view that we have expressed.

The judgment is reversed, with costs of this Court, and a new trial granted.

The other Justices concurred.

WILLIAM A. VAIL ET AL. v. WARREN WINTERSTEIN ET AL.

Married woman—Right to become partner—Charge upon separate estate.

A married woman may enter into partnership relations with others than her husband, and thus make her separate estate liable for the debts of the firm.

Appeal from Sanilac. (Beach, J.) Argued December 1, 1892. Decided December 22, 1892.

Bill to dissolve a copartnership, for the appointment of a receiver, and for an accounting. Complainants appeal. Decree modified and affirmed. The facts are stated in the opinion.

George McKay, for complainants.

George W. Weadock, for defendant Alice A. Tallmadge.

LONG, J. The complainants Henry W. Wilson and William A. Vail entered into a copartnership with defendants Alice A. Tallmadge and Warren Winterstein under the firm name of Winterstein, Vail & Co., for the purpose of carrying on a general banking business at Marlette, this State. They organized January 1, 1888, and under the

terms of the copartnership agreement were to continue to January 1, 1893. They contributed capital stock as follows: Henry W. Wilson $2,000, William A. Vail $3,000, Alice A. Tallmadge $3,000, and Warren Winterstein $4,000, making a capital stock of $12,000; Winterstein becoming the president, and Vail the cashier and bookkeeper. March 30, 1891, a bill was filed in the circuit court in chancery for Sanilac county by Vail and Wilson against the defendants Winterstein and Tallmadge, and others, to whom it was alleged conveyances and transfers of firm property had been made in violation of the rights of Vail and Wilson and the creditors of the firm. A receiver was asked for. Immediately after the filing of the bill, a common-law assignment was made by Vail and Wilson in the name of the firm to Thomas U. Dawson, one of the complainants here, of all the firm property for the benefit of all the firm's creditors. In making the assignment, Vail and Wilson assumed that the other members of the firm had disposed of their interests in the firm property, and were by such acts disqualified to act for the firm in any capacity, and that their transferees had no authority to act. An amended bill was subsequently filed by Vail and Wilson and Dawson, the assignee, and joining as defendants, with the others, John J. Lunau, a transferee of a part of the firm's real estate, and Annie, the wife of Warren Winterstein. A stipulation was thereafter made dismissing the bill as to Margaret J. Winterstein, Johnson Winterstein, and John J. Lunau. Proofs were taken, and a decree entered reciting in substance that the firm of Winterstein, Vail & Co. had been dissolved by the acts of the partners, and appointing complainant Dawson as receiver. It also recited that certain properties which it had been attempted to transfer to other parties belonged to the firm, and also that Alice A. Tallmadge, at the time of the execution of the partnership agreement, was a married woman, and still

so continued. It was therefore decreed that the copartnership be dissolved, placing all the properties in the hands of the receiver, with the right to sue and collect all the notes, bills, and choses in action belonging to the firm, and to collect the rents and avails of all the real estate belonging to the firm; and that Warren Winterstein execute, acknowledge, and deliver to the receiver an assignment of all the personal property belonging to the firm, and that he and his wife make certain conveyances to the receiver; and for an accounting to be made. The bill was thereupon dismissed, without costs, as to the defendant Alice A. Tallmadge.

This appeal raises but the one question whether the defendant Alice A. Tallmadge, being a married woman, could become a member of the firm of Winterstein, Vail & Co., and by such act bind her separate property, so that in the accounting for the benefit of creditors she would become liable out of her separate estate to the creditors of the firm.

Section 5, art. 16, of the Constitution of this State provides that—

"The real and personal estate of every female, acquired before marriage, and all property to which she may afterwards become entitled by gift, grant, inheritance, or devise, shall be and remain the estate and property of such female, and shall not be liable for the debts, obligations, or engagements of her husband, and may be devised or bequeathed by her as if she were unmarried."

Section 6295, How. Stat., provides that—

"The real and personal estate or every female, acquired before marriage, and all property, real and personal, to which she may afterwards become entitled by gift, grant, inheritance, devise, or in any other manner, shall be and remain the estate and property of such female, and shall not be liable for the debts, obligations, and engagements of her husband, and may be contracted, sold, transferred, mortgaged, conveyed, devised, or bequeathed by her in the

same manner and with the like effect as if she were unmarried."

It was held in *Edwards v. McEnhill,* 51 Mich. 165; *Bassett v. Shepardson,* 52 Id. 3; and *Artman v. Ferguson,* 73 Id. 146,—that a married woman could not become a partner in business with her husband, and make her separate estate liable upon the contracts and engagements of the firm. In the last-named case it was attempted to subject Mrs. Ferguson's separate estate to the payment of the firm's debts and liabilities, the firm being composed of herself and her husband. It was said in that case:

"A partnership is a contract of two or more *competent* persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions. That a married woman may, when she has separate estate, be a copartner with a person other than her husband, is held in many states under the married woman's statutes. But where the statute gives her no power, or only a limited power, to become a partner, the rule of the common law prevails, and she cannot enter a firm."

Great stress is laid by defendant's counsel upon the last clause before quoted, he insisting that the Court intended to hold in that case that a married woman in this State could not become a member of any firm and incur liability binding upon her separate estate. That question was not involved in the case, which related solely to her ability to bind her separate estate in the firm in which her husband was a partner. The reason given for the holding was that it was the purpose of these statutes to secure to a married woman the right to acquire and hold property separate from her husband, and free from his influence and control, and, if she might enter into a business partnership with him, it would subject her property to his control in a manner wholly inconsistent with the separation which it was the purpose of the statutes to secure, and might sub-

ject her to an indefinite liability for his engagements; that the important and sacred relations between man and wife, which lie at the very foundation of civilized society, are not to be disturbed and destroyed by contentions which may arise from such community of property, and a general power of disposal, and a mutual liability for the contracts and obligations of each other.

The question presented by the present record has not been directly disposed of by any of our previous decisions, and the reasons which have been given why a wife may not become a member of a firm with her husband under our statutes are not at all applicable to cases where she seeks to enter a firm conducting business separate from her husband. As was said in the former case, in many of the states married women are permitted to carry on business in this way, and under statutes quite analogous to our own. The statute of Massachusetts provides:

"Any married woman may, while married, bargain, sell, and convey her real and personal property which may now be her sole and separate property, or which may hereafter come to her by descent, devise, bequest, or gift of any person except her husband, and enter into any contract in reference to the same, in the same manner as if she were sole." Stat. 1857, c. 249, § 2.

Section 7, c. 304, Stat. 1855, of that state, provides:

"Any married woman may carry on any trade or business, and perform any labor or services, on her own sole and separate account."

It was held under these statutes in *Lord v. Parker*, 3 Allen, 127, that a married woman could not enter into a contract of copartnership with her husband. In *Plumer v. Lord*, 5 Allen, 460, it was held that, while she could not enter into a firm where her husband was a partner, yet she might engage in business with others as partners. Many of the other states, under quite similar statutes,

while holding that a married woman could not be a partner in a firm with her husband, have likewise determined that she might engage her services and property in copartnership undertakings with third parties.

The statutes of Massachusetts and of many other states expressly confer upon married women the right to carry on trade or business and perform labor or services on their sole and separate accounts. We have no such statutory provision conferring express power, but from the earliest cases since the passage of the married woman's act in 1855 our statutes have been interpreted as giving power to married women to carry on business or trade in their own names and upon their sole accounts. *Tillman v. Shackleton,* 15 Mich. 447; *Campbell v. White,* 22 Id. 178; *Powers v. Russell,* 26 Id. 179; *Rankin v. West,* 25 Id. 195. If a married woman may carry on a business in her own name, and appoint agents who may make contracts for her and in her name, we see no reason why these statutes should be interpreted as restrictive of her right to enter a firm as a partner with others aside from her husband, and thus bind her separate property for such firm's undertakings, as partners in a firm are the agents of each other in a transaction of partnership affairs, and it is conferring no more power upon the partner to bind the sole and separate property of a married woman than such married woman would have the right to contract for through any other agency. We think the great weight of authority under statutes quite similar to our own is that married women, while incompetent to enter into partnership engagements with their husbands, are free to enter into partnership relations with third parties, and bind their separate properties as fully and to the same extent as they might do through any other agency where they carry on business upon their sole and separate accounts.

1 Bates, Partn. § 136, states the rule as follows:

"Where statutes give a married woman power to sell and contract as to her separate property, and carry on business, she may invest it in a partnership, since this is a usual way of carrying on business; and it is no objection that she thereby becomes liable for the acts of others, for the same happens if she owns stock in a company, or employs an agent. Her separate property is still hers, and does not become liable for her husband's debts."

Harris, Cont. Mar. Wom. § 511, also lays down the following proposition:

"If the legislature has conferred upon the married woman the full, complete, and free power to carry on a separate trade or business, that seems to carry with it, by necessary implication of law, the right to conduct such business upon the same principles, the same system, in the same manner, to the same extent, and at her own option, as fully and freely as any other person, and to say that she cannot form a partnership would be to deny her a valuable right in business relations, which is allowed to other persons. It will not do to say that she is a sole trader, with all the power in relation to her trade and business that she would have if a *feme sole*, unless she has the liberty to exercise an unrestricted option as to the mode of carrying on such business, provided there be no fraud perpetrated on others. It has been insisted by some that, if she forms a partnership, she becomes, by that relation, liable as a partner, and is bound by the debts, either contracted by herself or another member of the firm, and this would often subject her property to the debts and liabilities of another person. But I can see no good reason consistent with the full power as a sole trader why she should not enter into a partnership in business if she thinks her separate interests would be promoted thereby."

The court below was therefore in error in dismissing the bill as against Mrs. Tallmadge. In other respects the bill will stand, and an accounting had as provided under the decree; the bill to stand against Mrs Tallmadge the same as the other defendants. The bill having been dismissed as to the defendants Margaret J. Winterstein, Johnson Winterstein, and John J. Lunau, under stipulation between the parties, the decree will not be disturbed as to them.

The decree of the court below, with these modifications, will be affirmed, and the case remanded to the court below for the purpose of taking an accounting. Complainants will recover their costs of this Court.

The other Justices concurred.

94 237
96 398
94 237
115 72

ALBERT B. HICKOX v. THE CHICAGO & CANADA SOUTHERN RAILWAY COMPANY AND THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY.

[See 78 Mich. 615.]

Res judicata—Right of way—Abandonment—Intention—Evidence.

1. It is a well-settled rule that courts will not review former decisions made by the same court in the same cause, and on the same state of facts.
2. Where a railroad company ceases to run cars over a portion of its road for 12 years, the question of abandonment is one to be determined from the facts, and not from testimony as to the intention of the officers of the railroad company either at the outset or during such period.

Error to Lenawee. (Lane, J.) Argued December 1, 1892. Decided December 22, 1892.

Ejectment. Defendants bring error. Affirmed. The facts are stated in the opinion, and in 78 Mich. 615.

C. E. Weaver (*George C. Greene* and *O. G. Getzen-Danner*, of counsel), for appellants.

Clement Carpenter and *Salsbury & O'Mealey*, for plaintiff.

GRANT, J. This case was once before this Court, and is reported in 78 Mich. 615.

The two main questions then before the Court were (1) the construction of the deed; (2) was there such an abandonment as to render the defeasance operative? Both these questions were decided against the defendants. The defendants took a new trial under the statute, and a verdict was again directed for the plaintiff. The facts and the questions presented upon the present record are the same as those in the former case.

Since that case was heard there has been an entire change of the members of this Court, with one exception. In a similar case, COOLEY, C. J., said:

"A due respect to our predecessors, I think, and to uniformity and stability in judicial action, demands that we shall recognize this point as no longer open to controversy. * * * The importance of adhering to judicial decisions, except when unmistakably wrong and mischievous, can certainly require no illustration at our hands." *Motz v. City of Detroit*, 18 Mich. 522.

It is a well-settled rule that courts will not review former decisions made by the same court in the same cause, and on the same facts. Wells, Res. Adj. § 613; *Stacy v. Railroad Co.*, 32 Vt. 552; *Washington Bridge Co. v. Stewart*, 3 How. 425, and authorities there cited.

But counsel for defendants insist that they offered testimoney which, if admitted, would have presented a different question for the determination of the court, and that such testimony was not introduced upon the former trial. In determining this question it is important to state the precise question determined by the former decision. It was there held that—

"When this right of way ceased to be used and operated as a railroad, and was used only for the storing of cars, the defeasance became operative, and the conveyance had no further force or effect."

The defendants ceased to run cars over this road in the year 1879, and the disuse of the road for that purpose continued down to the time of the second trial of this cause.[1] After this long-continued disuse the question became one of fact, and not of intention. The court held that this disuse was in law an abandonment of the road under the terms of the deed.

The president of the Chicago & Canada Southern Railway Company was a witness for the defendants, and, after testifying that the track between Grosvenor and Corbus had been used for the storage of cars whenever they had a surplus upon the line, he was asked whether, at the time the company ceased to run regular trains between those points, it was the intention to take such trains off permanently. This testimony was properly rejected. After so many years of disuse in running trains the defendants could not reply that their officers had not intended a permanent disuse, and that they intended at some future time to renew their train service. Under the circumstances of this case, the question is to be determined from the facts, and not from the secret intent of the parties. We do not intend so say that under no circumstances would such testimony be competent. The disuse may be so short, and to serve a temporary purpose, that it may be competent to show the intent to resume the usual operation of the road. The question, however, was directed to the time when the defendants ceased to run trains.

A further question was asked and rejected, as to the intent on the part of any officers of the road during the time of such disuse to permanently abandon this piece of the road for the running of through trains. No testimony was offered tending to show that the abandonment was temporary, or to fix any time when they intended to resume, or that they ever intended to resume. The defendants

[1] The second trial commenced June 10, 1891.

contended, and introduced evidence to show, that the public was better served by running their trains over their other tracks, and ceasing the use of this piece for that purpose. It is therefore too clear for argument that the testimony offered was immaterial and incompetent.

Judgment affirmed.

The other Justices concurred.

94 240
101 534
94 240
105 306
94 240
115 171
94 240
e134 [3]532
94 240
136 [2]141
94 240
137 [2]455
94 240
138 [2] 18

LEVI TILLOTSON v. THE CITY OF SAGINAW ET AL.

Statutes—Repeal by implication—Municipal corporations—Authority to issue bonds.

1. Where two acts of the Legislature cover the same subject, both must be given effect, if possible.
2. Repeals by implication are not favored, and will be allowed only when the inconsistency and repugnancy are plain and unavoidable; citing *Connors v. Iron Co.*, 54 Mich. 168.
3. Act No. 321, Local Acts of 1891, which authorizes the City of Saginaw to borrow $75,000 for bridge purposes, did not repeal the provision of the charter of said city (section 25, tit. 5, Act No. 455, Local Acts 1889) authorizing the common council to issue bonds to the amount of $125,000 for the construction of the bridges therein named, but was intended to continue in force said charter provision, and to authorize the issuance of bonds for $200,000.
4. It was entirely competent for the Legislature, in the act of 1891, to place any restrictions it chose upon the council in issuing the bonds authorized by the act, although such restrictions are not found in the provision of the charter authorizing the issuance of the first bonds.

Appeal from Saginaw. (Gage, J.) Argued December 2, 1892. Decided December 22, 1892.

Bill to restrain defendants from executing and negotiat-

ing certain bonds. Complainant appeals. Decree dismissing bill affirmed. The facts are stated in the opinion.

Wood & Joslin, for complainant.

Charles S. Smith, for defendants.

GRANT, J. The bill in this case was filed to restrain the defendants from executing and negotiating the bonds of said city to the amount of $200,000. The issue of $125,000 of these bonds was ordered by the council under section 25 of title 5 of the city charter, and $75,000 under Act No. 321, Local Acts of 1891. The provision of the charter, and the above-named enabling act, are given below in full. There is no dispute about the facts, which were agreed upon at the hearing in the court below. Decree was entered sustaining the action of the common council, and dismissing the bill. Complainant was a tax-payer, and his right to bring the suit is conceded.

The two cities of Saginaw and East Saginaw were consolidated under Act No. 455, Local Acts of 1889, which act constitutes the charter of the defendant city. The provision authorizing the city to issue bonds for the construction of certain bridges is as follows:

"SEC. 25. The common council is hereby authorized to issue the bonds of said city, to the amount of $125,000, for the purpose of raising money, first, to construct a bridge across the Saginaw river and the Emerson bayou, east from Court street, and to procure the right of way therefor, and, after that, for the construction of a bridge across said river at such point in the First ward of the city as the common council may deem proper, and to procure the right of way therefor; and also for the construction of a bridge across said river east from Perry street, and to procure the right of way therefor. Said bonds to be in such amounts, and payable at such times and places, and with such rate of interest, as the common council

may determine. Such bonds shall be issued, and the proceeds thereof shall be used, for no other purpose."

The act of 1891 is as follows:

"An Act to authorize the city of Saginaw to borrow money to be used in procuring right of way for, and approaches to, and the building of, three bridges across the Saginaw river, for the city of Saginaw, in the county of Saginaw, and to issue bonds therefor.

"SECTION 1. *The People of the State of Michigan enact,* That the common council of the city of Saginaw be, and it is hereby, authorized and empowered to borrow, on the faith and credit of said city, the sum of not exceeding $75,000, for a period not exceeding twenty years, at a rate of interest not exceeding five per cent. per annum, and to make, execute, negotiate, issue, and sell the bonds of said city therefor, with proper interest coupons attached thereto, in such manner as said common council shall determine, which said bonds in no case shall be sold for less than their par value.

"SEC. 2. Said bonds shall be denominated 'Bridge Bonds,' and the proceeds thereof shall be used in defraying the expense of procuring the right of way for, and approaches to, and the building of, three bridges across the Saginaw river, for the city of Saginaw, in Saginaw county, which said bridges, if built, shall be located as follows: One from a convenient place in the village of Carrollton to the opposite shore; one at the foot of Court steet, in said city; and one at or south of the foot of Wayne street, in said city —and for no other purposes; but no contract shall be let, or money expended, for the building of said Wayne-street bridge, until the contract shall be let for the building of the first two named, and work begun thereunder.

"SEC. 3. Said improvement shall be made, and money expended therefor, by the board of public works of said city, under the direction of the common council." Local Acts of 1891, p. 839.

The following facts are admitted:

"That at a meeting of said common council held March 28, 1892, the following resolutions were adopted:

"'*Resolved*, by the common council of the city of Saginaw, Mich., that there shall be raised the sum $125,000 for the

purpose of constructing a bridge across Saginaw river and Emerson bayou, on a line of Court street, in said city, extending easterly to the street authorized on November 2, 1891, by said common council, to be opened across lots 42 and 43 of James Riley reserve, in said city; also a bridge across said river on the line of Maple street, in the village of Carrollton, extending eastward into the First ward of said city of Saginaw; and also a bridge across said river east from Perry street, in said city,—and to procure the right of way for said bridges.'

"'*Resolved*, by the common council of the city of Saginaw, Mich., that there shall be borrowed, on the faith and credit of said city, the sum of $75,000, to be used in defraying the expense of procuring the right of way for, approaches to, and the building of, three bridges across Saginaw river, for said city, as provided by Act 321 of the laws of the State of Michigan, approved May 8, 1891, to wit: A bridge across Saginaw river and Emerson bayou, on a line of Court street, in said city, extended easterly to the street authorized on November 2, 1891, by said common council, to be opened across lots 42 and 43 of James Riley reserve, in said city; also a bridge across said river on the line of Maple street, in the village of Carrollton, extended eastward into the First ward of said city of Saginaw; and also a bridge across said river on a line running west, at right angles to River street, from the intersection of Center and Douglass streets, in said city of Saginaw,—each of said bridges to conform to the general description thereof as authorized by the board of supervisors of Saginaw county in October, 1891.'

"That at a meeting of said common council held September 8, 1890, the committee on bridges reported, among other things, as follows: 'In our opinion, the estimates for the bridges will largely overrun the appropriation,—$125,000,—in which case application will have to be made to the Legislature at their next session.'

"That at a meeting of said council held February 18, 1891, on motion of Alderman Higgins, the city attorney was instructed to draft, and caused to be introduced, an act to enable the city to issue and sell bonds to the amount of $200,000 to defray the expense of constructing bridges; that the city engineer furnished the common council, early in the winter of 1890-91, with surveys, maps, and approximate estimates for the work of erecting the three bridges, nd securing approaches thereto, from which report it

appears that the expense of said three bridges would largely exceed $125,000, and would, in fact, approximate $200,000.

"That an 'enabling act,' so called, was introduced in the last Legislature, and was so drafted as to read for $200,000, for the purpose of erecting the bridges, but was afterwards cut down to $75,000, upon the ground that, if not so changed, it would enable the city to expend $325,000 for the three bridges, instead of the desired sum of $200,000, as the city already had the right, by its charter, to raise $125,000.

"That at a meeting of the common council held April 27, 1891, the following resolution was adopted:

"'*Resolved*, that the Legislature be requested to so amend the pending bridge enabling act that, instead of its being compulsory to locate a bridge at Perry street, it may be located at any place south of Wayne street, the exact location to be determined hereafter by the common council, and that the city clerk forward a certified copy hereof to Hon. Rowland Connor.'

"That Perry street is the next street south of Wayne street, and Center street, where it strikes the river, is one block south of Perry street prolonged in a direct line across the river; that the said common council have at no time expressed an intention of locating a bridge at Perry street since the adoption of the resolution last above set forth, and have procured no authority from the board of supervisors to locate one at that point, but have procured authority from the board of supervisors to locate one at the foot of Center street; that the object of referring to Perry street in the resolution authorizing the issue of the bonds in the sum of $125,000 was to make the resolution, as a basis for the issue of the bonds, conform to the charter provision."

The complainant's counsel contend:

1. That the act of 1891 repeals, by implication, section 25 of title 5 of the charter.

2. That the resolutions of the common council based upon these statutes are inconsistent with each other, and hence inoperative.

There is no dispute as to the rule of interpretation where two acts cover the same subject. Both acts must be given effect, if possible. Repeals by implication are

not favored, and will be allowed only when the inconsistency and repugnancy are plain and unavoidable. The rule is well stated, and the authorities cited, in *Connors v. Iron Co.*, 54 Mich. 168; Mr. Justice CHAMPLIN speaking for the Court.

One allegation in the complainant's bill is, in this connection, of considerable significance. It reads as follows:

"The amount authorized to be raised for these three bridges, in the act of 1891, is notoriously inadequate for that purpose; and, should the bonds be issued, the money would remain in the city treasury until further authority can be obtained from the Legislature to increase the amount to an adequate sum."

This allegation is, of course, made upon the assumption that this act repeals the charter provision, leaving the common council authority to raise only the sum of $75,000. This was purely a local act; and, if the amount thereby authorized to be raised was notoriously inadequate, it is a reasonable presumption that the Legislature was cognizant of the fact, and the reasonable inference follows that it would not have passed the act if it had intended the repeal of the former provision. The resolutions of the council in regard to the matter were evidently intended as the basis for legislative action, and we must infer that they were placed before the Legislature, as it was the evident intention they should be.

But we think the agreed facts remove all doubt upon the question. It is conceded that the bill as introduced provided for issuing bonds to the amount of $200,000, and that the Legislature amended the bill by reducing the amount to $75,000, and that this was done for the reason that, if such amendment were not made, the city might raise $325,000, as it already possessed the right, under its charter, to raise $125,000. This action on the part of the

Legislature can lead to but one conclusion, viz., that it intended to continue in force the charter provision, and to authorize the issue of bonds for $200,000. The act of 1891 must therefore be held to be cumulative, or auxiliary to the charter.

The fact that the act of 1891 changes the location of one of the bridges, that it limits the time for the payment of the bonds to 20 years from the date of issue, that it restricts the rate of interest to 5 per cent., that it makes the board of public works the agency to expend the money, that it forbids the sale of the bonds at less than their par value, while the provisions of the charter differ in these respects in regard to the bonds there authorized, has no tendency to show a repugnancy between the two acts. While section 25 of the charter is silent as to under whose supervision the work is to be done and the money expended, still, under another provision of the charter itself, the supervision and charge of all public improvements are vested in the board of public works. It was entirely competent for the Legislature, in the act of 1891, to place any restrictions it chose upon the council in issuing the bonds authorized by the act, although such restrictions are not found in the charter authorizing the issue of the first bonds.

We do not think the resolutions of the council are inconsistent or inoperative. The only difficulty appears to have arisen from the desire on the part of the council to follow the language of the charter and of the act. The intention is apparent not to build a bridge east from Perry street, as the charter provides, but to construct it in accordance with the change authorized by the act of 1891. The city, therefore, appears to be acting in good faith, and to be complying both with the letter and spirit of its charter and the enabling act. In such case a technical construc-

tion should not be placed upon its acts, which will delay the progress of the city and the making of necessary improvements.

The decree is affirmed, with costs.

The other Justices concurred.

ALMOND G. PENNELL v. THE DELTA TRANSPORTATION COMPANY.

Custom and usage—Evidence.

1. Evidence of usage is admissible only on the ground that the parties who made the contract were both cognizant of the usage, and must be presumed to have made their engagements with reference to it; citing *Van Hoesen v. Cameron*, 54 Mich. 614.
2. The decisions in this State are uniform that custom cannot change a definite contract, and that no custom is binding which is not certain, definite, uniform, and notorious; citing *Lamb v. Henderson*, 63 Mich. 305.
3. A custom which is restricted to a certain locality or business, though shown to have become general and uniform, is not conclusive on the party, so that he may not give evidence that it was unknown to him.

Error to Cheboygan. (Aldrich, J., presiding.) Submitted on briefs December 2, 1892. Decided December 22, 1892.

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

George E. Frost, for appellant.

Frank Shepherd, for plaintiff.

LONG, J. This action was commenced in justice's

court, and after a trial there appealed to the circuit, where, upon the trial before a jury, plaintiff had verdict and judgment for $29.78.

It appears that the plaintiff entered into a verbal contract with the defendant, through defendant's agent, Capt. Field, who was in the employ of defendant as captain of a boat running on what is known as the "Inland Route" through Cheboygan county, by the terms of which the plaintiff was too clean out Crooked river from snags, logs, stumps, etc., that obstructed the channel. He was to be allowed two dollars per day, and the same for all help which he might employ. He hired two men, and entered upon the work the next day. Upon the completion of the work, plaintiff was paid the two dollars per day for himself and each man, as the contract stipulated. He then presented a bill for the board of himself and men during the time employed. It is conceded that nothing was said about the board of himself and men at the time the contract was entered into, but on the trial the court permitted the plaintiff to give evidence of a custom or usage in that community to pay the board of men employed in certain kinds of business. This evidence was admitted under objection of defendant's counsel. It was shown by several witnesses for the plaintiff that a custom existed among lumbermen in that vicinity to pay the board of the men who were engaged in running logs down the streams, and cleaning out streams for the purpose of running logs. It was also shown that Capt. Field, defendant's agent, had resided in that vicinity for five years and upwards. Capt. Field was called as a witness by defendant, and asked if he knew of any such custom. The answer was objected to by plaintiff's counsel as incompetent, and it was ruled out by the court.

At the close of the testimony, counsel for defendant asked the court to instruct the jury:

"2. That, in order to bind defendant under a custom or usage, when the custom was not made known to defendant when it made the contract, the jury must find from the evidence that defendant or its agent had been engaged in a business before the contract was made in some manner connected with the business in which said custom is sought to be established, or the defendant cannot be presumed to have knowledge of said custom.

"3. That the simple fact that defendant's agent had resided in the section or vicinity where said custom is sought to be established is not sufficient in itself to warrant the jury in finding that the defendant had knowledge of said custom.

"4. That, in order to bind the defendant to pay for the board of plaintiff and his men, the jury must find from the evidence that the defendant had knowledge of the custom to charge for board when not expressed in the contract; and that, if they do not so find, then their verdict must be for defendant as to the question of board."

These requests were refused by the court, and the jury directed upon the subject as follows:

"If you find from the evidence that the defendant agreed with the plaintiff to pay him for cleaning out this river at the rate of two dollars a day for all the work performed, and that there was a custom in that vicinity that persons who were working upon the river cleaning out the river in the manner that these men were working should be boarded by the person hiring them, and that such custom was general, uniform, certain, established, then, in that case, you should allow the plaintiff for his board and the board of these men whatever you find it to be reasonably worth."

The court charged further:

"The custom must be general, and it must be uniform. It must not vary from time to time. It must be an established custom; that is to say, a custom which would spring up at the time this contract was made, and continue from that time to the present, would not be an established custom. This must be the custom of that vicinity; it must be general, universal."

Continuing, the court said:

"Now, if you find that such a custom existed, and that this contract was made in relation to such custom, or that it was so well established and universal that all persons in that vicinity would be supposed to know the custom, and make their contracts in relation to it, then you will bring in a verdict for the plaintiff."

We think the court was in error in refusing to permit defendant's agent to testify that he had no knowledge of such a custom; and that the court was also in error in refusing to give the defendant's second, third, and fourth requests to charge, as well as in the charge as given. Where the custom or usage is restricted to a certain locality or business, though it has become general and uniform in that locality or in that particular business, and the custom is relied upon as a ground of recovery, it is settled, we think, that such custom is not conclusive on the party, so that he may not give evidence that it was unknown to him.

In *Walls v. Bailey*, 49 N. Y. 476, Mr. Justice Folger laid down the rule as follows:

"We have seen that there are usages which have become so general and so universally received and acted upon as that they have become a part of the common law, and no one can be heard to profess ignorance of them. But it is equally true that there are usages so restricted as to locality or trade or business as that ignorance of them is a valid reason why a party may not be held to have contracted in reference to them. There are many cases of this kind collected in notes in Broom's Legal Maxims. (See p. 684 [691], notes 2, 3.) It seems, then, to come to this: Is the presumption which the jury may thus make conclusive, or may not that presumption be repelled by express negatory proof of ignorance? When the defendant proposed by the question which was rejected to offer evidence tending to show his ignorance of the existence of the usage, he claimed no more than to exercise the right of attempting by direct evidence to repel the presumption of his knowledge which might without that proof, or perhaps in opposition to it, be made from the facts of the case.

"It is for the jury, then, under proper instructions from the court, to take all the evidence in the case,—that as to the existence, duration, and other characteristics of the custom or usage, and that as to the knowledge thereof of the parties,—and therefrom to determine whether there is shown a custom of such age and character as that the presumption of law will arise that the parties knew of and contracted in reference to it, or whether the usage is so local and particular as that knowledge in the party to be charged must be shown affirmatively or may be negatived. In this view, it was proper for the defendant to put and answer the question rejected."

Applying this rule to the facts in the present case, it is evident that the defendant's agent, with whom the contract was made, should have been permitted to answer the question whether he had any knowledge of the existence of such a custom. The proofs in support of the prevalence of such custom were confined to lumbermen who were having logs driven down the streams or through waters there, and who were compelled to clean out those waters for the purpose of driving logs. There was no testimony offered showing or tending to show that the defendant company, or Capt. Field, its agent, had ever driven logs down those streams, or that they were in any manner engaged in the lumbering business, necessitating the cleaning out of any streams for the purpose of driving logs. The only evidence of the business of the defendant company offered in the case was that it was running its boat through the inland waters in Cheboygan county, and that Capt. Field was the captain of the boat. Under these circumstances, the presumption cannot be conclusive upon the defendant that it had knowledge of this local custom or usage existing among lumbermen to pay the board of their men in running logs or cleaning out streams for the purpose of running logs. The mere fact that defendant's agent resided in that vicinity would not be sufficient to bring home to

him the knowledge of this custom, or warrant the jury in finding that the defendant had knowledge of it.

In cases where evidence of usage is admissible at all, it is only on the ground that the parties who made the contract are both cognizant of the usage, and must be presumed to have made their engagements in reference to it. *Van Hoesen v. Cameron*, 54 Mich. 614. The decisions in this State are uniform that custom cannot change a definite contract, and that no custom is binding which is not certain, definite, uniform, and notorious. *Lamb v. Henderson*, 63 Mich. 305, and the cases there cited. In the above case it was said by Chief Justice CAMPBELL:

"No attempt was made to bring notice of this usage to the knowledge of plaintiff."

The defendant in that case sought to set up a custom to defeat the payment of certain traveling expenses to one of his salesmen during the time he spent at the home office.

The court in the trial of the present case should not only have allowed Capt. Field to answer the question, and given the requests to charge asked, but should also have instructed the jury that the plaintiff could not recover unless they found that the parties contracted in reference to this custom; and in determining that question they should consider the testimony of defendant's agent, who made the contract. *Higgins v. Moore*, 34 N. Y. 425.

Judgment must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

EMMA A. MILLER v. JAMES HANLEY.

94 253
145 712

Execution—Alias writ—Replevin—Justification of officer—Fraudulent conveyances—Evidence.

1. Where an officer seeks to justify under an *alias* execution issued after the return-day of the original writ, and while it is in the officer's hands with a return *nulla bona* indorsed thereon after the release of a levy upon real estate which was found not to belong to the judgment debtor, it is in the power of the court to direct a return of the original execution *nunc pro tunc*, and thus cure the irregularity in the issuance of the *alias* writ.
2. An objection to an officer's justifying his seizure of property under an execution, because no notice of such defense has been given, is waived if not made in the trial court; citing *Frankel v. Coote*, 41 Mich. 75.
3. When a debtor undertakes to assign and convey his property in recognition of an indebtedness to his wife, originating 25 years before, no account of which has been kept, no evidence of the debt given, and no interest or principal paid or requested, the financial condition of both parties for the entire period is a proper subject of inquiry, and the broadest latitude should be allowed to the judgment creditor.

Error to Wayne. (Reilly, J.) Argued December 2, 1892. Decided December 22, 1892.

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

James H. Pound, for appellant.

John G. Hawley, for plaintiff, contended:

1. There is no authority for issuing an *alias* execution until the original has been returned.
2. Although a levy cannot be made under an execution after the return-day, yet, if a levy has been made, a sale may be made afterwards; citing How. Stat. § 7696; and the writ continues in force in the hands of the sheriff, even after he has gone out of office; citing *Vroman v. Thompson*, 51 Mich. 452; and a sale

may be made more than five years afterwards; citing *Ward v. Bank*, 46 Mich. 332.

3. The doctrine contended for is fully sustained by the authorities, which allow nothing to stand as a basis for an *alias fi. fa.* except the return of the first writ by the officer to whom it was issued; citing *Bishop v. Spruance*, 4 Harr. (Del.) 114; *Cairns v. Smith*, 8 Johns. 337; *Corning v. Burdick*, 4 McLean, 133; *Cutler v. Colver*, 3 Cow. 30; *Sutton v. Mayre*, 81 Va. 329; *Perrien v. Fetters*, 35 Mich. 236.

McGRATH, C. J. Replevin is brought for goods levied upon to satisfy a judgment against plaintiff's husband.

The judgment is dated June 13, 1891. An execution was taken out on that day, and a levy made upon certain real estate, but it was afterwards found that the real estate levied upon did not belong to the debtor, and the levy was released. A return *nulla bona* was then (August 25, 1891) indorsed on the writ by the sheriff, but was not signed. While this writ was in the sheriff's hands, an *alias* writ was issued, and the goods in controversy were levied upon under the *alias* writ. Before the *alias* writ was taken out, the sheriff had been requested to make a return of the first writ, and had promised to do so. The original writ was produced on the trial. The court admitted the *alias* execution in evidence, but at the close of the testimony directed a verdict for plaintiff; and it is now contended that the direction was right, for the reason that the *alias* execution was illegally issued, in the absence of the return of the original writ.

In *Farmers' & Mechanics' Bank v. Kingsley*, 2 Doug. 389, it was held that a second execution could not properly issue while a former one was outstanding, with a levy upon personal property unaccounted for, as the levy was *prima facie* evidence of satisfaction of the debt. But it was also held that such levy was not conclusive evidence of satisfaction, and that a plea setting up such a levy, if false in fact, might be traversed; or if a levy had been made, but

not followed by sale and satisfaction for any sufficient reason, the levy might be confessed, and its legal effect repelled by an allegation of any fact which by law should withdraw it from the operation of the general rule. Although the discussion in that case was thorough, and the opinion elaborate, no mention is made of the naked question raised here.

In *Spafford v. Beach*, 2 Doug. 150, it was held that a levy on real estate is not, as is a levy on personal property, a *prima facie* satisfaction, and that the issuing of an *alias fi. fa.*, while there was a levy by virtue of a former execution, on real estate, which remained undisposed of, was therefore a mere irregularity.

It is said here, by counsel for plaintiff, that "the reason for this rule is that a defendant is not to be exposed to the risk of having the same judgment collected from him twice by legal process." But the life of the execution had expired, and no levy was in force. The execution was in the hands of the officer, with a return of the failure to satisfy it in whole or in part indorsed thereon. The officer had failed to complete the return and discharge his duty. The issue of the *alias*, in the absence of a return of the former execution, was undoubtedly an irregularity, but it was in the power of the court to direct a return *nunc pro tunc*, and that course should have been taken.

It is next urged by plaintiff, in support of the ruling, that the plea was the general issue, without notice of justification under the writ; but this point was not raised in the court below, and must be deemed to have been waived. *Frankel v. Coots*, 41 Mich. 75.

Appellant complains of the rulings of the court upon the admission of testimony.

Judgment on *cognovit* was entered against plaintiff's husband, June 13, 1891, for $11,509. In July, 1890, bills of sale were executed by the debtor,—one to his son

of a yacht, in which the consideration named was $1,250; and another to his wife, the plaintiff, of all of his household furniture, beds, bedding, linen, silver and plated ware, wearing apparel, books, music, musical instruments, paintings, engravings, and family stores, "belonging to him, the said William B. Miller, and now in his possession at No. 85 Forest Ave. east, in the city of Detroit." The place named was the family residence of William B. Miller and plaintiff. The goods remained there, and the said parties continued to reside there, until the time of the levy. Anna De H. Morgan was the creditor.

William B. Miller was sworn for plaintiff, and testified that he told the sheriff that it was his wife's property. When asked how it came to be his wife's property, he said:

"I gave her a bill of sale of it. I don't remember when this bill of sale was delivered to my wife. I kept it in the safe at the gas office for a time. Just the date it was given to her I don't remember, but it was before the levy was made; how long I can't say. It was some months before. I think she kept it in her desk at the house. At the time this bill of sale was made to my wife, I was in debt to her, principal and interest, four or five thousand dollars. She had let me have money 25 years ago, to invest in business,—$2,300,—when we lived in Covington. This money came from her father's estate. There were nine or ten children, and she got an equal share,—$2,400, as I remember it; and she loaned $2,300 of it to me. I never paid her any of the principal or interest thereof. She also let me have $400 in the winter of 1890, somewhere in 1889 or 1890; I don't remember just exactly. I know where she got it; from Thomas Dean, $400. I saw the check. It was payable to her order. That money was a loan, to be returned when she wanted it."

It further appeared that no note, writing, or other evidence of debt had been given, no account kept, and that the wife had never made any request or demand for principal or interest, or for security therefor; that his wife

knew nothing of the execution of the bill of sale until its delivery, some time afterwards.

In the course of the cross-examination, defendant's counsel sought to show what property had been owned by Miller since the indebtedness to his wife originated; what the profits of his business were; what his earnings were when employed upon a salary; and his wife's knowledge, from time to time, of his business ventures and investments. The court excluded the testimony, and, we think, erroneously.

Counsel for defendant asked the witness whether Mrs. Morgan was here in 1888 to see him about his indebtedness to her. It was excluded, on the ground that it was immaterial. "*Counsel for defendant:* I want to show—*Court:* I have excluded it."

Mrs. Morgan, the plaintiff in execution, was sworn in her own behalf, and asked the following question:

"*Q.* Will you state whether or not you have ever had any conversation with W. B. Miller regarding the ownership of this furniture? (Objected to as immaterial.)

"*Court:* I will exclude it.

"*Q.* Will you state as to whether, during the year 1891, Mr. Miller said anything to you about the ownership of this furniture? (Objected to as immaterial. Excluded.)

"*Q.* Will you state whether or no during the past three years you have seen the plaintiff, Mrs. Miller, at all?

"*A.* I saw her last summer at our house; she was there to tea and lunch.

"*Q.* At that time, did you have any conversation with him.

"*A.* No, sir.

"*Q.* You had no conversation—

"*Court:* I will exclude that.

"*Q.* Now, you have known the plaintiff in this suit for a number of years?

"*A.* Yes, sir.

"*Q.* Will you state, in this conversation or interview with her, what, if anything, she said to you about the ownership of any property by her? (Objected to.)

"*Court:* I will exclude it.

"*Q.* What, if anything, did she say regarding the gift or loan of any money by herself to her husband? (Objected to as immaterial.)

"*Court:* I will exclude it.

"*Q.* Did she ever tell you anything of her circumstances, and what, if any, property she had? (Same objection, ruling, and exception.)

"*Q.* Or what she had done with any property she had? (Same objection, ruling, and exception.)

"*Q.* Will you state whether you ever heard any statement made by Mr. Miller or his wife regarding the ownership of furniture levied on in this case? (Same objection, ruling, and exception.)

The exceptions taken are omitted.

If there was any reason why answers to the questions asked this witness should not have been allowed, it was not that they were immaterial, but that no proper ground had been laid for them, and the reason why no proper ground had been laid was that the court would not permit it to be done. It was clearly material to the issue to show that both W. B. Miller and plaintiff had made statements relative to the ownership of the very property in dispute inconsistent with the claim now made.

According to the testimony of plaintiff, it was 25 years since she received the $2,300 from her father's estate, and loaned it to her husband. The $400 had been received from her husband's employer, who resided in the East, and who was sick and cared for at the house of the plaintiff and her husband. The house was supplied by the husband, and the sick man paid no board, but, after his return home, sent a check in March, 1890, for $400 payable to the order of plaintiff, which she turned over to her husband. Plaintiff and her husband also claimed that the furniture was given to plaintiff by her husband when he purchased it, some time prior to the execution of the bill of sale. It appeared also that the husband had, in 1891,

offered to execute a mortgage upon this furniture to one Dean to secure a debt.

In this class of cases a wide latitude of inquiry is always given, especially upon cross-examination of the execution debtor and his assignee. When a debtor undertakes to assign and convey away his property in recognition of an indebtedness to his wife, originating 25 years before, no account of which has been kept, no evidence of the debt given, and no interest or principal paid or requested, the financial condition of both parties for the entire period is a proper subject of inquiry, and the broadest latitude should be allowed to the judgment creditor.

Even upon the facts shown, the case should have been submitted to the jury, and the court erred, not only in directing a verdict, but in restricting the inquiry.

The judgment is reversed, and a new trial awarded.

The other Justices concurred.

94	259
108	104
94	259
114	389
94	259
127	468
94	259
150	558

HELEN C. AHLBERG AND WILLIAM E. TILDEN v. THE GERMAN INSURANCE COMPANY.

Fire insurance—Title to property—Knowledge of agent.

Where insurance is written upon the oral application of the insured, who is not asked for any statement as to the title to the land on which the buildings stand, and makes none, the agent knowing that the land is held under a lease, the company cannot escape liability under a clause in the policy voiding it if the ground is not owned by the insured in fee, unless otherwise provided by agreement indorsed on the policy; citing *Hoose v. Insurance Co.*, 84 Mich. 309.

Error to Wayne. (Gartner, J.) Submitted on briefs December 2, 1892. Decided December 22, 1892.

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

Howard & Roos, for appellant.

F. A. Baker (*Walter Barlow,* of counsel), for plaintiffs.

LONG, J. This is an action upon an insurance policy. The cause was tried before a jury, and a verdict rendered under the direction of the court for the sum of $518.75 in favor of the plaintiffs.

It appears that the plaintiffs were doing a manufacturing business in the city of Detroit. They owned the building in which the business was carried on, but did not own the ground upon which it was situated, it being leased from the Michigan Central Railroad Company. On or about February 17, 1891, they applied to Parkinson & Bonninghausen, insurance agents in Detroit, with whom they had previously done business, for additional insurance. Mr. Bonninghausen, of that firm, went to the factory, examined the risk, and agreed to write more insurance. Instead of Parkinson & Bonninghausen writing all the additional insurance asked for in the companies of which they were agents, they applied to a Mr. Bierce, who was then the agent of the defendant company in Detroit, to write $500 of it, which he did that day, filling out a one-year policy in the defendant company in consideration of the premium of $23.75, the policy covering the building, engine house, and additions, as well as the machinery, stock, and materials, dry-kiln, and lumber therein.

The policy was the regular printed form, known as the "Michigan Standard Policy." There was no statement or indorsement of any kind or nature on the policy that the buildings insured were situated upon leased ground, and Mr. Bierce, the agent, did not know that fact. Mr. Bierce delivered the policy to Mr. Bonninghausen, who delivered

it to the plaintiffs. Parkinson & Bonninghausen paid the premium to Bierce, and the plaintiffs repaid it to them.[1] It appears, further, that Parkinson & Bonninghausen knew that the property insured stood upon leased ground, for the reason that in December, 1889, they issued a policy for the Westchester Insurance Company upon this same property for one year, and that policy contained an indorsement to the effect that the building insured was situated upon lease ground, the lease having four years to run.

The policy in suit contained a clause, among others, as follows:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the subject of insurance be a building on ground not owned by the insured in fee-simple."

It is contended by defendant's counsel that under the facts stated the policy became void under the foregoing stipulation contained in the policy, and that the court should have directed a verdict in favor of the defendant. We cannot agree with this contention. The case falls directly within the principles applied in the case of *Hoose v. Insurance Co.*, 84 Mich. 309. No written application was made for the policy by the plaintiffs, and no statement made as to the title of the ground upon which the buildings to be insured were situated, and in fact all the persons who solicited the insurance were advised of the true situation and title of the buildings and premises.

Judgment must be affirmed, with costs.

The other Justices concurred.

[1] Plaintiffs dealt entirely with Parkinson & Bonninghausen in effecting the insurance, and had no knowledge of the part taken by defendant's agent, Bierce, until after the fire.

The Western Publishing House v. School-District No. 1 of the Township of Locke.

Schools and school-districts—Authority to purchase apparatus.

1. A purchase of "Yaggy's Anatomical Study," an atlas containing 40 or 50 pages of plates and printed matter prepared as an aid in teaching anatomy and physiology, with the special purpose of showing the effect of alcohol and nicotine upon the human system, can only be made so as to charge a school-district when authorized by a vote of the qualified electors thereof, lawfully assembled; citing How. Stat. § 5052, subds. 7, 12; Id. § 5073, subd. 6; *Gibson v. School-dist.*, 36 Mich. 404.
2. While the atlas in question may be convenient, it is not absolutely necessary in order that effect may be given to the purpose of 3 How. Stat. § 5067, which requires that instruction shall be given in physiology and hygiene, with special reference to the nature of alcohol and narcotics and their effect upon the human system, by the aid of text-books in the case of pupils who are able to read, and as thoroughly as in other studies pursued in the same school, said text-books to be first approved by the State Board of Education and selected by the school board.

Error to Ingham. (Person, J.) Submitted on briefs December 2, 1892. Decided December 22, 1892.

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

Franklin S. Porter, for appellant.

Luke S. Montague, for defendant.

Durand, J. On or about April 24, 1888, George R. Avery, who was the assessor of the defendant school-district, had some talk with plaintiff's agent about the purchase of Yaggy's Anatomical Study, which is an atlas containing 40 or 50 pages of plates and printed matter

prepared for teaching anatomy and physiology, with the special purpose of showing the effect of alcohol and nicotine upon the human system. Thereupon the plaintiff's agent applied to Oscar F. Perry, who was the director, to sell the study to the district. A contract for the sale to the district was then made, and signed by Oscar F. Perry, upon which the plaintiff's agent took the contract or order to George R. Avery, the assessor, who also signed it. He then took it to George Hunt, the moderator of the district, for the purpose of obtaining his signature, but he refused to sign it. It is admitted that neither previous to nor at the time of signing the contract were the district board, or any two of them, together, nor did they act together as such in reference to the contract, but that they acted separately in signing it. After it was signed the plaintiff, in pursuance of it, sent the study referred to to Mr. Perry, at Perry, Shiawassee county, with an order to be filled out or signed, providing for the payment of $35. The order reads as follows:

"LOCKE, MICHIGAN, April 24, 1888.

"*Assessor of School-District No. 1, Township of Locke, County of Ingham:*

"Pay to Western Publishing House, or bearer, on the first day of January, 1889, at Exchange Bank in Williamston, Michigan, the sum of $35.00, out of any moneys in your hands belonging to said district in incidental fund, for one copy of Yaggy's Anatomical Study, with interest at 7% per annum. By order of the board."

When the study and the order were received, Mr. Perry signed the order as director, and sent it by his daughter to Mr. Hunt, the moderator, who also signed it, and returned it to Mr. Perry, who forwarded it to the plaintiff, and took the study to his own house. Mr. Perry, the director, and Mr. Hunt, the moderator, were not together when the last order was signed, and the school board never met together as a board to act upon the question of the

purchase of the study. At the annual meeting of the school-district in September, 1888, Mr. Perry took the study to the meeting for the voters to examine, and he made a report of what had been done in reference to its purchase. The district refused to make the purchase of the study, or to recognize what had already been done in that direction, and the district has ever since that time refused to adopt the report of its officers or to accept the study. The study has never been used in the school, and has been in the possession of Mr. Perry, in his house, ever since it was received, and there has been no vote of the district adopting it as a text-book. After the annual school meeting in September, 1888, Mr. Perry wrote the plaintiff that the district refused to accept the study, and offered to pay express charges both ways if plaintiff would take it back. This offer the plaintiff refused, and, when the order became due, demand for payment was made and refused, and this suit was then brought to recover upon it.

The circuit judge found, as a conclusion of law, that the contract of purchase was without authority, and that the order was not a valid claim against the district, and gave a judgment in favor of the defendant.

We think the circuit judge was right. The director is expressly prohibited from making purchases of this character by subdivision 6 of section 5073, How. Stat., which provides that—

"Nothing herein contained shall be construed to authorize the director to purchase charts or any apparatus to be used in the school room without a vote of the district authorizing the same."

Neither can he gain any power by joining with the other members of the district board in making such purchase, for the board itself is not authorized to do so. *Board of Education v. Common Council,* 80 Mich. 548. Purchases of this character can only be made when authorized by a vote

of the district, and the power to make them is given to the qualified voters of the school-district, when lawfully assembled, and to no one else, as is seen by a reference to subdivision 6 of section 5073 referred to, and subdivisions 7 and 12 of section 5052, How. Stat. See, also, *Gibson v. School-Dist.*, 36 Mich. 464.

Section 5067, How. Stat., as amended by Act No. 165, Laws of 1887, does not change the general rule as above stated. While these charts may be convenient, they are not absolutely necessary in order that effect may be given to the purpose of the law. *Yaggy v. District Tp.*, 80 Iowa, 121 (45 N. W. Rep. 553).

The circumstances of this case show plainly the wisdom of the provisions of the statute which confide the power of making purchases of this character to the qualified voters of the school-district. They undoubtedly save the people from many useless and extravagant purchases urged by interested parties upon school-district officers when met (as they were in this case) singly, and who, in the hurry of private business, are often induced to sign contracts to which they would not consent if given an opportunity to have the subject fairly discussed at a regular meeting of the district board, or at a meeting of the qualified voters of the district.

The judgment is affirmed, with costs.

The other Justices concurred.

94 266
96 447
94 266
102 53
94 266
107 66
94 266
136 45
94 266
d149 288

THEODORE V. LAW v. THE NEW ENGLAND MUTUAL ACCIDENT ASSOCIATION.

Insurance—Conditions of policy—Limitation of time for bringing action.

Where an accident insurance policy provides that no suit shall be brought, or arbitration required, to recover any sum, unless commenced within one year after the injury, and more than five months elapse, after the assured is fully advised that the company refuses to pay or arbitrate the claim, before the expiration of the year, a suit thereafter brought is barred by the provision cited, unless it has been waived by the company; citing *McIntyre v. Insurance Co.*, 52 Mich. 189; *Gould v. Insurance Co.*, 90 Id. 302; *Voorheis v. Society*, 91 Id. 469; *Steele v. Insurance Co.*, 93 Id. 81.

Error to Wayne. (Hosmer, J.) Argued December 2, 1892. Decided December 22, 1892.

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

James H. Pound, for appellant.

John D. Conely, for defendant.

DURAND, J. This suit is brought upon a certificate of insurance issued by the defendant company to the plaintiff, by the terms of which it agreed to pay him certain specified sums of money in case he suffered personal bodily injuries of a certain character, mentioned in the certificate, at any time during its life.

During the life of the certificate or policy, and on April 9, 1890, the plaintiff was injured to an extent which partially prevented him from practicing his profession as a physician for a period of about four weeks. The plaintiff notified the defendant of the accident, which made an

examination into the facts, and a correspondence was had between the parties in relation to the subject-matter, extending until November 4, 1890, at which time the defendant, through its agent, practically declined to pay, and informed the plaintiff that "perhaps it would be better to let the courts decide this matter." On December 18, 1890, plaintiff began a suit in justice's court to recover upon the certificate against the defendant, which is a foreign corporation; and on January 12, 1891, the suit was quashed, on the ground that a justice's court summons could not be lawfully served upon a foreign corporation. Nothing further was done by the plaintiff in reference to the enforcement of his claim until June 15, 1891, when this suit was begun.

The certificate contained a clause as follows:

"And no suit or proceeding at law or in equity shall be brought, or arbitration required, to recover any sum, unless the same is commenced within one year from the time of the alleged accidental injury."

Upon the trial the circuit judge directed a verdict for the defendant on the ground that the action was not begun within a year after the accident occurred, as required by the policy. The plaintiff claims this is error.

We do not agree with this contention. As early as November 4, 1890, the plaintiff was fully advised that the defendant would not pay the claim, and all attempts looking towards an arbitration or settlement of it ceased. This left the plaintiff upwards of five months within which to have brought his suit and been strictly within this provision of the policy. This he did not do, but waited for upwards of two months after the time within which the suit should have been brought had expired before bringing it. The defendant had not misled him, or done anything which can be construed into a waiver of the substantial right expressed in the policy, and which required the suit

to be brought within a year after the alleged accidental injury. Under these circumstances, we think that the suit should have been brought within the year specified, and that, not having done so, the plaintiff lost his right to sue, under the principle recognized in the following cases: *McIntyre v. Insurance Co.*, 52 Mich. 189; *Voorheis v. Society*, 91 Id. 469; *Gould v. Insurance Co.*, 90 Id. 302; *Steele v. Insurance Co.*, 93 Id. 81.

As this disposes of the case, nothing else will be considered.

The judgment is affirmed, with costs.

The other Justices concurred.

---

94 268
104 451

94 268
119 62

94 268
f121 497

94 268
139 2 21

94 268
149 2117

HAMMET LUEBE v. JULIA A. THORPE.

Married woman—Liability on contract made with husband as her agent—Jury—Challenge for cause—Error without prejudice.

1. A married woman is liable for services rendered for her under an agreement made with her husband as her authorized agent.
2. While the fact that a juror is over the statutory age is not a ground for challenge for cause (*People v. Rawn*, 90 Mich. 377), the action of the circuit judge in excusing such a juror is not prejudicial error where it does not appear that there were not remaining a sufficient number of jurors of the regular panel to form a jury to try the case, or that the party complaining of such action had any ground of objection to any of the jurors who sat in the case, or that he had exhausted his peremptory challenges; citing *Mining Co. v. Johnston*, 23 Mich. 39; *Booming Co. v. Jarvis*, 30 Id. 308; *McGrail v. City of Kalamazoo*, 94 Id. 52.

Error to Shiawassee. (Newton, J.) Argued December 1, 1892. Decided December 22, 1892.

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

Selden S. Miner, for appellant.

A. L. Chandler, for plaintiff.

MONTGOMERY, J. Plaintiff recovered a judgment against the defendant, a married woman, for pasturing a horse and a colt, and for fruit and grain gathered by defendant on a farm which plaintiff was occupying as lessee, and for work done in plowing garden, and similar services.

The testimony showed that the original leasing to the plaintiff was by Thomas Thorpe, the defendant's husband, but that on November 9, 1889, Thomas Thorpe deeded the land to the defendant. The plaintiff also offered testimony tending to show that defendant had testified in other proceedings that Thomas Thorpe was, in whatever he did in regard to the premises, acting as her agent. It appeared that Thomas Thorpe turned the horse into pasture, and that the services for which recovery was had were rendered at his request, but without any express agreement to pay. The defendant offered no testimony whatever to dispute plaintiff.

The circuit judge charged the jury as follows:

"If the jury find from the evidence that the work done, and the goods and materials, and pasture and produce, were furnished to Julia A. Thorpe, and that she has received the same, after November 9, 1889, under such circumstances that it would be inequitable for her to receive the same without paying therefor, then the plaintiff would be entitled to recover therefor what such work, goods, materials, and pasture are reasonably worth, giving her credit for any and all the credits that plaintiff received in money or property, or other credits, from her husband during that time,—that is, from November 9, 1889, when she got the deed. * * * * *

"On the part of this defendant in this case I charge you that if the jury find that the farm was rented by

Thomas Thorpe to plaintiff, and plaintiff did his dealings with Thomas Thorpe, and charged his account to Thomas Thorpe and gave him the credit, he cannot recover against the defendant in this case. There is nothing in this case to show that Thomas Thorpe was her agent in renting the farm in question, or in employing the plaintiff to work on the farm in 1889.

"I charge you further, in that connection, that if you find that after November 9, 1889, after she took the deed, the work, pasturage, and labor were done on the farm, and that grain and other material were furnished by the plaintiff under his lease of the farm by her husband while he was the owner, and to which contract or lease she succeeded by becoming owner of the farm, November 9, 1889, she would be liable for any balance of the account that occurred after November 9, 1889, but not before, and credit her with any sums of money, or other crops or property, that may have been paid by her husband, or received by the plaintiff in produce or other things, after November 9, 1889, unless you should find that the pasturing and wintering of the stock after November 9, 1889, was done under an individual contract with Thomas Thorpe, —that he gave him the credit, and did not give the credit to the defendant in this suit,—in which case plaintiff could not recover; that is, an express contract made with Thomas Thorpe, and the credit was given to him notwithstanding the wife had succeeded to his rights, if he did not look to the defendant in such case, plaintiff could not recover, and your verdict should be for the defendant in the case."

We think the charge covered the law of the case. If the services were in fact rendered to the defendant, and Thomas Thorpe was acting as her agent, there is no reason why she should be treated with greater favor than an unmarried woman under precisely the same circumstances. If there had been an express contract with Thomas Thorpe as principal, there could be no recovery, as the circuit judge charged the jury, and as was held by this Court in *Newcomb v. Andrews*, 41 Mich. 518; *Willard v. Magoon*, 30 Id. 273; *Morrison v. Berry*, 42 Id. 393. But in this case the question of liability turned upon the identity of

the principal, and the testimony tended to show the defendant to have been the principal, and the services to have been rendered for her. In the cases cited the credit was expressly given to the husband on a contract made by him in his individual capacity, and not as agent. In the present case he was acting as agent only. It is to be noted that this action is not brought upon the lease, but for and on account of dealings outside of the lease, and, as before stated, the question was with whom, in fact, the plaintiff dealt.

The second assignment of error relates to the action of the circuit judge in excusing a juror on the ground that he was over 60 years of age. This ruling was based upon the *dictum* in *People v. Baumann*, 52 Mich. 584. It has since been held by this Court that the age of the juror is not a ground for challenge for cause. *People v. Rawn*, 90 Mich. 377. It does not follow, however, that the act of the circuit judge in excusing the juror was prejudicial to the defendant. It does not appear that there were not remaining a sufficient number of jurors of the regular panel to form a jury to try this case, nor does it appear that the defendant had any ground of objection to any of those who actually sat in the case, or that she had exhausted her peremptory challenges.

In *Atlas Mining Co. v. Johnston*, 23 Mich. 39, it was said:

"Though it would be ground of error for the court to admit a juror who is challenged and ought to have been rejected, it is no ground of error for the court to be more cautious and strict in securing an impartial jury than the law actually required; and for this purpose the court may very properly reject a juror on a ground which would not be strictly sufficient to sustain a challenge for cause, or, in other words, when the refusal to sustain the challenge would not constitute error. So long as an impartial jury is obtained, neither party has a right to complain of this course by the court, and especially when, as in this case,

no objection was taken by either party to the competency or impartiality of the jury which was obtained."

See, also, *Grand Rapids Booming Co. v. Jarvis,* 30 Mich. 308; *McGrail v. City of Kalamazoo, ante,* 52.

The other objections do not require special consideration. Some objections were made to the pleadings, but we think them without force; nor was there any prejudicial error in the remarks of counsel which were complained of.

The judgment will be affirmed, with costs.

The other Justices concurred.

94 272
98 484

94 272
111 155

94 272
115 242

94 272
123 614

94 272
127 615

94 272
128 595

94 272
154 199

MARIAN H. COOPER AND JAMES MCLAUGHLIN v. THE LANSING WHEEL COMPANY.

Contract—Mutuality—Offer to sell—Acceptance—Rescission.

1. It is now generally held that if a proposition be made, to be accepted within a given time, it constitutes a continuing offer, which, however, may be retracted at any time. But if, at any time before it is retracted, it is accepted, such offer and acceptance constitute a valid contract.
2. Where carriage manufacturers make an order for whatever wheels they may want during a specified season, at prices stated in the order, which is accepted by the orderee, the order and acceptance, when supplemented by the filling of one or more orders for wheels, become a valid and binding contract for the entire season.

Error to Ingham. (Person, J.) Submitted on briefs October 13, 1892. Decided December 23, 1892.

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

Q. A. Smith, for appellants, contended:

1. When the plaintiffs ordered specific bills of wheels according to the proposition, the contract was completed, and nothing was left to uncertainty; citing *Thayer v. Burchard*, 99 Mass. 508; *Keller v. Ybarru*, 3 Cal. 147; *Railway Co. v. Mitchell*, 38 Tex. 86; *Smith v. Morse*, 20 La. Ann. 220.

Cahill & Ostrander, for defendant, contended:

1. It is not averred in the declaration that the plaintiffs had, in consideration of the defendant's agreement to sell, agreed on its part to purchase a definite quantity of wheels, and without which agreement the contract would be void for want of mutuality; citing *Wilkinson v. Heavenrich*, 58 Mich. 574, 577, and cases cited; *Leather Co. v. Kurtz*, 34 Id. 90; *Bailey v. Austrian*, 19 Minn. 535; *Tarbox v. Gotzian*, 20 Id. 139; *Railroad Co. v. Brinckerhoff*, 21 Wend. 139; 1 Wait, Act. & Def. 102, and cases cited; 1 Pars. Cont. 448, and notes.
2. Upon the plaintiffs' theory, the declaration should show that the wheels ordered were actually needed in the plaintiffs' business, and should negative the idea that they were ordered for speculation or because of an advance in price merely. This it does not do. Nor does it appear that the plaintiffs in fact ordered from the defendant all the wheels used by them in their business during the year, which they were bound to do, as a performance of the contract on their part, which performance should be averred in the declaration to entitle plaintiffs to recover; citing *Smith v. Morse*, 20 La. Ann. 220.

MONTGOMERY, J. This is an appeal from a judgment sustaining a demurrer to plaintiffs' declaration.

The first count of the declaration alleges an agreement "whereby the said defendant did undertake, promise, and agree, to and with the plaintiffs, to furnish, sell, and deliver to said plaintiffs all such number or quantity of wheels, * * * at and for an agreed price, * * * as said plaintiffs should or might require or want, during the season of the year 1890, in their said business of manufacturing;" that during the season of 1890 plaintiffs agreed to order, and did order, of defendant, all of such wheels as they might or should want or require in their said business; that certain orders so given were filled, and that cer-

tain other orders given in November and December, 1890, defendant refused to fill.

The second count sets forth a written agreement, which is as follows:

"Owosso, Mich., Dec. 16, 1889.

"Mess. Lansing Wheel Co.,

"Lansing, Mich.

"*Gentlemen:* Please enter our order for what wheels we may want during the season of 1890, at following prices and terms: B, $6.00; C, $5.00; D, $4.00,—per set, f. o. b. Owosso, 30 days. All the wheels to be good stock, and smooth. Should we want a few D wheels to be extra nice stock, all selected white, they are to be furnished at same price, not to exceed 10 set in a 100.

"Very respectfully yours,

"Owosso Cart Co."

Upon receipt of this instrument, defendant indorsed thereon the following: "Accepted. Lansing Wheel Co." Then follow the allegations as to the giving and filling of certain orders, and the refusal to fill certain other orders which were given.

The defendant demurred to this declaration, the substantial ground of demurrer being that there was no mutuality of contract between the parties.

It was early held in England that a proposition to sell goods at a certain specified price, and to give the offeree a stated time in which to accept or reject the offer, did not make a binding contract which could not be withdrawn before acceptance. See *Cooke v. Oxley*, 3 Term R. 653. The doctrine of this case has not, however, remained unchallenged. Mr. Story, in his work on Sales, expresses the opinion that the rule is unjust and inequitable. Section 127. He contends that the grant of time to accept the offer is not made without consideration. He suggests as one sufficient legal consideration the expectation or hope of the offerer, and further suggests that the making of such

an offer might betray the other party into a loss of time and money, by inducing him to make examination, and to inquire into the value of the goods offered, and this inconvenience assumed by him is a sufficient consideration for the offer.

There is much force in this reasoning, but it has not prevailed to abate the doctrine of *Cooke v. Oxley*, further than this: That it is now generally held that if a proposition be made, to be accepted within a given time, it constitutes a continuing offer, which, however, may be retracted at any time. But if, at any time before it is retracted, it is accepted, such offer and acceptance constitute a valid contract. It was therefore within the power of defendant, in the present case, on the authority of the cases cited, to withdraw the offer made at any time before the plaintiffs had acted upon it.

Authorities may be found which go further than this. The case of *Bailey v. Austrian*, 19 Minn. 535, holds that a contract by which defendant agreed to supply plaintiffs with all the pig iron wanted by them in their business until December 31 next ensuing, at specified prices, and the plaintiffs simultaneously promised to purchase of defendant all of the iron which they might want in their said business during the time mentioned, at said prices, is not a mutual contract which can be enforced, on the ground that the plaintiffs did not engage to want any quantity whatever. The same court, in *Tarbox v. Gotzian*, 20 Minn. 139, reaffirm this doctrine.

In *Keller v. Ybarru*, 3 Cal. 147, plaintiff counted upon an agreement by the defendant, whereby he undertook to sell and deliver to the plaintiff so many of the grapes then growing in his vineyard as the plaintiff should wish to take, for which the plaintiff agreed to pay the defendant 10 cents per pound on delivery. The plaintiff averred that he subsequently notified the defendant that he wished to

take 1,900 pounds of grapes, and tendered the $190 in payment therefor, and requested the defendant to deliver such grapes to the plaintiff, but defendant refused to deliver the same, or any part thereof. The court held that this agreement, when first entered into, amounted to an offer upon the part of defendant, which the plaintiff had a right to accept or reject, and the defendant to retract at any time before acceptance; but that, when the plaintiff named the quantity of grapes which he desired to take under the offer of defendant, the contract was complete, and both parties were bound by it. Substantially the same doctrine was held in *Smith v. Morse,* 20 La. Ann. 220.

In *Railroad Co. v. Bartlett,* 3 Cush. 224, it was held that a proposition in writing to sell land at a certain price, if taken within 30 days, is a continuing offer, which may be retracted at any time; but if, not being retracted, it is accepted within the time, such offer and acceptance constitute a valid contract.

So it is generally held that in suits upon unilateral contracts, if the defendant has had the benefit of the consideration for which he bargained, he can be held bound. *Jones v. Robinson,* 17 Law J. Exch. 36; *Mills v. Blackall,* 11 Q. B. 358; *Morton v. Burn,* 7 Adol. & E. 19; *Kennaway v. Treleavan,* 5 Mees. & W. 498; *Richardson v. Hardwick,* 106 U. S. 255.

If it be held, as we think the correct doctrine is, that an offer to furnish such goods as the plaintiff may want within a stated time may, upon acceptance by the offeree before withdrawal, constitute a valid contract, it is difficult to see why, if the offeree orders any portion of the goods, and the offerer has the benefit of the sale, the entire contract may not become valid and binding. This certainly would constitute a sufficient consideration. If in the present case the defendant had, in consideration of the present sale and delivery to the plaintiffs of

one lot of wheels at a stated price, and for which the defendant received its pay, further agreed to furnish such further quantity of wheels as the plaintiffs might desire during the season, it would seem that a purchase of the one lot, as offered, would afford a sufficient consideration for defendant's undertaking. This view is adopted in England.

In Bishop on Contracts (section 78) it is said:

"Where it is admitted that there is nothing for A.'s promise to rest on but B.'s promise, if B. has not promised, A.'s promise rests on nothing, and is void. There may be cases in seeming contradiction to this; if there are any really so, they are not to be followed. In one case, parties agreed that one of them should supply the other during a designated period with certain stores, as the latter might order. He made an order, which was filled, then made another, which was declined; and, on suit brought, the defendant rested his case on the lack of mutuality in the contract, which, he contended, rendered it void. Plainly, it stood, in law, as a mere continuing offer by the defendant; but, when the plaintiff made an order, he thereby accepted the offer to the extent of the order, and it is was too late for the other to recede. So judgment went for the plaintiff."

See *Railway Co. v. Witham*, L. R. 9 C. P. 16. We think the doctrine of this case is sound, and that it should control the present case.

Judgment should be reversed, with costs, and defendant given leave to plead over.

The other Justices concurred.

94 278
102 628

94 278
126 572

JOHN HICKS ET AL. v. DANIEL MCLACHLAN AND EMMA MCLACHLAN.

Fraudulent conveyances—Husband and wife—Homestead.

1. Where in a suit brought to set aside a deed from a husband to his wife, charged to have been given in fraud of creditors, the complainant relies upon the testimony of the husband and wife to make out his case, he cannot discriminate between favorable and unfavorable testimony, where it is all equally probable, merely on suspicion that the unfavorable testimony is false; citing *Darling v. Hurst*, 39 Mich. 765.
2. A husband conveyed 80 acres of land, including his homestead, to his wife, in payment of a *bona fide* indebtedness amounting, with the homestead exemption, to the value of the entire land, which conveyance is sustained as within the decision in *Brigham v. Fawcett*, 42 Mich. 542.

Appeal from Isabella. (Hart, J.) Submitted on briefs October 14, 1892. Decided December 23, 1892.

Bill in aid of execution. Defendant Emma McLachlan appeals. Decree reversed, and bill dismissed. The facts are stated in the opinion.

Dodds & Dodds, for complainants, contended:

1. The defense set up in the answer must be supported by the proofs, for a defense made by the testimony can avail nothing unless it is set up in the answer; citing *Manning v. Drake*, 1 Mich. 34; *Jerome v. Hopkins*, 2 Id. 100; *Cicotte v. Gagnier*, Id. 386; *Warner v. Whittaker*, 6 Id. 134; *Bloomer v. Henderson*, 8 Id. 400; *Bomier v. Caldwell*, Id. 476; *Barrows v. Baughman*, 9 Id. 220; *Wurcherer v. Hewitt*, 10 Id. 453; *Peckham v. Buffam*, 11 Id. 531; *Moran v. Palmer*, 13 Id. 372; *Converse v. Blumrich*, 14 Id. 109; *Hubbard v. Winsor*, 15 Id. 147; *Fosdick v. Van Husan*, 21 Id. 567; *Harwood v. Underwood*, 28 Id. 430; *Ford v. Loomis*, 33 Id. 121; *Connerton v. Millar*, 41 Id. 608;

Livingston v. Hayes, 43 Id. 129; *Hoffman v. McMorran*, 52 Id. 319.

2. When a sale from husband to wife is contested by creditors, it can be sustained only when it appears (*a*) that an honest debt existed from the husband to the wife, and (*b*) that the transfer was made to pay that debt; citing *Jordan v. White*, 38 Mich. 253; and the fact that the wife does not know of the fraudulent intent of the husband makes no difference; citing *Fellows v. Smith*, 40 Mich. 691; *Matson v. Melchor*, 42 Id. 480.
3. Sales by a husband to his wife must be viewed by the court with suspicion, and closely scrutinized; citing *Leppig v. Bretzel*, 48 Mich. 322; and all of the facts must be taken into consideration; citing *Judge v. Vogel*, 38 Mich. 571; and it is always a suspicious circumstance that no written evidence of the debt exists; citing *Allen v. Antisdale*, 38 Mich. 231; *Keam v. Conkwright*, 78 Id. 65.
4. The legal presumption always is that the wife is employing her services for her husband, and where they are rendered to a third person, and the husband receives the money, the agreement to pay it back to the wife must be distinct; citing *Mason v. Dunbar*, 43 Mich. 409; and voluntary or gratuitous services can never be recovered for; citing *O'Connor v. Beckwith*, 41 Mich. 660; *Allen v. Allen*, 60 Id. 635.
5. The answer merely states that the defendants had occupied the north 40 acres as a homestead (which is shown by the testimony to have been worth from $2,000 to $2,400); but defendants do not ask to have it protected as such, nor show that it is within the limits of the homestead, and in such a case they cannot avail themselves of it as a defense in any way; citing *Matson v. Melchor*, 42 Mich. 481; *Stevenson v. Jackson*, 40 Id. 704; *Fetters v. Duvernois*, 73 Id. 483.

Graves & Wickham and *Charles T. Russell* for appellant, contended:

1. The bill called for an answer under oath, which claim was complied with, and the answer, being responsive to the bill, is evidence; citing *Schwarz v. Wendell*, Walk. Ch. 294; *Roberts v. Miles*, 12 Mich. 297.
2. Complainants made defendants their witnesses to prove their case, and must accept their statements; citing *Darling v. Hurst*, 39 Mich. 765; *Brigham v. Fawcett*, 42 Id. 542.
3. The defendants had a homestead right in the land, which was

not exposed to creditors, amounting, with the indebtedness of about $1,960, to about $3,460, nearly if not the full value of the land; and if the value of the land, over and above the exemption, did not exceed the indebtedness, the complainants have no reason to complain; citing *Brigham v. Fawcett*, 42 Mich. 542; *Pulte v. Geller*, 47 Id. 560; *Shay v. Wheeler*, 69 Id. 254.

4. The fact that the grantee pays less for property than it is worth is not evidence of a fraudulent transfer, unless the price is so small as to make it substantially a voluntary conveyance; citing *Fraser v. Passage*, 63 Mich. 551; and it is only where the consideration is grossly inadequate that it is considered a badge of fraud; citing *Shay v. Wheeler*, 69 Mich. 254; and in such a case, to render the conveyance void for fraud upon creditors, it is necessary that the grantee should have a knowledge of, and in some way participate in, the fraud; citing *Fraser v. Passage*, 63 Mich. 551.

5. Mrs. McLachlan had a right to bargain with her husband for any amount that was due her from him, and to take the deed from him in settlement of her claim, and it is not fraudulent with respect to other creditors; citing *Wooden v. Wooden*, 72 Mich. 352; and when property goes to pay an honest debt, it is lawful, even if it is intended to, and does, cut off other creditors; citing *Nichols v. Bancroft*, 74 Mich. 191.

6. Daniel McLachlan had a right to waive the statute of limitations in favor of his wife's claim; citing *Brigham v. Fawcett*, 42 Mich. 542; *Fraser v. Passage*, 63 Id. 551.

7. The absence of a written memorandum of the indebtedness is not a suspicious circumstance, as the court will recognize the confidential relations between husband and wife, and give them due weight; citing *Buhl v. Peck*, 70 Mich. 44; nor is it a suspicious circumstance that Mrs. McLachlan did not put her deed on record immediately; citing *Hill v. Bowman*, 35 Mich. 193; *Wooden v. Wooden*, 72 Id. 353.

McGRATH, C. J. This is a bill in aid of execution.

In November, 1886, Daniel McLachlan became indorser upon a note for $400. The note was renewed from time to time until May 21, 1888, at which time Daniel McLachlan gave his own note for the amount, which was renewed from time to time, and, not having been paid, suit was commenced thereon May 1, 1889, by attachment, which was levied upon the W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 9, township 14 N., of range 4 W.

On January 19, 1887, Daniel McLachlan conveyed the property to his wife, Emma McLachlan. The deed was recorded November 2, 1887. The bill sets up that the purpose of this conveyance was to defraud creditors, and asks for an answer upon oath. The answer denies the fraud, alleges that the north 40 acres of land has been occupied and used as a homestead by defendants for 10 years and upwards, and now is exempt from sale on execution as such; that Daniel McLachlan was at the time of said conveyance indebted to his wife, Emma McLachlan, setting forth such indebtedness specifically, and that said conveyance was made to her in satisfaction of such indebtedness.

The items of the alleged indebtedness were as follows: The proceeds of 40 acres of land which Emma McLachlan owned and sold in 1878, being $400; the proceeds of her labor in 1873, as cook for one Andre, in a lumber camp, $250; the proceeds of the sale of two cows in 1871, which she received from her relations, $83; a loan in 1881, of $40; her earnings as cook in a lumber camp operated by her husband and others as partners in 1882, 1883, and 1884, amounting to $450,—which items, together with the interest, aggregated $1,960.86.

The court below held that defendants have homestead rights in the north 40; that there was no valid consideration for the deed sought to be set aside, except $400, received for the 40 acres which the wife had owned; that the north 40 acres was worth much more than the $1,500 allowed by law; and that the bill be dismissed as to the north 40, and the deed set aside as to the south 40. Emma McLachlan appeals.

All of the questions raised are disposed of in defendants' favor by *Brigham v. Fawcett*, 42 Mich. 542, and *Darling v. Hurst*, 39 Id. 765. Here, as there, complainants relied upon the testimony of the defendants. The wife testifies

that there was an express agreement in each instance that these moneys should be refunded to her, with interest; that she worked for Andre under a distinct agreement that her wages were to be paid to her, and that they were so paid to her; that she went to work in the lumber camp operated by her husband and partners under an agreement that she should have her wages, and her husband agreed to pay her; that her husband had frequently promised to deed this land to her in payment for these loans and this indebtedness. While there is some conflict between the testimony of husband and wife as to any agreement at the time, and in each instance, to refund these loans, and pay the indebtedness of $450, yet he testifies that he intended to pay her, and that she referred to the indebtedness at different times, and he said that he would pay her. There is no doubt from the testimony that these sums of money charged to her husband were actually earned by her, received by her, turned over and contributed by her to her husband, and used by him in the purchase and improvement of this very property, and that an agreement to repay, and to pay for her services, is fairly deducible, even from the testimony of the husband. From the testimony of both it is clear that the wife would be entitled to judgment. It is unquestionably true that, in the absence of an express agreement, the presumption is that the wife is employing her services for the husband; but here the express agreement to refund and to pay is present. In *Darling v. Hurst, supra,* both husband and wife were employed upon a salary at the same place.

According to the testimony, the 80 acres of land—one 40 of which was and is occupied as a homestead—was worth at the time of the conveyance from $3,000 to $3,500. That question is expressly ruled by *Brigham v. Fawcett, supra.* The indebtedness set up is $1,961, and the homestead exemption $1,500, making a total of $3,461.

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

The other Justices concurred.

94 283
96 548

94 283
108 135

94 283
112 507
113 586

94 283
114 522

94 283
d121 128

94 283
126 514

94 283
s53NW 938
j129 ²493
129 ²606

94 283
f141 ² 68

94 283
144 ²383
144 ²390

94 283
147 ²436

94 283
f149 111

94 283
f153 ²371

GEORGE J. ROBINSON v. CHARLES WRIGHT & COMPANY (A CORPORATION).

Master and servant—Injury to employé—Contributory negligence—Defective appliances.

1. Where an employé is familiar with a freight elevator, its construction, and use, and knows that, unless the brake is properly set and locked, a weight placed upon the car will cause it to descend, and that the brake must be set according to the weight of the material placed upon it for carriage, it is his duty to see that the brake is properly set and locked before using the elevator.
2. The sudden breaking or giving way of a piece of machinery, properly constructed, is not sufficient to justify the conclusion of negligence.

Error to Wayne. (Reilly, J.) Argued October 25, 1892. Decided December 23, 1892.

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

James H. Pound (*Charles Kudner* and *Edwin F. Conely*, of counsel), for appellant.

George W. Radford and *Edward A. Barnes*, for defendant.

GRANT, J. Plaintiff, while in the employ of the defendant, rolled a barrel weighing about 250 pounds upon the elevator, placing it on one side. He then rolled a second barrel on, when the platform commenced to descend, and

went suddenly to the bottom, carrying plaintiff with it, and injuring him.

The car of this elevator consists of a platform about six feet square, with two posts rising from the middle of opposite edges, about six feet high, connected and braced at the top by a crossbeam. These posts travel up and down two guides extending from the top to the bottom of the elevator shaft, and serve to hold the platform of the car level, and prevent its swaying from its position. Two heavy iron hooks are screwed into the floor of the platform, one at the side of each of the posts. Across the top of the elevator opening or shaft, and in a direction parallel with the crossbeam of the elevator car, is hung a piece of steel shafting with several wheel pulleys keyed upon it. Two ropes, into the end of each of which is spliced an iron ring or eye, are fastened to the platform of the car by slipping these rings over the hooks mentioned above. These ropes, passing up through the elevator shaft over two of the wheel pulleys upon the steel shafting above and down on the other side, are attached to two very heavy weights, which travel up and down guides on the sides of the elevator shaft, and serve to counterbalance the weight of the car; the weights moving up as the car moves down, and *vice versa*. The wheel pulleys over which these ropes pass have V-shaped grooves in their rims, to prevent the ropes from slipping around, by causing them always to fit tightly in the grooves, no matter how much worn they may be. The elevator is operated by hand power, by pulling up and down on an endless rope, which passes over a wheel pulley geared to the same shafting that carries the pulleys over which the balance ropes run. This pulley also has the V-shaped groove in its rim, and, when any one pulls up or down on the endless rope, the shafting revolves, and the elevator is moved up and down by the balance ropes. The brake is a device for tightening

an iron band that is hooped over another pulley fastened into the shafting. This band is tightened over the pulley by pulling down on a rope fastened to the end of a lever attached to the hoop. After pulling on this rope until it is as tight as desired, the brake is locked (before letting go of this rope) by pulling on another rope, which drops a ratchet into notches on the brake lever, the arrangement being similar in principle to that by which a railroad brakeman sets a brake with his toe. To unset the brake it must be tightened a little more, when the ratchet will drop out of the notch, and release the lever.

The allegation of negligence in the declaration is of the most general character, consisting of the statement that the defendant negligently suffered and permitted the elevator to become and to be and remain worn out, broken, and defective, and in an unsafe and insecure condition, and unfit for use.

After the accident it was found that one of the balance ropes had become detached, the eye having slipped off the hook, and the weight attached to the opposite end had fallen to the cellar. It was also found that the key or pin which held the wheel on the axle above had come out. When this key was out, there was, of course, no control of that side of the elevator.

The court submitted the question as to plaintiff's contributory negligence and defendant's negligence to a jury, who found a verdict for the defendant.

We deem it unnecessary to discuss the various errors alleged to have been committed during the progress of the trial, for the reason that the jury rendered the only verdict that can be justified by the undisputed facts and the law applicable thereto. Where the correct result is reached, the errors alleged are immaterial. We think the court, under the evidence, should have directed a verdict for the defendant.

1. The plaintiff did not show himself to be free from negligence. He was entirely familiar with the elevator, its construction, and method of use. He knew that, unless the brake was properly set and locked, a weight placed upon the car would cause it to descend. The brake must in all cases be set according to the weight of the material placed upon it for carriage. For a heavy weight it should be set harder than for a light one. It was therefore his duty to see that the brake was properly set and locked, and his duty to prove it upon the trial. His testimony upon this point was as follows:

"I do not remember where the elevator was when I first wanted to use it. It might have been on the floor below. I do not remember how the elevator got there, or whether I tried to see if it was solid, or put my hand on the brake from the beginning to the end, if I brought the elevator up. If I did, I would have to tie the brakes, or the elevator would have gone still higher. It would not have stopped if I had not put on the brakes. It would have gone up. I did not try the brakes after I got the first barrel on; and as I was putting the second barrel on the elevator went down."

It thus appears that the plaintiff rolled two barrels upon the elevator platform without first directing his attention to the brake, and seeing that it was properly set. The elevator had just before raised a weight of 1,500 pounds in safety, and the brake was found sufficient to control it. A proper regard for plaintiff's own safety and for the safety of the property of his employer required him to take this necessary precaution. Having failed to show this, he was not entitled to recover. In my judgment, a recovery under such circumstances has no foundation either in law or justice.

2. Plaintiff's proofs failed to show any negligence on the part of the defendant. Whatever other authorities may hold, it is the settled rule in this State that negligence cannot be inferred from the mere proof of an accident and

consequent injury. *Toomey v. Steel Works*, 89 Mich. 249, and authorities there cited. The sudden breaking or giving way of a piece of machinery, properly constructed, is not sufficient to justify the conclusion of negligence. Machinery well constructed, apparently safe, and having been tested by use, often gives way from some hidden cause or unknown defect.

This elevator had been in constant use for a long time, and had, without accident, performed the work for which it was intended. The fact that once before it had descended in a manner similar to that in the present case, is not evidence that it was out of repair, as in that case the accident may have resulted from the failure to set and lock the brake. The slipping of the hook was unquestionably the result of the fall, rather than its cause. This is conceded by the plaintiff's counsel, for they say in their brief that there is no evidence that the rope became detached before it fell, and that, if it had been so detached, the car would have locked itself upon the slides. All the witnesses familiar with the elevator, and who examined it just after the accident, agree that all the parts of the elevator were in proper shape and condition, except that the key which held the wheel upon the shaft was out, and the hook was out of the ring. There is no evidence that the key was out before the accident, or that it was loose. The strain upon this wheel and the shaft by the fall of this heavy weight, almost unchecked, for 30 feet would be very great. The heavy balance weights, upon the sudden stoppage, would fly up, and then fall back upon the wheel with great force. That the key was not out, but was in fact in place, at the time plaintiff commenced to load the elevator, is certain. This appears from the facts, as already stated, that it had just carried up a heavy load, and that, if out, the elevator would have at once descended when the first barrel was rolled on.

Negligence cannot, therefore, be predicated upon the theory that the key was out, and that this caused the fall. There is no evidence to show that it was loose before the fall, or that the ordinary use of the elevator would tend to loosen it. Plaintiff gave no evidence tending to show a necessity to inspect this pin for the reason that it might become loose. It is certainly as consistent with the theory that the key was jarred out by the sudden and great strain upon it as that it had become loose from ordinary use. In such case it is not competent for the jury to guess which theory is correct.

Under the undisputed facts in the case, the testimony of the witness Perry, as to the condition of the elevator when he worked for the defendant, becomes immaterial. He left defendant's employ six months before the accident. The elevator was overhauled and repaired after he left, and about three months before the accident, and there is no evidence showing any difficulty in running it after that time.

Judgment affirmed.

LONG, DURAND, and MONTGOMERY, JJ., concurred with GRANT, J.

MCGRATH, C. J. (*dissenting*). Plaintiff was injured while in defendant's employ, by the fall of a hand elevator car, upon which he was loading some freight. The jury found for the defendant, and plaintiff appeals.

Plaintiff was directed by the superintendent to remove two barrels, containing liquid, and weighing about 250 pounds each, from the second floor to the basement. While putting the second barrel on the car, the car suddenly gave way, and fell to the basement, carrying plaintiff with it. Plaintiff says:

"I rolled the barrels on the usual way. The platform was just wide enough to hold two barrels, and it was about square, so that four barrels filled the platform. As I was

letting the second barrel down after I rolled it on its head, the whole thing went down, and I followed head first. Something broke about the elevator, and we all went down together."

After the fall, it was discovered that the key pin that held one of the spools or pulleys upon the shaft was out, and that the rope which passed over another pulley, and was attached to the car, had become detached. The ropes were attached to the car by hooks in the car, and an eye in the end of each rope. Whether these conditions were caused by the concussion of the car with the basement floor, or prior to that time in some other way, does not appear.

One witness says that this elevator had been in use 15 years; another that "it was an old elevator." One of the plaintiff's witnesses says that in October, 1888, while he was at work for defendant, it was—

"In a very bad condition. The brake was in bad shape. It would not catch every time; and a number of times, when I was working in the shipping room, one of us would have to hold the brake at the ground floor, while another man ran to the top floor and put on the brake. The catch that held the brake would not hold it. It would go down on one side; and it was seen that the rope was loose, and slipped off the pulley at the top. It did not work smoothly. I called Mr. Wright's attention to it at least a half a dozen times. Whenever the elevator got broke in any way he would have it fixed, but the brake he never fixed from the day I went there until I left [October 19, 1888]. * * * I knew the elevator was out of repair. I did not report it every time I noticed to Mr. Wright, because he never used to pay much attention to it when we did. He did not always have it fixed when I reported it out of order. He never had the brake fixed. I complained of that half a dozen times anyway, repeatedly, to Mr. Wright himself. He knew the brake was out of order. I talked with him about it. I say I reported it to him frequently, and he did not have it fixed."

Another witness, who was in the employ of the defend-

ant when plaintiff was hurt, speaking of the elevator, says: "I had seen it in operation, and had operated it myself. It was rickety all through."

This was the second fall of this elevator car. The first occurred some time before the injury to plaintiff. After that defendant notified its employès not to ride upon it. It was operated from each floor. The superintendent says:

"After we got the load on at the cellar we would begin to pull the rope after taking off the brake. We would have a man on each floor above to pull the rope."

Mr. Wright testified:

"I can't say that it was ever reported to me that there was anything the matter with the brake. If it was, it was attended to at once. Prior to the accident, I had no knowledge the elevator was out of order. There had been no complaint made to me about the elevator for some little time."

Expert testimony was introduced by defendant tending to show that the striking of the car upon the floor of the basement might have caused the disconnection; that, if the key pin had been out on one side, and the eye in the hook on the other, the car could not be operated, and could not fall, unless the guides spread, because the car would bind; that, if the key pin was out on one side, and the rope disconnected on the other, the car could not be operated, and would fall; that the brake might hold the car in position, even with the weight on, the key pin out on one side, and the rope disconnected on the other; that, if the brake was not on, the car, under such circumstances, would fall with its own weight; that, if the brake was not put on, the weights would force the car up from the second floor, and, if the machinery was in proper condition, and the brake was not set, the car would go down with the weight of one barrel, weighing 250 pounds, on it; that the

brake may not have been set tight enough; that, if the brake had been set tight enough to hold 250 pounds, and not tight enough to hold 500 pounds, the car would go down, but in that case it would start slowly, increasing in velocity as it descended.

At the close of plaintiff's testimony, counsel for defendant, addressing the court, said:

"I fail to see that any evidence is before the jury to make out a case for the plaintiff, and I move that the jury be directed to find for the defendant, on the ground of contributory negligence.

"*Court:* I don't think the question of contributory negligence applies. I will overrule the motion. Note an exception. I think the question is very close, but I will give the plaintiff the benefit of the doubt."

We think the language of the court, taken in connection with other remarks interjected by the court pending the trial, was calculated to impress the jury with the court's opinion of plaintiff's case, and was therefore erroneous. To illustrate: Defendant called a witness, who testified that he owned the building occupied by defendant, and put in the elevator. The witness, continuing, said:

"I could not say, while defendant has occupied the building, I have done anything more than have the repairs made that my attention was called to by Mr. Wright. He has called my attention to some, but I could not tell when they were, except they were likely prior to 1889.

"*Q.* Will you state to the jury the nature of the complaint that he made, and what repairs you have made prior to 1889?

"*Mr. Pound:* I object to it. The repairs he don't remember about.

"*Court:* Answer the question. (Exception for plaintiff.)

"*A.* I could not say anything in particular in regard to that matter. If anything was the matter, Mr. Wright notified me.

"*Court:* Well, was there anything the matter?

"*A.* Not that I know of.

"*Court:* Then, why didn't you say so? You were asked for a fact."

The question by the court was not a proper one. The witness only knew what Wright had told him.

Mr. Wright, sworn for defendant, testified that he had positively prohibited the use of the elevator, except by certain employés. On cross-examination, being asked who represented him in his absence, counsel asked who had charge "in an emergency." "*Court:* You are asking him about facts. Every man is supposed to have control of his own business." The question was a proper one, and the remarks of the court improper.

A witness for defendant had testified to the condition of the hook referred to when found. Continuing, the witness said:

"The bending of the hook may have happened in the fall. It might have been bent and I not able to detect it.

"*Q.* (on cross-examination). The only way you could tell was by a pair of calipers, and measuring before and after the accident?

"*A.* Yes, sir.

"*Court:* Is there any evidence that any one ever struck that hook to bend it?

"*Witness:* No, sir. (Question objected to as incompetent and immaterial, and exception for plaintiff.)"

Juries very properly place much reliance upon what is said by the trial judge, and courts should direct, rather than influence respecting the facts by intimations during the progress of the trial. When plaintiff's case as made is such, in the opinion of the court, as to warrant the direction of a verdict for defendant, the direction should be given, and in such case the expression of the court's opinion cannot prejudice, but, upon a refusal to direct a verdict, the court should refrain from any expression upon the facts calculated to convey to the jury the court's opinion of the case as made.

The superintendent, a witness for defendant, was asked by defendant's counsel:

"*Q.* Do you know whether his [plaintiff's] duties required him to do anything with the elevator?

"*A.* I don't think they did, sir.

"*Q.* What makes you think that way? (Objected to as incompetent. Overruled, and exception.)"

The witness then proceeded to give argumentative reasons why he thought so.

One of the building inspectors testified that the board had a code of rules upon which they operated all elevators. That code of rules was, under objection, offered and received in evidence. Counsel for defendant, referring to to said rules, then put the following:

"Now, with reference to running, 'that the speed of passenger elevators be not more than 90 feet per minute, and freight elevators not more than 60 feet per minute,' I ask you if this particular elevator was so constructed as to make this rule applicable? (Objected to as incompetent and immaterial. Objection overruled, and exception.)"

Plaintiff was recalled after the defendant had rested, and asked if, in the interview at plaintiff's house, the witness Hanmer said anything about what happened to him at the elevator.

"*Court:* What was the question you asked Hanmer?

"*Mr. Pound:* The question was whether or not, at the interview he designated at plaintiff's house, after the plaintiff was injured, if he did not say he came near having an accident himself a few days before, and he would not have anything to do with the elevator, or words to that effect; and he denied having said anything of that kind, and I simply desired to ask this young man as to that; Hanmer having testified that the elevator was in good shape."

The court excluded the testimony. These rulings were erroneous, so clearly so that it is unnecessary to discuss them.

One of the defendant's employés was asked:

"What can you say as to orders prior to the accident with reference to the use of the elevator?

"*A.* It has always been, since I have been in the house, known to be against Mr. Wright's orders, and against all orders, for anybody to get on the elevator at any time."

A similar question was put to other witnesses, and answered under objection. This was error. *Fox v. Color Works,* 84 Mich. 676.

One of defendant's witnesses had testified that plaintiff, after the injury, had done the same work as he had before the injury. On cross-examination, plaintiff's counsel asked witness if it was not a fact that one Stackpole, immediately upon plaintiff's coming back, assisted him with his work, and was so delegated to do. The court, of its own motion, excluded the testimony. This was proper cross-examination, and the court erred in excluding it.

Plaintiff's counsel requested the court to instruct the jury as follows:

"4. If the jury find that the defendant's superintendent, Mr. Furlong, directed plaintiff to remove the refuse, and the plaintiff was proceeding so to do in a careful and in the usual manner, and was injured by the negligence of the defendant and its agents in not exercising ordinary care in having safe machinery, then plaintiff is entitled to recover.

"5. The notice given by Mr. Wright, even if believed to have been given, would not absolve the defendant from the exercise of ordinary care to provide for the safety of its employés, if Mr. Furlong overrode the same by having plaintiff and others, not specially designated, assist in running the elevator.

"6. There is no evidence in this case that the plaintiff was doing, or was about to do, other than load the elevator with goods to be moved by the direct commands of his superiors in defendant's employ."

These requests were not sufficiently covered by the instructions given. Defendant Wright had testified that he had committed the exclusive use of this elevator to certain designated persons, had prohibited all other employés from its use, and had notified all his employés

not to ride upon it; and a large portion of the testimony was to this effect. There was no testimony tending to show that plaintiff was riding upon the car, or went upon it for that purpose. The court alluded to the claim of the defendant—

"That this young man had no right to use the elevator; that it was no part of his duty or his work down there to use the elevator as he was using it at the time of the accident."

Plaintiff, under the circumstances, was entitled to specific instructions upon these points.

The court, in the instructions given, alluding to the detached rope, said:

"Now, when did that become detached? Was it from the fall, or was it detached at the time the plaintiff in this case attempted to put the second barrel upon it? If it was, gentlemen of the jury, detached at that time, it was his duty to have noticed it. If he saw the cause of the fall of the elevator, and that rope was detached at the time he put these barrels on, then there could be no recovery in this case."

Again:

"The other question, as to the negligence necessary for the plaintiff to show, I have referred to, and also the question of his action as to contributory negligence. Now, as I have said, if this hook was unfastened at the time he put these barrels upon the elevator—

"*Mr. Pound:* And could be discerned, I suppose.

"*Court:* There is no doubt it could be discerned. That I would leave to you as a question of fact. It was there in plain sight. The hook was attached to the bottom of the elevator. It was one of the ropes that raised up the elevator, and it was his duty to observe it. It being there in plain sight, *under the evidence in the case, he would not be justified in attempting to use as dangerous a piece of machinery as this elevator, without ascertaining whether it was in proper condition to be used.* And if it came through this hook being unfastened,—if that was what caused the fall,—and he could have seen that, *and did not see it,* then I say to you, as a matter of law, he is not entitled to recover on

the ground of contributory negligence. In a large business, such as the defendant is carrying on, it has to operate through its employés, and every one of its employés must use the senses with which God has endowed him in performing the duties devolved upon him by reason of his employment."

Counsel for plaintiff, during the charge, asked the court to say to the jury that—

"If, while the plaintiff was putting on the barrels, the hook and eye were connected up to the time, and they separated in putting them on, he would be under no fault."

The court then said to the jury:

"If this hook was in the eye at the time this barrel was rolled upon there, and the pin was in the shaft at the time, so that the plaintiff in this case could not see it, and on this account the elevator fell, then he is not liable for contributory negligence; nor would the defendant be liable in this case, if he had used ordinary care in keeping that machinery in proper condition. If that pin had become loosened through the use of that elevator in the morning, so that no one of the employés, in the exercise of ordinary care and diligence in the use of the machine, could have discovered it, and the accident came in that way, then the defendant is not responsible. It is one of those unforeseen and unavoidable accidents that the law does not hold anyone responsible for."

In the instructions given, the court in effect placed the burden of inspection upon plaintiff. This was error. Plaintiff had a right to assume that the apparatus was reasonably safe for use. He assumed such risks as were incident to the use, and such as arose from apparent defects, or defects of which he had knowledge, in the machinery or apparatus. He is held to a degree of care in the use corresponding with the danger involved, but he was not charged with the care or inspection of this elevator, and did not assume any risk incident to defects which were not apparent, and of which he had no knowledge.

There was, however, another theory upon which plaintiff

was entitled to go to the jury, viz., that the brake was defective. There was no testimony in the record that this brake had been repaired after the witness Perry left defendant's employ, nor was there any testimony tending to show that plaintiff was aware of this condition. The court's instruction was calculated to impress the jury with the idea that it was the duty of plaintiff to ascertain and discover the existence of this defect, and, further, to exclude the question of the existence of this defect from consideration by the jury.

The question as to whether the elevator was in a defective condition, and that defective condition occasioned the fall, should have been left to the jury under all the facts. If the jury became satisfied that the elevator was defective, and that such defective condition caused the accident, they should next determine, under proper instructions, whether the defendant had exercised reasonable care and supervision. The law imposes upon the master a duty to the servant not only to provide reasonably safe machinery and appliances, but to keep the same in reasonable repair. This duty is a continuing one. The degree of care to be exercised must be in proportion to the dangerous character of the appliance, and the liability to accident and injury in the absence of such care. Where, as here, a defect in the apparatus is liable to endanger the life of the servant, the master is bound not only to repair upon the discovery of the defect, but he is held to supervision, examination, and inspection. Negligent ignorance of defects is equivalent to actual knowledge of their existence. A master cannot be said to have exercised reasonable care who relies upon servants, charged simply with the use of appliances, to report defects, or who relies upon accidents to disclose them.

Defendant is not bound to show that no defect existed in fact, but only that it has performed the duty which the law imposes upon it, viz., that of reasonable care, super-

vision, and examination. It is urged that the elevator had been used shortly before this accident to carry a much greater load; but it does not follow that the elevator at the time was in good order. A time comes when defects manifest themselves. The key pin and the detached rope may or may not have been the cause of the accident. But, conceding that the key pin falling out was the primary cause, yet key pins do not shoot out from their proper place into space in a moment. They become loose gradually. The machinery was in a defective condition after the key pin started, and it may have started some time before. So, too, of the hook and eye. It does not follow that the condition of the hook was produced just at the moment that the car started upon its fall. If it had been sprung so as to admit of the escape of the eye, that may have been done a week or month before that time. The object of inspection is not to see whether the key pin and the rope eye are out, for these conditions manifest themselves, but it is to ascertain whether either is liable to get out. The master will not be permitted to screen himself from liability because he did not in fact know that the key pin was loose, and liable to fall out, or that the hook had been sprung, and the eye likely to get out, if he has omitted such reasonable and proper inspection by competent persons as might have disclosed such condition. *Cooper v. Railroad Co.*, 24 W. Va. 37. Ignorance on the part of the master will be negligence in a case in which any proper inquiry would have obtained the necessary information. 2 Thomp. Neg. 996. If the master knew of its defective condition, or ought to have known, and the servant did not know, and was not bound to know, of its defective condition, the liability of the master—the servant being in the exercise of due care—is fixed. Id. 992.

If the elevator fell because of defective condition, and

the master fails to show reasonable care and inspection, he must be held liable, unless it be that the servant knew of the defect, or it was such an apparent defect that he ought to have known of it, or he was himself guilty of carelessness in the operation of the elevator, and thereby caused or contributed to the accident. A servant, however, who is not charged with the duty of the care, supervision, or inspection of an elevator, is only chargeable with knowledge of such defects as are apparent to ordinary observation in its use.

The judgment should, therefore, be reversed, and a new trial ordered.

---

94 299
d154 692

CORDELIA F. BLAKELEY v. NORA MOSHIER ET AL.

Mechanic's lien—Acceptance of note—Waiver.

1. A lien once waived cannot afterwards be revived; citing *Boom Co. v. Sanborn*, 36 Mich. 358.
2. Taking a note in settlement of the amount due a material-man, which does not mature until after the expiration of the 30 days within which he is required to file his claim of lien in order to make it effectual as against a *bona fide* purchaser or incumbrancer without notice, amounts to a waiver of such lien to the extent of the items then furnished.
3. In such a case, the refusal of the material-man to accept pay for materials furnished after the giving of the note, coupled with the statement that "he would collect it all together," is held a waiver of his right to claim a lien therefor.

Appeal from Kent. (Grove, J.) Submitted on briefs October 27, 1892. Decided December 23, 1892.

Bill to enforce a mechanic's lien. Defendants Moshier

appeal. Decree reversed, and bill dismissed. The facts are stated in the opinion.

J. M. Jamison, for complainant, contended:

1. It has been held by courts that taking a mortgage is a waiver of the right to claim a lien, but this Court has never held that taking a note was payment of the demand, in the absence of an agreement that it should be received in payment; citing *Gardner v. Gorham*, 1 Doug. 507; *Hotchin v. Secor*, 8 Mich. 494; and that the taking of a note or a chattel security does not operate as such waiver, see *Howe v. Kindred*, 42 Minn. 433; nor does it affect the right to a lien that the note has been discounted, provided it can be produced and delivered up at the trial; citing *Clement v. Newton*, 78 Ill. 427.

C. O. Smedley, for appellants, contended for the doctrine of the opinion.

DURAND, J. The bill of complaint was filed in this cause for the purpose of enforcing a mechanic's lien, under Act No. 216, Laws of 1885.

It appears that the defendant Etta B. Kindra was the owner of certain premises in the city of Grand Rapids, and in January, 1891, she commenced the erection of a house thereon. Her husband was a contractor and builder, and he had the management of the work, and the purchasing of the materials therefor. On January 6, 1891, he went to the store of complainant, who is a hardware merchant in Grand Rapids, and purchased a quantity of hardware to be used in the construction of the house, and from time to time thereafter, and until June 24, 1891, he purchased from complainant, and used in the construction of the house, including the purchase of January 6, 1891, hardware to the amount of $146.02. On July 16, 1891, the complainant, after insisting upon the payment of the amount due to her from the defendant Etta B. Kindra for this amount and other indebtedness, but not receiving it, consented to take, and took from her, a note due in 30 days,

for $247. The items which were included in the amount of the note were $99.35, the balance of an old account, $1.63, bank discount, and the $146.02 above mentioned. After the taking of the note, two other small bills of hardware were purchased, amounting to about $17, one on August 10, and the other on August 12, 1891.

On August 17, 1891, the defendant Etta B. Kindra sold and conveyed the house and premises in question to the defendant Nora Moshier, and on the same day Nora Moshier conveyed an undivided one-half interest therein to the defendant George K. Moshier, her husband. At the time Nora Moshier purchased this property she employed a competent person to examine the abstract of title, and to ascertain if any liens existed against the property. After a careful examination, no incumbrances or liens were found of record except certain mortgages, about which there is no dispute. Everything was done by her that was possible to be done to ascertain the true state of the title to this property, and after satisfying herself, and also being advised, that no liens or incumbrances existed against it, other than the mortgages above mentioned, she purchased the property in good faith, and paid full value therefor.

At the time the note given by Mrs. Kindra matured, the complainant's son, who was managing the business for her, was away from home. On his return, which was some time during the first part of September, 1891, he ascertained that the note had not been paid. He then had a talk with Mr. Kindra relative to the payment of the note, and, failing to get his pay on the note from him, he then went and tried to induce Mrs. Moshier to pay it, but she also declined.

About the time, or soon after, the note became due, the defendants claim that Mr. Kindra, the husband of the defendant Etta B. Kindra, acting for her, went to the complainant's son, who, as before stated, was in charge of the

complainant's business, and offered to pay to him the amount of the purchases that were made subsequent to the giving of the note, but that he refused to accept such payment, saying that "he would collect it all together." This is disputed by the complainant, but we think all the circumstances in the case tend to corroborate the testimony of Mr. Kindra in this particular, and tend to prove that he offered to pay the amount, as testified to by him. The note had been given for all purchases which were made prior to its date; he had made an affidavit that all bills for material were paid; the property had been sold; and it is but fair to presume that he was trying to pay the indebtedness incurred subsequent to the giving of the note, so that no lien could possibly attach to the property. We are convinced from the evidence that, about the time the note became due, he offered to pay for the materials which were purchased after the note was given, which payment was refused by the complainant.

The complainant filed her notice of claim of lien on September 23, 1891, and on October 20, 1891, she filed this bill of complaint to enforce its payment.

Several questions were raised on the hearing of the cause in the court below, and the same questions are raised by the record and the briefs of counsel in this Court, which need not be noticed, for we are satisfied that by the complainant's action in taking the note for this and all other indebtedness due from Mrs. Kindra, and by her refusal to accept payment for the materials subsequently purchased, she has waived her right to claim a lien on the property in question. At the time the note was given, on July 16, 1891, no materials had been purchased for this house since the 24th of the preceding June. The complainant, under the lien law of 1885, is undoubtedly a *material-man*, and as such she would have to file her claim of lien, if she intended to claim one, within 30 days after the last of the

materials were furnished, or some time before July 24. The note was made payable in 30 days from its date. It would therefore not become due until August 16,—more than 20 days after the 30 days in which she could claim a lien, if she intended to claim one, would have expired. By the taking of the note she put the payment of the claim off for more than 20 days after she could file a claim of lien that could be enforced as against a *bona fide* purchaser or incumbrancer, without notice, whose rights had accrued at any time during those 20 days. The note was not given for the amount of the materials purchased for this house alone, but there was included in it, as stated, an old account of $99.35 and $1.63 bank discount, and no attempt to claim a lien was made until after payment of the note was refused. Under these facts it seems to us clear that, at the time the note was given, the complainant did not intend to claim a lien on the premises in question, but that, on the contrary, the taking of the note was intended to be, as it was in fact, a settlement of all accounts between the parties to that date; and no lien could thereafter attach for the amount of these accounts, or either of them, no matter what subsequent dealings the parties might have, for a lien once waived cannot afterwards be revived. *Au Sable River Boom Co. v. Sanborn*, 36 Mich. 358.

The complainant, having refused to accept payment for the materials which were purchased subsequent to the giving of the note, has waived her right to a lien for the amount of those materials also. She having waived her right to claim a lien for the amount of the materials purchased up to the time the note was given, and that amount having become the mere debt of the defendant Etta B. Kindra, her refusal to accept payment for the materials purchased after that time, when payment was offered, together with the reason given by her, that "she would collect it all together," must be held to be a waiver of her

right to claim a lien therefor, and an election on her part to treat the whole amount due her as the personal debt of the defendant Etta B. Kindra.

The decree of the court below should be reversed, and a decree entered here dismissing complainant's bill of complaint. The defendants Nora Moshier and George K. Moshier, being the only defendants who have appealed, will recover the costs of both courts.

The other Justices concurred.

---

94 304
117 491

94 304
124 563

94 304
138 148

94 304
e152 696

IN THE MATTER OF THE ESTATE OF NEHEMIAH D. STEBBINS, DECEASED. EMILY D. R. STEBBINS v. ABRAM L. STEBBINS, EXECUTOR, ETC.

Jury trial—Appeal from probate court—Will—Omission of provision for child—Evidence.

1. The fullest latitude has been given, both by the profession and the courts, to How. Stat. § 6783, which provides that upon an appeal from the probate court, if there be any question of fact to be decided, issue may be joined thereon under the direction of the court, and a trial thereof had by jury; and the absolute right of a party to have all questions of fact in this class of cases tried by a jury was determined in *Grovier v. Hall*, 23 Mich. 11, and such right may well be considered as settled in this State.
2. The question whether or not a testator omitted to provide in his will for certain of his children unintentionally or by accident or mistake is one of fact, which the contestant has a right to have submitted to a jury, whose verdict in his favor is conclusive, if there is any competent evidence submitted to them upon which to base it.
3. A clause in a will by which the testator bequeaths to his son the family Bible, if he desires it, and, if not, providing that it may be put into the hands of a granddaughter, naming her, and a clause directing the division of his books and clothing

among his brothers and their families, but giving the granddaughter the privilege of selecting from them, if it is her wish, cannot be said, as matter of law, to make provision for the granddaughter, within the meaning of How. Stat. § 5810, which provides that when any testator shall omit to provide in his will for any of his children, or for the issue of any deceased child, and it shall appear that such omission was not intentional, but was made by mistake or accident, such omitted heir shall have the same share in the estate as if the testator had died intestate.

4. The omission to provide may be shown to have been unintentional either by the terms of the will or by extrinsic parol testimony; and the relation of the testator to the objects of his bounty and to the omitted heir, as well as his intelligence, his mental and physical condition, and the circumstances connected with the making of the will, are all proper matters for consideration by the jury.

Certiorari to Wayne. (Gartner, J.) Argued November 3, 1892. Decided December 23, 1892.

Petition, by an heir alleged to have been unintentionally omitted from the will, for the assignment to her of an interest in the testator's estate. The executor brings *certiorari*. Judgment affirmed. The facts are stated in the opinion.

Hoyt Post, for respondent (petitioner in *certiorari*), *F. H. Canfield*, *C. I. Walker*, and *Walker & Walker*, for the several legatees of decedent, contended:

1. In support of the claim that it was error to submit the question of fact to the jury, counsel cited *Gott v. Culp*, 45 Mich. 265; *Mower's Appeal*, 48 Id. 441; *Brinsmade's Appeal*, 52 Id. 537; *Wisner v. Mabley Estate*, 70 Id. 277.

2. In all the cases which have been cited under the various statutes, however they may disagree as to minor questions, and even where the statute casts the burden on the party seeking to uphold the will of proving that the omission was intentional, there is not a single one, nor has one come to our attention during quite an extended examination, that holds a child or grandchild *who is mentioned by name* in the will to be entitled

to a share as in case of intestacy under any of the statutes. All the decisions in cases where demandant is named hold that the statute does not apply, whether any legacy at all is given or only the most insignificant one,—as, of course, it could not, if the principles laid down in the cases cited are to govern, because, if the statute was intended only to reach cases in which the child or grandchild was forgotten or overlooked, the naming of the person in the will, especially in a holographic will, ought to be quite conclusive; citing, in support of these propositions, *Terry v. Foster*, 1 Mass. 146; *Wild v. Brewer*, 2 Id. 570; *Church v. Crocker*, 3 Id. 17; *Wilder v. Goss*, 14 Id. 357; *Tucker v. Boston*, 18 Pick. 162; *Wilson v. Fosket*, 6 Metc. 400; *Bancroft v. Ives*, 3 Gray, 367; *Converse v. Wales*, 4 Allen, 512; *Prentiss v. Prentiss*, 11 Id. 47; *Wilder v. Thayer*, 97 Mass. 439; *Ramsdill v. Wentworth*, 101 Id. 125, 106 Id. 320; *Buckley v. Gerard*, 123 Id. 8; *Peters v. Siders*, 126 Id. 135; *Hurley v. O'Sullivan*, 137 Id. 86; *Merrill v. Sanborn*, 2 N. H. 499; *Smalley v. Smalley*, 70 Me. 545; *Payne v. Payne*, 18 Cal. 291; *Block v. Block*, 3 Mo. 408; *Guitar v. Gordon*, 17 Id. 408; *Bradley v. Bradley*, 24 Id. 311, 320; *Beck v. Metz*, 25 Id. 70; *Hockensmith v. Slusher*, 26 Id. 237; *McCourtney v. Mathes*, 47 Id. 533; *Pounds v. Dale*, 48 Id. 270; *Gerrish v. Gerrish*, 8 Ore. 351; *Moon v. Estate of Evans*, 69 Wis. 667; *Case v. Young*, 3 Minn. 209; *Prentiss v. Prentiss*, 14 Id. 18.

3. On the question of the admissibility of parol evidence to show that the omission was intentional, counsel cited *Wilson v. Fosket*, 6 Metc. 400; *Converse v. Wales*, 4 Allen, 512; *Ramsdill v. Wentworth*, 101 Mass. 125; *Buckley v. Gerard*, 123 Id. 8; *Peters v. Siders*, 126 Id. 135; *Lorings v. Marsh*, 6 Wall. 350; *Lorieux v. Keller*, 5 Iowa, 196; *Coulam v. Doull*, 4 Utah, 267; S. C. 133 U. S. 216; *Case v. Young*, 3 Minn. 209; *Whittemore v. Russell*, 80 Me. 297.

B. M. Thompson, for petitioner, contended for the doctrine of the majority opinion.

DURAND, J. This case was brought into this Court by *certiorari*, but, as the whole record was brought up, together with the exceptions taken at the trial, it was argued by counsel and heard as if brought here by writ of error.

Emily D. R. Stebbins, who is a granddaughter and one of the two sole heirs at law of Nehemiah D. Stebbins, who died testate, petitioned the probate court of Wayne

county, asking for an order assigning to her one-half of his estate, on the ground that he had omitted to provide for her in his will, and that such omission was unintentional and accidental. Her claim is based upon section 5810, How. Stat., which provides that—

"When any testator shall omit to provide in his will for any of his children, or for the issue of any deceased child, and it shall appear that such omission was not intentional, but was made by mistake or accident, such child, or the issue of such child, shall have the same share in the estate of the testator as if he had died intestate."

The probate judge denied the petition, and, upon an appeal being taken to the circuit court for the county of Wayne, the question of fact was tried by a jury, who found that the omission to provide for the petitioner was unintentional and accidental. Thereupon the circuit judge caused a judgment to be entered that the petitioner was entitled to the same share in the estate of the testator as if he had died intestate. The circuit judge refused to decide whether he would consider the verdict of the jury as conclusive on the facts or advisory merely, but submitted to them these two questions of fact:

"1. Was the omission to provide in the will in question for Emily D. R. Stebbins intentional?

"2. Was the omission to provide in the will in question for Emily D. R. Stebbins due either to accident or mistake?"

The jury answered the first question in the negative and the second question in the affirmative.

The learned counsel for the estate insist that it was error for the circuit judge to submit these questions of fact to the jury, and that it was not such a case as should have been tried before a jury, but that it appeals rather to the equitable jurisdiction of the court, and should therefore be decided by the court without the intervention of a jury. We cannot agree with this contention The

question was purely one of fact. It had no reference to the proper or improper exercise of any discretionary power vested in any one, or to any accounting by any one, or considerations as to the propriety of any charges or investments, or as to the allowance of compensation, or any other matter which appeals to equitable principles, or to the equitable consideration of the court, under the rule laid down in *Gott v. Culp*, 45 Mich. 275. No such question arose in this case, nor anything approaching it, and the question of whether or not the testator omitted to provide in his will for his granddaughter unintentionally or by accident or mistake is as clearly a simple question of fact as is that of whether or not the testator was of sound and disposing mind when he executed the will, or whether he signed it at all, or whether or not he had been unduly influenced to sign it, or whether or not the attesting witnesses had signed it in the presence of the testator and of each other.

Section 6783, How. Stat., provides that upon an appeal from the probate court the circuit court—

> "Shall proceed to the trial and determination of the question according to the rules of law; and, if there shall be any question of fact to be decided, issue may be joined thereon under the direction of the court, and a trial thereof had by jury."

The fullest latitude has been given to this statute in this State both by the profession and the courts, and the absolute right of a party to have all questions of fact in this class of cases tried by a jury was settled by this Court in *Grovier v. Hall*, 23 Mich. 11. This rule has never been seriously questioned in any of the numerous cases which have been in this Court for review, and we may well consider this right to be fully settled in this State.

The testator, in one clause of his will, after giving to his son, Theodore W. Stebbins, the sum of $500, also gave him the large family Bible, if he desired it, and, if not,

then this clause states that it may be put into the hands of the granddaughter, Emily D. R. Stebbins. By another clause he gave his books and clothing to be divided among his brothers and their families, but gave the granddaughter referred to the privilege of selecting from them if it was her wish. It is insisted, because the testator thus mentioned the granddaughter in his will, that he did provide for her, within the meaning of the statute referred to, and that she is thereby, and as a matter of law, precluded from claiming to the contrary. We do not think so. There is nothing in the language of either of the clauses in which her name is written, nor in the character of the gifts thus conditionally bestowed, and which at most are to be treated as mere mementos, which, as a matter of law, in any way concludes her from claiming that the testator unintentionally or by mistake or accident omitted to provide for her. While it would undoubtedly be true that she would be concluded by the terms of the will itself, if the testator had made some provision for her of a substantial character, however insignificant it might be in amount, but which showed that he intended it as a provision, and not as a keepsake merely, yet we cannot hold as a matter of law that these trifling articles, whose only real value to the petitioner is based upon the fact that they are personal relics of the testator, and which were evidently so considered by him, if he gave any thought to it at all, are such a provision as is meant by the statute under which the petitioner in this case claims. On the contrary, it is a question to go to the jury with the other facts in the case, and from which they might determine, if they chose, that, the testator having remembered her even as he did, it was not his intention to do more for her, and that his failure to provide further for her was intentional.

It is also contended that the evidence in the case did

not warrant the jury in finding that the omission to provide for the petitioner was accidental or unintentional. Upon this point we are limited in our authority. The only question we can consider is whether there was any evidence at all submitted to the jury from which they could find as they did, and not whether that evidence is sufficient in amount or character to satisfy us. The jury were the sole judges of the weight to be given the testimony, and they alone were entitled to decide upon whether a preponderance of the proof was with the petitioner.

There was testimony in the case in reference to the circumstances attending the making of the will; the relationship and condition of the parties; the affection existing between them; the extent and frequency of their visits and correspondence; the age of the testator; his mental and physical condition, as evidenced not only by the will itself, and by the peculiarity of some of its provisions, but also by his feeble condition about the time the will was made, and his death shortly afterwards. This class of testimony was all competent for the jury to consider, and from it they had a right to determine the questions submitted to them by the court. The relation of the testator to the objects of his bounty and to this granddaughter, as well as his intelligence, his mental and physical condition, and the circumstances connected with the making of the will, are all proper matters for consideration by the jury. *Buckley v. Gerard,* 123 Mass. 8; *Converse v. Wales,* 4 Allen, 512; *Ramsdill v. Wentworth,* 101 Mass. 125; *Peters v. Siders,* 126 Id. 135; *Prentis v. Bates,* 93 Mich. 234, and cases cited. And the omission to provide may be shown to be unintentional either by the terms of the will or by extrinsic parol evidence. *Wilson v. Fosket,* 6 Metc. 400.

The jury, therefore, having some evidence upon which to base their verdict, we have no right to disturb it, for we must hold in this case, and do hold, that the verdict

of the jury was not advisory merely, but conclusive upon the facts submitted to and decided by them.

It follows that the judgment must be affirmed, with costs.

LONG and GRANT, JJ., concurred with DURAND, J.

MONTGOMERY, J. I agree fully with my Brother DURAND that it was competent to try the question presented in this case by a jury, and that the verdict of a jury stands precisely as in any civil case, and is conclusive in cases where the testimony offered has any legal tendency to support the conclusion reached. But, in my opinion, there was not a *scintilla* of evidence which had a legitimate tendency to establish the fact that the intervener was omitted by mistake or accident.

It may be conceded that the contention of the learned counsel for the petitioner is correct, that the bequest of keepsakes to her does not amount to provision, within the meaning of the statute. Does the mere failure to make such provision create a presumption that the testator omitted to make provision for her by accident or mistake? The language of the statute (section 5810, How. Stat.) ought to be a sufficient answer to this question. The statute declares:

"When any testator shall omit to provide in his will for any of his children, or for the issue of any deceased child, *and* it shall appear that such omission was not intentional, but was made by mistake or accident, such child, or the issue of such child, shall have the same share," etc.

The statute does not, it seems to me, admit of a construction which shall dispense with a showing of either of the two requisites before one for whom provision is omitted shall be entitled to take. These two prerequisites are: *First,* an omission to provide; *second,* that it shall be made to appear that the omission was by mistake. The statutes in some of the other states, under which it has

been held that the burden of proof is placed upon those disputing the claim of the child omitted, differ from our statute in this very particular. Nor do the cases of *McCallum v. McKenzie*, 26 Iowa, 510, and *Railroad Co. v. Wasserman*, 22 Fed. Rep. 872, sustain the contention of intervener's counsel on this point. These are cases which deal with the rights of an heir born after the making of the will. It may well be held that a presumption would arise that the father would make provision for such child, and that the omission to make provision was not intentional. This presumption arises, not from conditions existing at the time the will is executed, but from a change in conditions occurring thereafter. How, then, shall it be made to appear that the omission was accidental, by merely showing, as in this case, that the deceased was friendly with petitioner; that they kept up a correspondence; that he was an old man, though mentally competent to make a will? If this be enough, then it becomes at once the province of juries to administer estates according to their own sense of right. This statute was not intended to abridge the rights of a man to do what he will with his own. On the contrary, where it is established by the probate of the will, as in this case, that the deceased is competent, and has in fact executed the will, the legal presumption is that the instrument expresses his wishes. This presumption can be overcome, not by showing what, according to some people's sense of right, would have been a proper disposition of the property, but by showing facts and circumstances which lead to a conclusion that the testator had other views or other purposes than those expressed, or did not have the purposes expressed in the will, but that by accident or mistake the provision for the child was omitted. This could, of course, be made to appear by declarations of the testator evidencing a purpose to provide for the omitted child, or by declarations

made after the will, showing that he supposed he had provided for such child; and perhaps in other ways. But it cannot, in my judgment, be done by simply showing a state of facts which would show it to have been eminently proper to provide for such child, without fixing a limitation upon the power of disposal of one's property by will which the statute gives no color for.

I think the finding of the jury should be reversed.

McGRATH, C. J., concurred with MONTGOMERY, J.

HENRY M. SNYDER v. HENRY W. HITCHCOCK.

94 313
114 227

Statute of limitations—Action upon judgment—Assumpsit.

Under How. Stat. § 8736, an action of *assumpsit* may be brought upon a circuit court judgment at any time within 10 years after its entry.

Error to Ionia. (Smith, J.) Submitted on briefs November 3, 1892. Decided December 23, 1892.

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

John G. Patterson and *Edwin H. Lyon*, for appellant.

William O. Webster, for defendant.

MONTGOMERY, J. This is an action of *assumpsit* upon a judgment rendered in the circuit court June 25, 1881. The declaration by which the suit was commenced was filed June 13, 1891. The defendant interposed a plea of the statute of limitations. On the trial the court directed a judgment in favor of the defendant, on the ground that

the action, being in *assumpsit*, was barred by the statute.

The only question to be determined is whether the general statute of limitations relating to actions of *assumpsit* controls, or whether a special statute of limitations exists, applicable to all actions brought upon judgment.

The general statute of limitations (section 8713) provides that—

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

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

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

"4. All actions of *assumpsit* or upon the case, founded upon any contract or liability, express or implied."

Section 8719 provides:

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

Section 8736 provides:

"Every action upon a judgment or decree heretofore rendered, or hereafter to be rendered, in a court of record of the United States or of this State, or of any other state of the United States, shall be brought within ten years after the entry of the judgment or decree, and not afterwards."

It is contended by defendant's counsel that as the present action is in *assumpsit*, the provision of the section first above quoted—that all actions of *assumpsit* or upon the case, founded upon any contract or liability, express or implied, must be brought within six years—controls. It has been held in numerous cases by this Court that the form of action governs in determining whether section

8719 or section 8713 applies in fixing the period of limitation. *Sigler v. Platt,* 16 Mich. 206; *Goodrich v. Leland,* 18 Id. 110; *Christy v. Farlin,* 49 Id. 319; *Sherwood v. Landon,* 57 Id. 219; *Avery v. Miller,* 81 Id. 85. But in none of these cases was the action upon a judgment, and there was no provision of the statute which fixed the term of limitation except the provision which depends upon the form of action. By section 8736, however, the term of limitation is fixed in every action upon a judgment or decree, without reference to the form of action chosen. It seems to me altogether clear that under this section the action was in time, and that the plaintiff is entitled to recover.

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

The other Justices concurred.

---

94 315
s 106 46
94 315
118 238

GEORGE HANLEY v. GEORGE W. BALCH ET AL.

Corporations—Fraud of director—Action at law by minority stockholder.

1. The general rule is that a stockholder's suit must be brought in a court of equity, but there are exceptions to this rule; citing *Kimmell v. Geeting,* 2 Grant, Cas. 125; *Kimmel v. Stoner,* 18 Penn. St. 155.
2. The right of the directors of a corporation to execute a mortgage to secure its indebtedness does not include the right of a member of that corporation, who is under obligations to carry the corporation paper, to introduce a dummy into the board of directors, and, confederating with him, direct the execution of a mortgage to another confederate, to whom the paper has been assigned for the purpose of avoiding these obligations, wrecking the corporation, and appropriating its

assets; nor does the right of a creditor to foreclose include the right of such confederate fraudulently to obtain the security for the purpose named, and to foreclose it in furtherance of that purpose.

Error to Wayne. (Reilly, J.) Argued November 3, 1892. Decided December 23, 1892.

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

Dickinson, Thurber & Stevenson, for appellant, contended:

1. The true rule is stated in *Detroit v. Dean,* 106 U. S. 537, where it is said that a single stockholder can sue the corporation for the protection of his individual rights, but, when he sues to protect the corporate rights against third parties, he must show a refusal of the directors to act.

Griffin, Warner & Hunt, for defendants, contended:

1. We are unable to see what application *Detroit v. Dean,* 106 U. S. 537, has to the case. There is no pretense, however, that any application was made to the directors to act. It would hardly do in any case for a stockholder to assume that the directors would not act. Even if it were their inclination not to act, they might well repent upon a demand made by a stockholder. But we had supposed, from carefully reading the declaration, that the injury alleged to have been occasioned was based upon the promises and agreement made to Ryan, and the loss in value of his stock which had been brought about by their non-fulfillment, and not any wrong done to the corporation. Moreover, the case is not applicable otherwise. Ryan had full opportunity to protect the rights and property of the corporation in the mortgage foreclosure proceedings, if they were being invaded. He knew perfectly well that nothing wrong was being done, and therefore he made no attempt in that direction. Still further, if plaintiff has any such rights as is contended for by reason of being a stockholder or holding stock of Ryan, he should proceed in a court of equity. He surely has no standing in a court of law.

2. The declaration is framed upon the theory that the defendants have been guilty of a conspiracy, for which the plaintiff is entitled to recover. It was decided in this State in 1878 that, as a matter of pleading, a charge of conspiracy in the decla-

ration is mere surplusage, and is only matter of aggravation, and that conspiracy can be proved even if not charged; citing *Hamilton v. Smith*, 39 Mich. 222; and no action lies for simply conspiring to do an unlawful act; it is doing the act itself, and the resulting damage to the plaintiff, which afford the ground of the action; citing *Kimball v. Harman*, 34 Md. 407; *Sheple v. Page*, 12 Vt. 519; *Lee v. Kendall*, 56 Hun, 610; *Verplanck v. Van Buren*, 76 N. Y. 259; *Brackett v. Griswold*, 112 Id. 457; *Van Horn v. Van Horn*, 52 N. J. Law, 284; *McHenry v. Sneer*, 56 Iowa, 649.

3. If an act be lawful, the intent or motive with which it is done is immaterial; citing *Hale v. Bank*, 64 N. Y. 550; *Phelps v. Nowlen*, 72 Id. 39; *Neudecker v. Kohlberg*, 81 Id. 296.

McGRATH, C. J. This is an appeal from a judgment sustaining a demurrer to a declaration.

The declaration alleges that in February, 1891, John T. Ryan was the owner of the stock and plant of certain knitting works, valued at from $100,000 to $160,000, subject to a floating indebtedness of about $55,000; that, in order to provide for the payment of this floating indebtedness and continuing the business, a corporation was organized March 2, 1891, with a capital stock of $50,000, and the stock, plant, and assets were turned over to the corporation. The names of the stockholders, with the number of shares held by each, were as follows: Frank Howard, 1,000; George C. Balch, 1,200; George Hanley, 2,300; Isaac Mendelson, trustee, 500. Mendelson represented Simon & Co. Hanley was indorser for Ryan and represented him. Howard, Balch, Mendelson, Ryan, and Simon were elected directors. Howard was elected president, and Balch secretary and treasurer. Howard and Balch obtained their interests because of their ability to carry the indebtedness, and in pursuance of a preliminary agreement to do so, and to provide the necessary funds to carry on the business. An agreement was entered into between the corporation and Howard and Balch, by the terms of which Howard

and Balch were to liquidate the floating indebtedness, and were to receive the company's notes, with 6 per cent. interest, and were to carry, renew, and extend the same for the convenience of the corporation. They were also to advance whatever further or other sums were deemed necessary by the directors to carry on the business.

Howard and Balch, in accordance with this agreement, assumed $45,000 of this floating indebtedness, and two notes of the corporation—one of $15,000 and one of $30,000—were executed by the corporation, and delivered to Balch. Simon & Co. received goods to the amount of their stock, and Mendelson assigned the shares held by him to the corporation. Howard assigned his interest and stock to Balch. Balch, by artifice, induced Ryan to readjust the shares of stock, and to assign to Thomas Balch, a brother, one share. The readjustment and this assignment gave to the Balches a controlling interest. New officers were elected. Thomas Balch became president, John T. Ryan vice president, and George C. Balch secretary and treasurer. George C. Balch, April 1, 1891, transferred the note for $15,000 to the Citizens' Savings Bank, and the note for $30,000 to George W. Balch, his father. A meeting of the board of directors was then called, and a resolution adopted, directing the execution of a chattel mortgage to George W. Balch on the stock and plant to secure the payment of said notes. George C. and Thomas Balch voted in favor of said resolution, and Ryan voted and protested against its adoption.

On April 9, 1891, before the maturity of either of said notes, George W. Balch filed a bill in the circuit court for the county of Wayne for the foreclosure of the chattel mortgage, and attached to it was an affidavit of George C. Balch, setting forth—

"That he had read the said bill of complaint, and knew

the contents thereof to be true, as to the said indebtedness; that he was familiar with the value of the mortgaged property, and believed that, unless carefully handled, and sold to the best advantage, it would not be sufficient to pay the said mortgage debt in full; that the said business was being run at a loss of from $50 to $75 a day; that the said corporation had but little money on hand, and was then practically without means to carry on its business; and that, if such business were to be permitted to be carried on under their present circumstances, the said complainant's mortgage security would be impaired and depreciated."

Service was had upon George C. Balch, as secretary and treasurer. A receiver was appointed April 16, 1891. The bill was taken as confessed May 19. A sale of the property was ordered and made on May 19, and on May 20 a final decree of foreclosure and for deficiency was entered, from which it appears that the property was sold to the Citizens' Savings Bank and George W. Balch for $39,500, out of which $1,037.29 was paid to the receiver and $38,462.71 was applied upon the indebtedness, leaving a deficiency of $7,172.12.

The declaration alleges that the introduction of Thomas Balch into said firm, the readjustment of the shares of stock, the change made in the officers of said firm, the transfer of said notes, the resolution directing the execution of the chattel mortgage, the execution of said mortgage, and the sale of the property were acts done in pursuance of a fraudulent scheme to relieve George C. Balch from his obligations, to appropriate the assets, goods, and plant, and deprive plaintiff of his interest in said corporation, and that defendants unlawfully conspired together to accomplish the desired purposes.

We think the declaration sets forth a cause of action. The right of the directors of a corporation to execute a mortgage to secure its indebtedness does not include the

right of a member of that corporation, who is under obligations to carry the corporation paper, to introduce a dummy into the board of directors, and, confederating with him, direct the execution of a mortgage to another confederate, to whom the paper has been assigned for the purpose of avoiding these obligations, wrecking the corporation, and appropriating its assets; nor does the right of a creditor to foreclose include the right of such confederate fraudulently to obtain the security for the purpose named, and to foreclose it in furtherance of that purpose.

The general rule is that a stockholder's suit must be brought in a court of equity, but there are exceptions to this rule. *Kimmell v. Geeting*, 2 Grant, Cas. 125; *Kimmel v. Stoner*, 18 Penn. St. 155. In the present case the result is practically a dissolution of the corporation. There is nothing left but the shell. The value of the corporate property is susceptible of ascertainment. Plaintiff represents the only stockholder not involved in the conspiracy, and his interest is a matter of computation merely. This is not an action of trover, but of case for damage done plaintiff.

The judgment is reversed. Defendants will have 20 days in which to plead, and the record will be remanded.

The other Justices concurred.

J. IRVING PEARCE AND WELCOME HYDE v. ELISHA C. WARE.

Sale—Fraudulent representations—Rescission—Equity—Parties.

1. Where a purchaser of land combines with the agent of the owners to buy the land of the principals, and to take advantage of the agent's betrayal of his trust, and profit by a reduction from the price which he had previously agreed with the agent to pay, he is not in a position to complain of the misstatements of the agent in regard to the land, nor will equity relieve him if, under such circumstances, he is deceived by the agent.
2. Where a vendee secures a portion of the purchase price by his note and a mortgage on the land, and the securities are assigned to one of the two vendors, who receives enough of the cash payment to make, with the securities, his half of the purchase price, and he brings a suit to foreclose the mortgage, and the vendee defends on the ground of alleged fraudulent representations by the vendors and their agent, who negotiated the sale, and who was to share equally with the vendee in the profits realized from the land, no decree of rescission can be made until the other vendor and the agent are made parties to the foreclosure suit.

Appeal from Marquette. (Stone, J.) Argued November 1, 1892. Decided December 23, 1892.

Bill to foreclose a mortgage. Defendant appeals. Decree affirmed. The facts are stated in the opinion.

Ball & Hanscom, for complainants, contended:

1. Statements of value are usually matters of opinion upon which the purchaser is not entitled to rely; citing *Medbury v. Watson,* 6 Metc. 246, 260; *Manning v. Albee,* 11 Allen, 520; *Ellis v. Andrews,* 56 N. Y. 83; *Van Epps v. Harrison,* 5 Hill, 63; and exaggeration in matters of opinion does not constitute fraudulent misrepresentation; citing *Dawson v. Graham,* 48

Iowa, 378; *Gordon v. Butler*, 105 U. S. 553; *Holbrook v. Connor*, 60 Me. 578; *Uhler v. Semple*, 20 N. J. Eq. 291.

2. The statements that much of the land was good farming land; that it had nearly $30,000 worth of hemlock on it, and that it could be sold in Escanaba or Marquette any day for $25,000, even if made, were matters of opinion, and could not have been otherwise understood. At least, it would need to be shown that such opinions were absolutely without foundation, intended to be relied on, and were knowingly false; citing *Collins v. Jackson*, 54 Mich. 186.

Dallas Boudeman, of counsel for defendant, contended:

1. Where a transaction which has been entered into has been induced by fraud, it is voidable at the instance of the defrauded party; citing *Carroll v. Rice*, Walk. Ch. 373; *Galloway v. Holmes*, 1 Doug. 330; *Jewett v. Petit*, 4 Mich. 508; *Dunks v. Fuller*, 32 Id. 242.

2. Where a transaction, such as this one, rests upon fraud or false representations, it can be avoided by the party defrauded, even though the principal, or all of the joint contracting parties, did not fully know of all the means used for the deception, or did not know of the representations. The court in such a case would place all parties *in statu quo*, and if any of the parties are innocent of any moral wrong they are not financially injured; citing *Gardner v. Ogden*, 22 N. Y. 327; *Conkey v. Bond*, 36 Id. 427; *Taussig v. Hart*, 58 Id. 425; *Bain v. Brown*, 56 Id. 285; *Tewksbury v. Spruance*, 75 Ill. 187; *Bischoffsheim v. Baltzer*, 20 Fed. Rep. 890; *Adams v. Sayre*, 70 Ala. 318; *Marsh v. Whitmore*, 21 Wall. 178; *Ruckman v. Bergholz*, 37 N. J. Law, 437; *Francis v. Kerker*, 85 Ill. 190; *Steinbach v. Hill*, 25 Mich. 78.

3. It may be claimed by complainants that the statement of these parties as to the value of the lands is but the expression of opinion. This is not true in such a case as this; citing *Wright v. Wright*, 37 Mich. 55; *Nowlin v. Snow*, 40 Id. 699; *Holcomb v. Noble*, 69 Id. 396; *Manning v. Albee*, 11 Allen, 520; *Simar v. Canaday*, 53 N. Y. 298; *Burr v. Willson*, 22 Minn. 206.

Clark & Pearl (*E. M. Irish*, of counsel), for defendant.

MONTGOMERY, J. This is a bill filed to foreclose a mortgage for $8,000 given on lands in the county of Marquette

to secure a portion of the purchase price thereof. The complainant Pearce is named as trustee in the mortgage; the complainant Hyde is the real owner of the security. The defendant filed an answer, and claimed the benefit of a cross-bill, alleging that there was fraud perpetrated upon the defendant in the sale of the lands by the complainant Hyde and one Alonzo L. Foster, who, as tenant in common with Hyde, conveyed the lands to defendant.

The facts appearing by the testimony are that complainant Hyde and Foster held the legal title to the lands in question. It appears, however, that one Warrick Price was a partner with Foster in the lumber business, and was also interested with him in these lands. It is very doubtful whether Hyde knew anything of this relation, but this is immaterial, as we shall see later on. In April, 1890, Warrick Price, who had had some deal with defendant before, informed him that he knew of a good bargain in the Upper Peninsula, and that he had got the lands traded for Iowa lands, which he could sell at a large advance, and proposed to defendant that, if he (the defendant) would furnish the money, he (Price) would pay 5 per cent. on the money advanced on the Michigan lands, and divide the profits in the property with defendant, and defendant assented to this arrangement. In these negotiations Price stated that the Michigan lands could be bought for $20,000. Subsequent negotiations resulted in a meeting between Price, Foster, complainant Hyde, and the defendant. Defendant testified that previous to this he had said to Mr. Price that, before closing any deal, he desired to see the owners of the land; to quote his own language, "I says I want to see these principals in Michigan which you claim to represent." On the occasion of the meeting of the three, it is claimed that Hyde and Foster misrepresented the character and value of the lands in question; and because of these misrepresentations, and of the misstatements of Price, defendant

now seeks to rescind the contract, and defeat the foreclosure of the mortgage in question.

Defendant testified as follows:

"He came to me after these gentlemen came down that morning, and said he had made them an offer of $2,000 less than he had agreed to sell me. I had agreed to put it at $20,000 the day before. When Mr. Hyde and Mr. Foster came down, Mr. Price came in, and told me he had pressed them down $2,000; it was $2,000 our way; instead of being $20,000, he had bought it of them at $18,000. I says, 'All right. You have won $2,000 for us.' He says, 'Yes, I did that. That goes to profit and loss account.'"

It is contended by defendant that complainant Hyde is bound by the representations of Price, for the reason that he has profited by the fraud which it is claimed Price perpetrated upon defendant. But it seems to us that the defendant does not occupy a position entitling him to maintain this claim. If the defendant's testimony as to Price's position as agent is true, then it amounts to this: He (defendant) combined with Hyde and Foster's agent to buy the land of the principals, and to take advantage of the betrayal of trust by the agent, and profit to the extent of $2,000 reduction from the price which he had previously agreed with the agent to pay. If, under these circumstances, he was deceived by the agent, a court of equity will not relieve him.

We think, aside from the false statements of Price, if any, the fraud charged in the cross-bill is not made out by a preponderance of evidence.

But another reason why the relief prayed in this answer cannot be granted is that the proper parties are not before the court. After the sale to Ware, Foster indorsed the note, which was given to Foster and Hyde jointly, to Hyde. The consideration for the land was $18,000, of which $10,000 was paid in cash. One thousand dollars of this, and the note, were retained by complainant Hyde, and the

other $9,000, in cash, was paid to Foster. Before a rescission of this transaction could be decreed, Foster was a necessary party, and upon defendant's theory Price was also a necessary party. No attempt was made by defendant to bring in these parties; and upon the case and pleadings, as they stood, no decree of rescission could be properly made by the court below.

The decree will be affirmed, with costs.

The other Justices concurred.

WILLIAM L. WORTHINGTON, ADMINISTRATOR, ETC., v. WILLIAM JAMES MAJOR AND ELIZABETH S. MAJOR.

Equity practice—Submission of questions to jury—Release of mortgage—Mental capacity of mortgagee.

1. In the submission of any special question to a jury, whether the verdict is to be regarded as final or as advisory only, the same rules of evidence should be observed as in the ordinary jury trial; otherwise, the verdict should have little weight.[1]
2. Upon the facts in this case (see opinion), a discharge of mortgage, executed by the mortgagee a few hours before her death, is set aside upon the grounds of undue influence and incapacity to make it.

Appeal from St. Joseph. (Loveridge, J.) Argued December 1, 1892. Decided December 23, 1892.

Bill to set aside a discharge of mortgage. Complainant appeals. Decree reversed, and one entered here setting aside the discharge. The facts are stated in the opinion.

[1] See *In re Estate of Stebbins, ante,* 304.

R. R. Pealer and *George E. Miller*, for complainant.

Boudeman & Adams, for defendants, contended:

1. The testimony introduced by the complainant fails to show that Margaret S. Kershaw, at the time she executed and delivered the paper in question, was mentally incompetent so to do, or that she was unduly influenced by any one to do it.
2. As to the value of expert testimony, counsel cited *Rutherford v. Morris*, 77 Ill. 397; *Ferguson v. Hubbell*, 97 N. Y. 507; *Van Wycklen v. City of Brooklyn*, 118 Id. 424; 1 Whart. Ev. § 722; *Beaubien v. Cicotte*, 12 Mich. 501.
3. It must be conceded that no greater mental capacity would be required to make the gift here made than to have made a will; citing *Van Deusen v. Rowley*, 8 N. Y. 358; *Crum v. Thornley*, 47 Ill. 192; 2 Schouler, Pers. Prop. §§ 59, 141.
4. In this State the Court has held that, to make a testator competent, he must have sufficient active memory to collect in his mind, without prompting, the elements of the business to be transacted, but need not have the same perfect and complete understanding and appreciation of all these matters in all their bearings that a person in sound and vigorous health of mind and body would have; citing *Kempsey v. McGinniss*, 21 Mich. 141, 142; and, whatever a person's mental disorder may be, the instrument will not be set aside unless such disorder is shown to have been sufficient to affect, and that it did affect, the making of the instrument; citing *Fraser v. Jennison*, 42 Mich. 206.
5. This Court has held that undue influence, in order to affect a business transaction,—a will, a deed, or a gift,—must be such as to destroy all freedom of action at the time of the particular transaction; citing *Maynard v. Vinton*, 59 Mich. 139; *Potter's Appeal*, 53 Id. 106; *Latham v. Udell*, 38 Id. 238; *Pierce v. Pierce*, Id. 412; and, further, that influence by moderate persuasions, or arguments addressed to the understanding, or an appeal to the affections, is not undue influence; citing *Schofield v. Walker*, 58 Mich. 96.
6. This transaction was, no doubt, a gift *causa mortis*. If Mrs. Kershaw had recovered, the law would have revoked the gift, and she could have recovered the property; citing *Emery v. Clough*, 63 N. H. 552; *Kiff v. Weaver*, 94 N. C. 274; *Parcher*

v. Savings Institution, 78 Me. 470; *Taylor v. Henry*, 48 Md. 550; *Dickeschied v. Bank*, 28 W. Va. 340.

7. Where a party draws out in an examination under the statute a part of the facts regarding a transaction, and offers and puts them in evidence, the statutory exclusion of the witness is waived, and so the courts have held; citing *Smith's Appeal*, 52 Mich. 415; *Beardslee v. Reeves*, 76 Id. 661.

8. Where the relations between the parties are only natural relations, the law does not apply the doctrine of constructive fraud, and impose upon the claimant the burden of showing the fairness and good faith of the transaction; citing *Jenkins v. Pye*, 12 Pet. 253; *Howe v. Howe*, 99 Mass. 88; *Sawfley v. Jackson*, 16 Texas, 584; *Cowee v. Cornell*, 75 N. Y. 100, 101.

McGRATH, C. J. This is a bill to set aside the discharge of a mortgage executed by complainant's decedent a few hours before her death, on the ground of undue influence and incompetency.

On December 31, 1888, William James Major executed to his sister, Margaret S. Kershaw, a mortgage for $14,689.77, and, as collateral thereto, assigned to her bank stock, the par value of which was $2,000. In February, 1890, Margaret S. Kershaw and her mother were living in a small cottage on the farm owned by defendant, and about 80 rods from defendant's residence. John S. Major, another brother, and the only other member of the family, owned an adjoining farm, and resided about five-eighths of a mile east from William's residence, which was about one mile and a quarter from the village of Centreville.

On Saturday, February 8, 1890, Margaret and her mother were both indisposed, and were brought to William's residence. The doctor was called in that day; visited them again on Sunday, on Monday at noon, and also at about 6 o'clock in the evening, remaining until 7 o'clock, and pronounced her much worse; was called again Tuesday morning at 5 o'clock, and found her failing rapidly; called again at 11 o'clock, and found her in a comatose condi-

tion; and at 1 o'clock she died. The discharge of the mortgage purports to have been executed on Monday, the 10th, and it is alleged to have been executed at about 10 o'clock at night. The discharge contains the following recitation:

"And now, being sick, and not expecting to live, and being desirous of giving to said William James Major all my worldly possessions, to the exclusion of all my other relatives, and all worldly possessions being represented by said mortgage, and the notes accompanying it, I therefore hereby fully discharge said mortgage and the said indebtedness, and release the said William James Major from all liability upon the same, meaning to make full release of all claims I have against said William James Major, and choosing this method, instead of willing said mortgage and notes to him; and I therefore hereby declare that said mortgage is fully paid, satisfied, and discharged."

The only persons present at the execution of the paper were William J. Major, the attorney who prepared it, and one William Meyers. William J. Major testifies that he had been involved for some time in a legal controversy with one Todd, his brother-in-law, with whom he had been in partnership, and that a bill had been filed against him claiming a large indebtedness; that his sister had frequently spoken to him with reference to this mortgage, saying that she wished that the Todd matter could be arranged so that she could discharge the mortgage; that—

"During the afternoon [on Monday] she spoke again in regard to this mortgage and the Todd matter, and she said she really wished it could be fixed up. She said that she wanted to send down for the attorney, naming him, and have him come up and have him make a release of the mortgage and an assignment of the bank stock. I told her I thought that the Constantine Church case was in progress; that he couldn't come until evening. The doctor went away that evening, just as we were ready to sit down to supper. After supper I went back into the room, and she said, 'You haven't sent for the attorney, have you?' I told her, 'No; I have not.' She said, 'I wish you would

send for him right away.' So I went out and told the hired man to hitch up the horse; that I wanted him to go over to town. I went back, and wrote a note to Meyers for him to see the attorney, and to have him bring up a release of mortgage. Just then John S. came, and I gave the note to Ernst, and sent him to Meyers. John came in and spoke to my sister, and was about going away, and did not sit down. She said, 'Stuart, stay awhile, and sit down and talk a little.' He sat down, maybe 10 minutes, and then went out into the sitting room. He stayed perhaps half an hour."

That Meyers and the attorney came between 9 and 10 o'clock that evening; that the attorney prepared the discharge, and his sister executed it, and also executed an assignment of the bank stock.

The attorney says that Meyers came for him; that he was busy in the office; that he sent word to Meyers that he was busy; that, after he got through with his business,—

"I don't know what time it was, but I judge it was half past nine,—I went out into the other office, and found Mr. Meyers, and we rode up to the house. I went into the bedroom. She put out her hand. I took it. I said, 'Mrs. Kershaw, you are sick, and I did not hear of it until this evening.' She said, 'Yes; I am quite sick;' and she said, 'I sent for you.' I said to her, 'What do you want?' and she said, 'I want to discharge the mortgage that I hold against James, and I want to give him what I have got.' That is as near as I can recollect it. I don't remember the exact language. I said to her, 'Mrs. Kershaw, would it not be better to make a will?' And she said, 'I don't want to make a will. I prefer to discharge the mortgage.' And I had some other talk with her, quite a considerable of it, and the talk was probably five or ten minutes. I then said to her, 'Very well, I will draft the paper;' and I stepped out. I said to her, before, that I would have to have the mortgage, and she said, 'James will get you the mortgage.' I stepped out into the other room, and said, 'Mr. Major, Mrs. Kershaw wants me to discharge the mortgage that she holds against you. Where is it?' James gave me the mortgage. I took the mortgage, and sat down and drafted the discharge, and,

after I had drafted it, I took it up and went into the bedroom where Mrs. Kershaw was, and I read it to her, and asked her if that was what she wanted, and she said, 'That will do.' That is the language she used, as near as I can recollect. 'Very well, then,' I said, 'you sign it;' and I handed the paper to her, and I got a pen and some ink and a book, and gave her the book, or I put it down, and she started to write, lying down. She said, 'I can't write my name lying down. You will have to lift me up.' She then sat up in bed, with her feet out of bed, her book on her lap, and signed her name to the paper. I recollect that she didn't sign it very well, and she looked up with a kind of a smile, and said, 'Is that all right?' And I looked at it, and said, 'Yes.' I said to her, 'You acknowledge this?' And she said, 'I do;' and then Mr. Major, I think, handed me the bank stock. I didn't notice what it was. I hadn't brought an assignment for that. It was all on the blank upon the back, filled out. I said to Mrs. Kershaw, 'Here is the bank stock. Do you want to assign that?' She said, 'Oh, yes,' and wrote her name on that, and handed it back to me; and I said to her, 'What shall I do with these papers?' She said, 'Deliver them to Mr. Major,' or 'Deliver it to James.' Meyers signed as a witness, and I handed the bank stock to James, and left the mortgage and notes lying on the table."

Meyers says that he went to the attorney's office,—

"And he came out and told me he would be ready in about half an hour. I went over home and stayed half an hour, and then went back, and the attorney was not quite ready then, and I waited a little while. When I got up there, I helped unhitch the horse, and when I went into the house the attorney was busy writing. Afterwards he took a paper that he had been writing, took it into the bedroom where Mrs. Kershaw was lying on the bed, and read it to her. He afterwards came out and acknowledged it, and I think asked me to sign that, and I did. I was standing near the door of the bedroom, heard him read it over to her, and saw her sign the paper. As near as I can remember, he asked her whether that was what she wanted, and the reply that I heard was, it was."

John S. Major testifies that he and his wife called at

William's house on Monday evening about 7 o'clock, and remained two or three hours, until half past 9 o'clock, standard time; that, on the way home, they crossed the railroad track, and the train due at 9:30 crossed the highway in front of them; that, when he drove into the yard of William's house, he saw Ernst, the hired man, hitching a horse to a buggy; that, after they had gone into the house, "Ernst came into the house in a few moments, with his cap and overcoat on, and he waited a few minutes as if waiting for orders, and they told him to put his horse out, that he need not go now;" that, at about 8 o'clock, the hired man went to his room. He further testifies that he and his wife offered to stay all night, and assist in the care of the sick, but their offer was declined. He denies that during his stay his sister volunteered any remark to him. John's wife corroborates him in this story.

Ernst is sworn, and says that on Monday evening, when John S. Major came to the house, he (Ernst) was hitching up the horse to the buggy; that defendant William had told him to do so; that, after hitching up, he tied the horse to a post, and went into the house, and asked what they wanted in town; that Mrs. Major told him to go and hitch the horse in the barn; that he did so; that he did not take the harness off, because Mrs. Major said they wanted it ready; that he then went into the house, and went to his room, and remained there some time; that afterwards William Major called him, and told him to hitch the horse to the buggy, and go down and get Meyers and the attorney; that he first went to Meyers' house, and Meyers got into the buggy, drove down street, and hitched the horse in front of Wolfe's Bank; that Meyers then went to the office of the attorney; that one Wilson, the village marshal, came along at that time, and asked what they were there for, at that time of night, and Meyers said, "we are over for the doctor." Wilson,

the village marshal, testifies to this same conversation, and says that it occurred just as Meyers and Ernst drove up to hitch the horse in front of Wolfe's Bank, and he fixes the time at "close to 10 o'clock;" that the stores were all closed, the lights all out, and the hacks had returned from the depot, where they had gone to meet the 9:30 train; that Meyers went towards the attorney's office.

Meyers was an old employé of William's, and William, in his testimony, at first strives to create the impression that the note was sent to Meyers because Ernst did not understand English, but, after some evasion, he admits, upon cross-examination, that the purpose in sending for him was that he should witness the execution of the instrument. If the witnesses John S. Major and his wife tell the truth, then it was about 10 o'clock, local time, when they left William's house, and it is not true, as William says, that they remained but a few minutes. If what John S. and his wife say relative to the direction of Ernst's movements is true, and Ernst's testimony is correct as to his detention, then William's story is not true, and there was an evident design to clothe what was done with secrecy. If what Ernst and the marshal say is true, as to Meyers' statement that they were after the doctor, then it would seem that he, too, was in the plot, and had been enjoined to secrecy. If the statement alleged to have been made by William to his sister in the afternoon of Monday, when asked why he had not sent for the attorney, was true, it showed a familiarity with the attorney's movements. If it was not true,—and the attorney says that the case was at issue, but not on trial, on that day,—then it discredits William's statement as to the whole of the alleged interview with his sister. If what John says as to when he left the house on Monday night, and the village marshal's statement as to when he saw Meyers and Ernst, are also true, or if either is correct, and it is true that Meyers and Ernst

waited some time for the attorney, it must have been at least 11 o'clock before the papers were prepared and ready for execution. If William's statement that his sister, as early as Monday morning, had expressed a desire to discharge this mortgage, there seems to be no valid reason given why an opportunity was not given her. It does not seem probable that the mortgagor would delay the execution of the expressed desire of the mortgagee to discharge a mortgage amounting to $14,700 until midnight of that day. This was Monday night. The doctor had informed the family that the sister was much worse. The mother lay seriously ill in another room. The sister dies the next day, and the mother the day after. It was not improbable that John and his wife should proffer their assistance for the night, and it was but natural that it should be accepted. There is nothing improbable in the story told by John and his wife, either as to what occurred or as to the sister's condition on Monday evening; and upon all points they are corroborated, except by William and his wife. They tell substantially the same story as to decedent's condition on Monday evening that the physician tells, and as to the incidents of that evening the testimony of Ernst and Wilson supports them. John S. and wife were there on Tuesday morning. Both say that Margaret was unconscious; that, while there, the mother remarked that men had been there during the night, and that she didn't know whether it was right or not; that this statement she repeated, and Mrs. William J. Major, who was present, said "she didn't know what made mother talk so, unless it was the medicine they were giving her." John S. testifies that he knew nothing of the discharge of the mortgage until after the appointment of the administrator, who, when he was collecting *data* to prepare the inventory, was told by William of the discharge.

Mrs. Kershaw died of double pneumonia. Dr. Sabin,

her physician, says that at his first visit, on Saturday, he found her temperature high, pulse rapid, tongue covered with a white coat, having a yellowish tinge; that she had had a chill; that she had a peculiar dusky, haggard, and tired look; expectoration rusty; an oppressed condition of the nerves; breathing difficult; the right lung was congested, the back part especially; complained of pain in her chest, and difficulty in respiration; and which confirmed the idea that she had inflammation of the lungs, with a high fever.

"Thought there were malarial complications, and addressed myself to the removal thereof.

"On Sunday, at 9 A. M., visited her again; found the bilious complication somewhat relieved, but the lungs no better; the inflammatory action was extending, and more advanced than I had anticipated; auscultation revealed crepitation in the left lung, and difficulty in the respiratory murmur in the right; the difficulty was increasing; half of the left lung and a quarter of the right was inflamed; temperature high; pulse rapid; breathing not so labored, but shallow; her general appearance was better, but progress had been made in the lung complication; no material change in the nervous system; same haggard look and tired expression; expressed pain in breathing in her left side, and a sense of fullness in the right.

"Monday noon found her in bed; she was worse; two-thirds of the left lung was involved, and three-quarters of the right was solidified; discovered crepitation in the right lung; inflammation extending more rapidly in the right lung; there was more duskiness in the face, and an inclination to drowsiness; the sputa had changed from a rusty to a prunish color, denoting an extension of the inflammatory process, more blood in the air cells, and destruction of lung tissue; the breathing and respiration had increased rapidly, probably 20 per cent.; the face was flushed; there were nervous symptoms, and very much more prostration than on the previous day; talked with her considerably; told her that I desired to arrange, and did arrange, a paper in a pan so as to catch the sputa, and explained that I wished to observe the changes therein, and she understood me.

"On Monday evening, about six o'clock, I found her failing; the prune-colored expectoration was more fluid in

its character, indicating an advance of the inflammation, and destructive tendency; the respiration was rapid, shallow, and labored; temperature very high; pulse rapid, and not so strong as on the previous visit that day, indicating failure; she had more of the cyanotic or dark bluish look; the stupor was increasing; examined the sputa, and she asked, 'Is that what you expected?' That is all the talk I had with her. I was there for an hour, but had no conversation.

"*Q.* Did she reply to your inquiries or talk?

"*A.* Well, not much. When I could get her attention, she did reply to some, I think. It was more difficult to get her attention and arouse her, but I think she understood. Her replies would be short, because of difficulty and pain in talking. After answering the questions that were put to her, she would fall back in a stupor or sleep. She spent most of the time in a sleep or stupor, because she only talked when you talked to her. It was somewhat difficult to arouse her. I told the family, soon after I saw them that evening, that she was very bad.

"On Tuesday morning, at five o'clock, I found her much worse, and failing evidently; the crepitation was more marked over the left lung, and she was perspiring; there was a dusky look, and some little coldness on the surface; the left lung was probably not much more involved, but the right was thoroughly filled up; there was but a quarter of the left lung fit for duty; her breathing was very rapid, and there was a rattling over the chest; there was an opening and shutting of the nostrils in breathing; she breathed probably 60 times a minute; the expectoration indicated a breaking down of the lungs; the stupor was very much worse, and more marked; I remained there until eight o'clock."

During this visit it does not appear that the patient spoke a word. At noon the doctor visited her again, and found her in a comatose state. She died at 1 o'clock. Death resulted from the filling up of the lungs with mucus, in the progress of the disease.

Counsel for both sides seem to have studiously avoided any questions to this witness as to the competency of the patient on Monday evening, or at any later period, to comprehend a matter of the nature of that involved. Dr.

Sabin had said, however, that, so far as he had any conversation with the patient, her answers appeared to be intelligent and rational. A number of prominent physicians were called by each party as experts, but the opinions given by them were predicated upon entirely dissimilar hypotheses. The hypothetical question submitted by the counsel for defendants, after reciting the course of the disease, and the symptoms up to and including the last visit made by the doctor on Monday, concluded as follows:

"That during the afternoon of that day she requested that an attorney be sent for, for the purpose of discharging a mortgage which she held against her brother, with whom she had always been on intimate terms, and on Monday evening she again made the same request; that the attorney was sent for, and arrived about nine o'clock in the evening, and when he came she told him that she wished to discharge the mortgage in question, and to give everything over to her brother, and the attorney drew the paper, discharging the mortgage, and assigning the property to her brother; that it was read over to the patient, and she said it was as she wanted it, and she signed and acknowledged the paper, and the notes and mortgage were then turned over to her brother, by her direction; that up to this time the patient had shown no delirium in her conversation, but had always talked rationally. Under those circumstances, what would you say as to whether or not, in your opinion and judgment, the patient was mentally competent to do the business which she did transact, and to fully understand and appreciate its import?"

Invariably the answer was, "I should say the patient was competent," or, as one of the witnesses said, "I should think from the whole question, and especially the latter portion of it, she was competent to do any business." It was hardly necessary to call an expert to answer that question. The real inquiry here is whether the testimony of the witnesses who testify to the occurrences after the brother left on Monday evening is credible; whether the capacity indicated by this testimony was consistent with

the condition of the patient at 7 o'clock Monday evening, and at 5 o'clock Tuesday morning.

The experts all agree that the lungs are a chemical laboratory, where the blood is purified and made nutritious, and the carbonic acid gas is thrown out and off; that this carbonic acid gas is poison; that, in the event of the inability of the lungs to perform their functions, the carbonic acid gas accumulates in the system, depresses the vital forces, and poisons the nerve centers and the brain; that in some cases delirium results, in others, stupor; that stupor indicates brain poisoning; that the cyanotic or dusky hue of the countenance indicates the carbonization of the blood, and that the supply of oxygen is insufficient and the condition serious; that there are three stages to the disease; that stupor or delirium manifests itself first in the second stage; that the third stage is the process where suppuration begins, in which there is congestion, hepatization, and softening; that this softening may result in rotting, or it may turn towards health; that the testimony of Dr. Sabin showed a steady progress of the disease through these several stages, and that the patient had reached the last stage on Monday evening; that her condition at that time was serious; that the condition Tuesday morning indicated a constant progression of the disease; that the symptoms clearly indicated the gradually increasing stupor, until it reached the comatose state which, Dr. Sabin describes, existed at 11 o'clock on Tuesday.

None of the expert testimony even suggests the probability of a cessation of this progression, of this increasing stupor, between the hours of 7 o'clock Monday evening and 5 o'clock Tuesday morning. There is a seeming conflict in the testimony of the experts as to the mental comprehension of the patient on Monday evening, but this conflict is largely due to the failure to get before the

witnesses the same conditions. It is clear from the testimony of Dr. Sabin that the stupor had advanced on Monday evening so that it was difficult to arouse her; so that the brain was inactive; so that there was no affirmative operation of that organ, and the mind was incapable of suggestion. The testimony as to the transaction four or five hours later indicates not alone capacity to comprehend, but activity of the brain, and exertion, inquiry, request, suggestion, dictation, and direction on the part of the patient. There is no pretense that she was aroused, her condition suggested to her, asked if she desired to make any disposition of her property, or even this disposition suggested to her; but it is alleged that she, of her own volition, gave minute and explicit directions, and exercised a choice as between a will and the discharge. The doctor informed defendants on Monday evening of her condition, but no word of inquiry is addressed to him by them as to her capacity to do what it is alleged by them that she had contemplated and had suggested a desire to do.

It is only from the defendants, Meyers, and the attorney sent for to prepare this discharge, that there is any testimony indicating mental activity after the doctor's visit on Monday evening. William J. Major says that, at 9 o'clock Tuesday morning,—

"I raised her up, and gave her the medicine, and she said she would like to sit up a little while. I bolstered her up with pillows in the bed, and she asked me if I thought she was dangerously sick; and I told her in reply that anybody with pneumonia was always dangerously sick, but I said to her I hoped she would be better in a day or two. She said, 'You look sick, too. You have been up two or three nights, and you ought to go to bed and sleep, for you look sick.'"

Elizabeth S. Major says that on Tuesday morning she conversed with her long enough—

"So that she inquired how mother rested, and if I had turned the bed head towards the north. When they came home the head of the bed was towards the west, and when mother occupied the room we always had it towards the north, because mother felt so much more at home with the bed standing that way. She asked if I had slept any during the night, and if I was tired."

This testimony is utterly irreconcilable with that of the physician, and with all the testimony as to the probabilities. Dr. Sabin had been instrumental in separating the mother and daughter on Monday noon. The two were much attached. The doctor came on Monday evening to see both patients. Not a word is said by her to the doctor as to her mother's condition. Her mother had been living with her, and it does not appear that her mother had any property, at least sufficient for her support. She is alleged to have conveyed away all she possessed, without reference to the attachment she had evinced for her mother, and without any reference to her. At 7 o'clock Monday evening the doctor leaves the patient in the condition described by him. Four or five hours thereafter the discharge is executed. At 3 o'clock Tuesday morning her condition becomes alarming to defendants. Ernst is sent away to notify John, and to bring the doctor and Meyers. The doctor gets there at 5 o'clock. He finds no unusual condition, but that the disease and stupor and weakness have progressed during the hours since the last visit. He remains until 8 o'clock. At 9 o'clock, William alleges, the patient asks to sit up in bed, and asks if he thinks she is dangerously sick; tells him that he looks sick, and that he ought to go to bed. At 11 o'clock the doctor returns, and finds her in a state of coma, and, as he terms it, "about dead."

Wherever the testimony of defendants respecting the condition of Margaret S. Kershaw after 5 o'clock Monday

evening relates to a period of time covered by the observation of the physician, it is in conflict with that of the physician; wherever it relates to a proximate time, it is entirely inconsistent with that of the physician; and wherever it relates to a more remote period, it is not only utterly inconsistent with that of the physician, but it is opposed to all the probabilities. The circumstances attending this midnight transaction, and the atmosphere of concealment that pervaded it, throw suspicion upon the entire transaction. The testimony associates with this transaction conduct on the part of the beneficiaries incompatible with a belief in her mental capacity. It discloses conduct on the part of one of the witnesses, who claims to have been present, indicating a participation in the efforts to conceal. The instrument prepared for signature recites more than was necessary in a simple discharge, and its preparation indicates a desire to protect the beneficiary, and puts into the mouth of this dying woman words that she had not uttered.

A jury was called at the instance of complainant, and the question of undue influence and incompetency submitted, and the jury found for defendants. A motion was made to set the verdict aside, and the circuit judge granted the motion, treated the case as having been heard without a jury, and dismissed the bill. It is urged that the finding of the jury, and the conclusion of the court below, should be regarded in the consideration of the case here. How far the conclusion of the court below was affected by the finding of the jury we are not advised. A large mass of incompetent testimony was calculated to influence and bias the jury; was admitted under objection; and, in spite of objection, the court treated the trial as a chancery hearing, and declined to interfere. In the submission of any special question to a jury, whether the verdict is to be

regarded as final or as advisory only, the same rules of evidence should be observed as in the ordinary jury trial; otherwise, the verdict should have little weight.

The decree of the court below is reversed, and a decree entered here for complainant, setting aside the said discharge of the mortgage; and the record will be remanded for further proceedings, relating to the foreclosure of said mortgage. The rights of the wife can be fully protected in that proceeding. Complainant will be entitled to costs.

The other Justices concurred.

CAROLINE KORNETZSKI, ADMINISTRATRIX, ETC., v. THE CITY OF DETROIT AND THE DETROIT CITY RAILWAY.

Municipal corporations—Defective streets—Contributory negligence—Driving on street railway track.

The primary purpose of a street-car track is not travel by the general public, but use by the street-railway company, and a person driving upon it must be deemed to have assumed the ordinary risks attending such use, one of which is held to be the dropping of a wheel into a rut outside the rail, worn by such frequent dropping of wheels.[1]

Error to Wayne. (Reilly, J.) Argued November 4, 1892. Decided December 23, 1892.

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

John J. Speed, for appellant.

[1] See *Rascher v. Railway Co.*, 90 Mich. 413.

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

Haig & Yerkes, for plaintiff.

McGRATH, C. J. Plaintiff's intestate, while driving upon Mack street, in Detroit, was thrown from his wagon, March 15, 1890, and killed.

Mack street is unpaved, the roadbed is narrow, and the Detroit City Railway had laid its track in the center of the street during the previous summer, at which time the grade of the highway had been conformed to the grade of the railway track. It was but about eight or ten feet from the track to the ditch on either side of the highway. The highway outside of the track was in a very bad condition, due to an open winter, and to the fact that the travel when upon the roadway was confined to narrow limits. To avoid that portion of the roadway outside of the track, the track bed was driven upon, and the wagon wheels would frequently drop outside of the rails, causing a succession of ruts just outside of the rails, and driving the earth away from the stringers upon which the rails were laid, so that in some places the track was several inches higher than the street grade. Plaintiff's intestate was picked up from the roadway, beside his wagon, in an unconscious condition, and died within a few moments. His wagon was used for carrying furniture, and the driver's seat was quite high. Deceased had evidently been driving along on the street-car track, and one of the front wheels had left the track, and dropped into a rut, which was from six to twelve inches deep. The horse had evidently stopped as his driver fell, as the wheel was still in the rut when deceased was picked up. The accident occurred in the day-time, when the condition of the street and of the track, and the liability of the wagon wheels to leave the track and drop into one of these ruts, were apparent.

While the street-car track occupied the street, its primary purpose was not travel by the general public, but use by the street-railway company, and a person driving upon it must be deemed to have assumed the ordinary risks attending such use. The evidence clearly shows that the danger was an ordinary one incident to the use of the track for driving purposes, and one that was open to observation. Under the circumstances, the plaintiff's intestate must be deemed to have himself taken the chances, and plaintiff cannot recover. It is unnecessary, therefore, to consider the other questions raised.

The judgment is reversed, and no new trial ordered, with costs of both courts to appellant.

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

MONTGOMERY, J. (*dissenting*). I think that, under the circumstances of this case, the question of the contributory negligence of plaintiff's intestate was properly submitted to the jury. See Elliott, Roads & S. 470; *Harris v. Township of Clinton*, 64 Mich. 447.

LEO AUSTRIAN & COMPANY (A CORPORATION) v. NATHAN SPRINGER.

94 343
142 s 10

94 343
f158 634

Sale—Contract—Authority of agent—Custom—Evidence—Damages.

1. The procurement by a traveling agent of an order for goods, signed by the orderer, in which the prices and date of shipment are specified, supplemented by a paper signed by the agent and delivered to the orderer, acknowledging the ordering of the goods, describing them, and giving prices and time of shipment the same as in the order, creates a contract for the sale of the goods.

2. Parties dealing with an agent have a right to presume that his agency is general; citing *Methuen Co. v. Hayes*, 33 Me. 169; *Trainer v. Morison*, 78 Id. 160.

3. The presumption is that one known to be an agent is acting within the scope of his authority; citing *Inglish v. Ayer*, 79 Mich. 516.

4. Evidence of persons who have dealt with the principal through the agent is competent to show the character of the agency; citing *Heffron v. Armsby*, 61 Mich. 505; *Haughton v. Maurer*, 55 Id. 323; *Gallinger v. Traffic Co.*, 67 Wis. 529.

5. The authority of the agent must depend, so far as it involves the rights of innocent third persons who have relied thereon, upon the character bestowed, rather than the instructions given; citing 1 Amer. Lead. Cas. 567, 568; *Griggs v. Selden*, 58 Vt. 561; *Insurance Co. v. Pierce*, 75 Ill. 426; *Packet Co. v. Parker*, 59 Id. 23; *Inglish v. Ayer*, 79 Mich. 516.

6. Whatever attributes properly belong to the character bestowed upon an agent will be presumed to exist, and they cannot be cut off by private instructions of which those who deal with the agent are ignorant; and among those attributes is the power to do all that is usual and necessary to accomplish the object for which the agency was created; citing Mechem, Ag. § 347; *Tobacco Co. v. Jenison*, 48 Mich. 459, 462.

7. Agents sent out by manufacturers to solicit orders are held out to the trade as having authority to act according to the general usage, practice, and course of business conducted by such manufacturers through such agents; and the question of what is usual or necessary to be done by such agents is ordinarily for the jury.

8. A general custom, so well settled and notorious as to raise the presumption that it was known to buyer and seller, cannot be rebutted by the testimony of the seller that he was not aware of its existence; distinguishing *Pennell v. Transportation Co.*, 94 Mich. 247, where the custom sought to be shown was confined to a particular locality.

9. The general rule is that the measure of damages for the breach of a contract to sell and deliver personal property, when the purchase price has not been paid, is the difference between the contract price and the market price at the time and place of the promised delivery; citing *Haskell v. Hunter*, 23 Mich. 305; 2 Suth. Dam. 365.

10. A question calling for the name of an association, to which the witness has referred in a letter written by him, does not necessarily call for the contents of a written instrument.

Error to Kent. (Adsit, J.) Argued November 16, 1892. Decided December 23, 1892.

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

John T. Miller and *Taggart, Wolcott & Ganson,* for appellant, contended:

1. There was no evidence of defendant's knowledge of the alleged custom, and, in the absence of such proof, the jury should have been instructed that it was their duty to find that he did not know of it; citing *Byles v. Township of Golden,* 52 Mich. 612.
2. We fail to find any authority to sustain the proposition which is involved in the charge given, viz., that, after one party to a contract receives notification from the other party that the latter is unable to perform the contract, he may wait six weeks after the date fixed as the limit for delivery before making any effort to procure the goods in question elsewhere, thereby increasing the loss to some 10 or 12 times its original amount, and then throw the entire loss upon the other party. Such, we respectfully submit, is not the law; citing *Chadwick v. Butler,* 28 Mich. 349; 2 Suth. Dam. 365-375.
3. The rule of law is that in an executory contract for the sale of personal property, if the vendor refuses to deliver, the vendee is entitled to recover as damages the difference between the contract price and the market value of the goods at the time and place appointed for delivery, and interest; citing 2 Suth. Dam. 365; Benj. Sales, § 870; *Chadwick v. Butler,* 28 Mich. 349.

Stuart & Knappen, for plaintiff, contended for the doctrine of the opinion.

McGrath, C. J. Plaintiff is engaged in manufacturing furniture at Chicago, Ill., and defendant is a manufacturer of looking-glass plates at Fuerth, Bavaria. On the 21st of March, 1890, one Frank O. Fitton called at plaintiff's office; gave to plaintiff's manager a card as agent of defendant; "said he came to sell me German looking-glass plates for importation; that he was selling for defend-

ant,—and quoted prices;" and after some negotiations plaintiff signed a written order drawn up by Fitton, which is as follows:

"[Letter heading of Leo Austrian & Co.]

"CHICAGO, March 21, 1890.

"NATHAN SPRINGER, Fuerth, Bavaria.

"*Dear Sir:* Please enter our order for following German looking-glass plates; same to be shipped as soon as possible,—not later than May 15,—and f. o. b. Chicago; freight to be prepaid to New York, and duty and freight from New York to be paid by consignee, and deducted from invoice. [List given.] Terms and discount: 60—10—2½ on plain; 60—10—5—2½ on beveled. The size 10½ by 17, beveled, being quoted at net 37½ cents, f. o. b. Chicago. Net 60 and 90 days.

"LEO AUSTRIAN & Co."

Fitton drew up, signed, and delivered to plaintiff, the following:

"[Letter head of Leo Austrian & Co.]

"CHICAGO, March 21, 1890.

"Ordered from Nathan Springer, Fuerth, Bavaria, following German mirrors, to be shipped soon as possible,—not later than May 15. Terms, f. o. b. Chicago. Net 60 and 90 days. [List of glass, prices, terms, and discounts, same as in order signed by plaintiff.]

"FRANK O. FITTON, Agent."

Fitton said he would accept the order. The discounts were from list prices. Plaintiff had a price list, on which Fitton gave the discounts.

The defendant did not deliver the goods. About May 1, 1890, plaintiff received from defendant the following letter:

"[Letter head of N. Springer.]

"FUERTH, BAVARIA, April 15, 1890.

"Mess. LEO AUSTRIAN & Co.,

"Chicago, Ill.

"*Gentlemen:* Your valued order March 21 duly to hand, and regret not to be able to execute it in the time specified. Hoping to hear from you later, I remain,

"Truly yours,

"N. SPRINGER."

Leo Austrian says:

"Upon receipt of that letter, I wrote to defendant. I suppose my letter was sent out of the office as all the mail is. The letter copy book was accidentally destroyed. Up to the 1st day of July, I expected that the order would be filled. On June 28, 1890, I placed an order in New York. They would give me no price at the time, but the order was placed subject to July prices."

This suit is brought to recover the difference between the prices named in the order given to Fitton and the prices paid. Plaintiff recovered, and defendant appeals.

The first question raised is that the evidence fails to show a contract between the parties:

1. The order signed by plaintiff and the paper signed by Fitton do not constitute a contract.
2. It does not appear in evidence that Fitton had authority to make a binding contract.

These two propositions practically resolve themselves into one; for, if Fitton had authority to bind defendant, the procurement and receipt of the order was sufficient, in itself, to create a contract. *Kessler v. Smith*, 42 Minn. 494 (44 N. W. Rep. 794). In that case the order was solicited at St. Paul, Minn., by one of the firm, and was addressed to the firm at New York. In *Heffron v. Armsby*, 61 Mich. 505, a memorandum of sale was signed by the soliciting agent only, and delivered to the purchaser. It was held that, if the agent was authorized to act for the vendor, the memorandum was sufficient to satisfy the statute of frauds.

In addition to the receipt of the order by the agent in the present case, the agent executed an acknowledgment, "Ordered from Nathan Springer," etc., and signed it, "Frank O. Fitton, Agent." This cannot be treated as a mere receipt for an order, nor is it an acknowledgment of a request to enter an order, but rather an acknowledg-

ment of the entry of the order, signed by Fitton as agent for his principal.

As to the authority of the agent, there is no evidence of any limitation upon his powers. It appears that he was the agent of defendant. He was in defendant's employ, and sent out for the express purpose of taking orders for glass. He was a resident of the United States, and was employed by letter. He held himself out as an agent, and that to defendant's knowledge. In his correspondence with his principal, he wrote upon a letter head in which his name appeared as "manufacturer's agent." The only question that can be raised under this record is as to the extent of his authority. Parties dealing with an agent have a right to presume that his agency is general, and not limited (*Methuen Co. v. Hayes*, 33 Me. 169; *Trainer v. Morison*, 78 Id. 160); and the presumption is that one known to be an agent is acting within the scope of his authority (*Inglish v. Ayer*, 79 Mich. 516). Plaintiff went further. Evidence of persons who had dealt with defendant through this agent was introduced to show the character of his agency. This was competent. *Heffron v. Armsby, supra; Haughton v. Maurer*, 55 Mich. 323; *Gallinger v. Traffic Co.*, 67 Wis. 529 (30 N. W. Rep. 790). One Sielkin testified that he had known defendant since January, 1889; that for three years the firm of which he was a member had been buying glass from defendant,—a part of that time through Fitton; that orders had been given by his firm, through Fitton, in September, 1889, and February, 1890. In December, 1889, witness received an invoice from defendant of the September order, on the heading of which was printed the words, "Agents are not authorized to collect or receive money on my account." The witness says, further:

"Mr. Fitton solicited, in person, the order which I

handed to him personally, and the order mailed to him was solicited by him, in person. During the same time we purchased goods direct from the defendant, Springer. The defendant mailed us two price lists, and Mr. Fitton has at divers times made quotations verbally to us. I have other bills showing sales from Springer to H. Lieber & Co., either verbally or through correspondence, but am unable to fix any dates as to when such orders were given."

One Pugh testified that he had acted as agent for defendant, Nathan Springer; that on the 15th day of May, 1890, he became the partner of Warren C. Dewey, who was at that time the agent at Grand Rapids for the defendant, for the sale of his products; that the agency ended on the 1st of July, 1890, by reason of Nathan Springer's entering into a pool, in consequence of which he could not sell to parties outside of the combination.

"We were authorized to take orders for the defendant for German looking-glass plates. We were in the habit of accepting orders without submitting them to the defendant, except in cases where a new account was opened, when the name was referred by us to the financial agent at New York of the defendant, for the purpose of ascertaining the financial standing of such new customer, in such cases, where the standing of such new customer was doubtful. The defendant knew of this habit, and filled orders that were sent to him. We were apprised of the prices at which we were authorized to make sales either by cablegram or by letter. I do not know Frank O. Fitton. I do not know whether he was an agent of the defendant, but I know he was reputed to be, and was generally acknowledged to be such an agent, among the trade."

It is well settled that the authority of the agent must depend, so far as it involves the rights of innocent third persons who have relied thereon, upon the character bestowed, rather than the instructions given. In other words, the principal is bound to third persons, acting in ignorance of any limitations, by the apparent authority given, and not by the express authority. Mechem, Ag. § 283.

The question is not, what was the authority actually given? but, what was the plaintiff, in dealing with the agent, justified in believing the authority to be? 1 Amer. Lead. Cas. 567, 568; *Griggs v. Selden*, 58 Vt. 561 (5 Atl. Rep. 504); *Insurance Co. v. Pierce*, 75 Ill. 426; *Packet Co. v. Parker*, 59 Id. 23; *Inglish v. Ayer*, 79 Mich. 516. Whatever attributes properly belong to the character bestowed will be presumed to exist, and they cannot be cut off by private instructions of which those who deal with the agent are ignorant. Among those attributes is the power to do all that is usual and necessary to accomplish the object for which the agency was created. Mechem, Ag. § 347; *Banner Tobacco Co. v. Jenison*, 48 Mich 459, 462. Parties sent out by manufacturers to solicit orders are held out to the trade as having authority to act according to the general usage, practice, and course of business conducted by such manufacturers through such agents; and the question of what is usual or necessary to be done by such agents is ordinarily for the jury. In the present case the principal was removed thousands of miles from the customer, at a point where, in the ordinary course of mail, it would take from four to six weeks to exchange letters. We find no error in the instructions given upon the point discussed.

The second and third assignments of error relate to the admission of testimony tending to show a custom in selling glass to furniture manufacturers—First, as to the means of making such sales; and, second, as to the acceptance of orders by agents making the sales. The evidence was objected to, unless coupled with a proposal to bring home to the defendant knowledge of such custom. One of the witnesses had resided in Grand Rapids; was then a resident of Chicago; had, while at Grand Rapids, acted as agent for defendant; and, while such agent, had habitually

accepted orders without conference with defendant, and to his knowledge. Another witness was a resident of Chicago, but had been connected with a firm of manufacturers and importers of looking-glass, having their place of business in New York, and their factories at Fuerth, Bavaria. Another was a salesman, engaged in Illinois and Wisconsin, selling mirrors as agent for foreign manufacturers. Another witness was a member, at Indianapolis, of a firm dealing in mirror glass, and had been connected with the firm for 22 years. For 3 years the firm had been buying mirror plates from defendant, and several orders had been given through Fitton, as agent for defendant. This evidence tended to show that the custom was not a purely local one, but one that prevailed generally. The rule is that the custom must be one so well settled and notorious as to raise the presumption that it was known to buyer and seller. Mechem, Ag. § 348. This presumption was not, therefore, rebutted by defendant's testimony that he was not aware of such custom, although it might have been, had the custom been shown to have been a purely local one. This was shown to be a general custom pertaining to the glass trade in this country, and not confined to any particular locality, as was the case in *Pennell v. Transportation Co.*, *ante*, 247.

Upon the question of damages, it is insisted that immediately after the receipt of defendant's letter, or in the early part of May, the advance in the price of glass was but light, and that plaintiff should have at that time supplied itself, but, instead of so doing, it waited until the latter part of June, at which time the advance was much greater. The general rule is that the measure of damages for a breach of contract to sell and deliver personal property, when the purchase price has not been paid, is the difference between the contract price and the market price at the time and place of the promised delivery.

Haskell v. Hunter, 23 Mich. 305; 2 Suth. Dam. 365. The goods were to be delivered at Chicago, and were to be shipped not later than May 15. In the ordinary course it would take from 30 days to 2 months for them to arrive at Chicago. The times of payment fixed by the contract were net 60 and 90 days after delivery at Chicago. Leo Austrian testified that he placed a number of orders during the month of June, but that the parties refused to ship the goods. There was abundant testimony tending to show that dealers declined and evaded contracts or shipments during that month, in expectation of an advance in prices. He says:

"I tried to make larger purchases in June. I tried to buy of Mr. Hart and Mr. Gloeckler, and I went myself to New York, personally, to buy. I could not get glass. They gave me prices all right, but, when I inquired for such sizes as I needed in my business, they uniformly said: 'We have not got them now. Wait a few weeks, and we will give them to you.'"

Referring to certain New York houses, he says, further:

"I believe those were the only four houses in New York that I had any dealings with, and I tried to buy glass of them at that time. I made an effort to buy glass, and they uniformly told me that they had none for sale just now; to wait a few days, and I could have all the glass I wanted."

He placed an order on June 28, but it was taken subject to the July advance. One of defendant's witnesses testifies that he gave an order to defendant in the latter part of May, and it was declined.

It was held in *Goodrich v. Hubbard*, 51 Mich. 62, 70, that, the plaintiff not having elected to consider the contract broken before the arrival of the time for its full performance, he was entitled to the difference in value as of that time. See, also, *Schmertz v. Dwyer*, 53 Penn. St. 335; *Kribs v. Jones*, 44 Md. 398. The court instructed the jury

that plaintiff was entitled to wait a reasonable time for the goods to reach Chicago, after the final date of shipment, and in this we think there was no error. It is very evident from this record that there was, in fact, no market price for mirror glass during any time in the month of June, and under the testimony the goods could not have reached plaintiff before some time in that month.

The testimony of defendant's manager was taken by deposition. He testified that he wrote the letter to plaintiff dated April 15, 1890, and that the defendant did not have the manufacturing capacity to fill the order at that time, and undertook to give additional reasons why the order had not been filled, viz., that the order included a size not contained in the list, and that he was unwilling to give plaintiff credit to the amount of the order. On cross-examination the witness testified that they had refused to ship an order given by the Kent Furniture Company of Grand Rapids, dated May 24, 1890, taken by one Dewey; that on the 20th of May, 1890, they cabled Dewey to take no more orders; that he had a brother to whom he wrote, asking him to effect a settlement by which the moneys owing from the Grand Rapids Furniture Company to the defendant, held back by reason of damages claimed for failure to fill orders, might be paid over; that the contract with the association is dated June 30, 1890,—therefore, it could have nothing to do with the rejection of these orders.

"*Q.* What is the name of that association referred to in that letter?

"*A.* I may have referred in my letter to a contract which Mr. Springer had subsequently made, on the 30th of June, 1890, with the German Looking-Glass Company, of New York.

"*Q.* For what period of years did the contract referred to in that letter run?

"*A.* From its date, the 30th of June, 1890, to the 31st of December, 1892.

"*Q.* In that letter, did you not state, in substance, to your brother, that you were satisfied the defendant had made a mistake in going into that contract with the association referred to, and that you and defendant desired now to make such arrangements with the Grand Rapids furniture trade as to be able to regain their patronage when the term of years for which defendant was under contract not to sell to American houses should expire?

"*A.* Yes, I may have said something of that kind. I keep no copy of my private letters."

These questions were objected to, but the objections were overruled, and we think properly. This was cross-examination, and the testimony tended to show reasons for the failure to fill the order other than those given. The jury were instructed that the testimony was admitted for that purpose only.

A witness who had written a letter in which he had referred to an "association" was asked to name the association referred to. The question did not necessarily call for the contents of a written instrument.

The testimony called for in the question put to the witness Creque, and excluded, was substantially given by the witness.

Evidence admitted without objection tended to prove the assertions made by counsel for plaintiff in his opening.

The rules laid down dispose of the other questions raised.

The judgment is affirmed.

The other Justices concurred.

GEORGE F. BALL v. DAVID L. PHENICIE AND ELIZA A. PHENICIE.

94 355
118 154
94 355
122 385
94 355
s53NW1114
130 1362
130 380

Fraudulent conveyances—Husband and wife—Evidence—Vendor's lien—Subrogation.

1. An alleged course of dealing between a husband and wife, by which he becomes indebted to her for moneys advanced and loaned by her from time to time, the aggregate amount claimed to be due being the various sums originally advanced, with interest, without any deduction whatever on any account, is so against common experience as to call for a very careful scrutiny of the testimony by the court.
2. The court is not precluded from construing the testimony of a husband and wife, when called as witnesses for the complainant, in a suit brought to set aside a deed executed by the husband to the wife as fraudulent as to his creditors.[1]
3. In this cause the Court find that it was the intent of the husband to sell the land to his wife at an agreed price of $10,000, which it is found to have been worth, and that from mistake, or for other reason, she failed to pay him the full consideration price, his indebtedness to her, which was the sole consideration paid, being $2,169 less than the $10,000 and the value of certain personal property received by her; and the land is subjected to a vendor's lien for $2,169 in favor of the husband, to which lien the complainant, who is an execution creditor of the husband, is subrogated.[2]

Appeal from Branch. (Loveridge, J.) Argued November 18, 1892. Decided December 23, 1892.

Bill in aid of execution. Complainant appeals. Decree reversed, and one entered in accordance with the majority opinion. The facts are stated in the opinions.

H. H. Barlow, for complainant.

[1] See *Hicks v. McLachlan*, *ante*, 278.
[2] See *Joslin v. Goebel*, 90 Mich. 71.

William E. Ware (*John B. Shipman*, of counsel), for defendants.

MONTGOMERY, J. This is a bill in aid of execution. Complainant levied execution upon real estate formerly the property of David L. Phenicie, which was conveyed on May 31, 1889, to Eliza A. Phenicie, the bill alleges, without consideration, and in fraud of creditors; and complainant asks that the deed be set aside and held void as to him. The answer denies the alleged fraud. The cause was heard in open court, before the circuit judge, and a decree was made dismissing the bill, with costs against the complainant. Complainant appeals.

The theory of the defense was that David L. Phenicie became indebted to his wife for moneys advanced and loaned by her from time to time, and, as is usual in such cases, the aggregate amount claimed to be due is the various sums originally advanced by the wife to the husband, together with interest, without any deduction whatever on any account. Such a course of dealing is so against common experience as to call for a very careful scrutiny of the testimony by the court. It is not the common course for a lady possessed of considerable means to continue in possession of an estate for a long term of years without applying or appropriating one dollar of it to any purpose whatever, and while it is the duty of the court to protect the property rights of married women, even as against the creditors of the husband, it is no injustice to the parties in a case like the present to apply, in construing the testimony, such fair presumptions as the common experience of mankind suggests. The learned circuit judge found as a fact that the value of the real estate conveyed was $10,000, and it appears that, at the same time that the real estate was conveyed, $350 worth of personal property was also transferred. The circuit judge also found that, at

the time the deed was made, the indebtedness due from defendant Phenicie to his wife amounted to $8,181, which, as before stated, included all the sums advanced, together with interest thereon, deducting, however, from her claim the value of 40 acres of land, which she testified was given to her by her husband as a New Year's gift in January, 1875.

I am satisfied from a careful examination of the record that the circuit judge reached the correct conclusion in deducting the value of this 40 acres from the sum due to the wife. It is suggested that, as the complainant called the defendants as witnesses, he is bound to accept their statements. This does not preclude the court from construing their testimony, and if, from the whole course of dealing of the parties, the court is convinced that it was the intention by the purchase of the 40 acres to set aside so much of the funds which had come to the defendant Mrs. Phenicie from her father's estate, there is ample justification in charging her with it. The circuit judge, who heard the testimony and saw the witnesses, reached this conclusion, and, in my opinion, his conclusion on the question of fact should not be disturbed.

But it is said that the disparity between the amount of indebtedness from the husband to the wife and the value of the real estate is so small as not to suggest any intention to defraud. The parties may have been mistaken as to the amount, but, if so, there is no reason why the defendant Eliza A. Phenicie should not be chargeable with the unpaid portion of the purchase price. It is not a case where the question is whether the inadequacy of the consideration is such as to render the transaction void as to creditors, but it is clear that the intent was, on his part, to sell the land to defendant at the agreed price of $10,000. If, from mistake or for other reason, she failed to pay the

full consideration price, it is not an injustice to require that that payment be now made.

I think that the land should be held subject to a vendor's lien, amounting to $2,169, and this complainant subrogated to the rights which the vendor would have in the premises; and that a decree should be entered for complainant for that sum, with interest from the date of the transfer,—May 31, 1889; and that, in case of failure to redeem within 90 days from the date of this decree, the land should be sold to satisfy the amount of this lien. The complainant should recover costs of both courts.

LONG and GRANT, JJ., concurred with MONTGOMERY, J.

DURAND, J. *(dissenting).* The bill of complaint is filed in this cause in aid of two executions. It avers the commencement of a suit by attachment on July 22, 1889, in favor of complainant and against Warren W. Wilkinson and the defendant David L. Phenicie, in which a judgment was rendered on December 7, 1889, for $4,100.68 damages, besides costs. It also avers the commencement of a second suit in attachment by and against the same parties on October 4, 1889, in which a judgment was rendered on December 7, 1889, for $1,385 damages, besides costs. Both attachments were levied on the property now in question, and on December 30, 1889, executions were issued upon the judgments, and levied upon the land which the complainant now seeks to enforce them against. The bill also avers that on May 31, 1889, the defendant David L. Phenicie, who was then the owner thereof, conveyed the land in question to the defendant Eliza A. Phenicie, who is his wife, without consideration, and in fraud of creditors, and asks that the deed be set aside and held to be void as against the complainant. The answer admits the conveyance substantially as alleged in the bill, but

denies all the allegations of fraud, and avers that it was made for a full and adequate consideration. After issue was joined, the cause was heard in open court, the witnesses appearing before the circuit judge, and testifying as in a suit at law; and on October 17, 1891, a decree was made and entered, dismissing the bill, with costs against the complainant. The complainant appeals.

That fraud cannot be presumed, but must be proved, is a rule so well established and so universally recognized that it has become axiomatic. Recognizing the force of this rule, and the absolute necessity of proving facts and circumstances from which the court could find that the conveyance referred to was in fraud of creditors and without consideration, the complainant called the defendant Eliza A. Phenicie as a witness to prove such facts, and it is upon her testimony principally, if not entirely, that he relies as a basis for the claim he now makes. It would be useless to state fully all the details of her testimony, and, in the view we take of the case, it is quite unnecessary to do so. It is sufficient to say that, in the light of the testimony given by her, the complainant does not now seriously contend that the deed of the land referred to is void and wholly without consideration, as alleged in the bill, but he insists that, instead of the conveyance having been made to satisfy the grantee for an indebtedness due to her from her husband in an amount equal to or exceeding the value of the property conveyed, as is claimed by the defendants, such indebtedness does not much exceed the sum of $5,000, and that he is therefore entitled to have the excess of the value of the property over and above the indebtedness subjected to the executions, and that they should be declared to be a first lien thereon.

The land levied upon is a farm of 240 acres, situated in the town of Kinderhook, in Branch county, which is assessed at $8,600, and the value of which is variously

estimated by the witnesses upon both sides at from $35 to $60 per acre, and the circuit judge who heard the case placed the value of it at $10,000, which was the consideration expressed in the deed. We have no doubt that this was the fair cash value of the land at the time the deed was made, and as the question of value is so much a matter of opinion, and depends so largely upon the credit to be given to the witnesses, their manner of testifying, and their knowledge of the situation and locality of the property, the conclusion of the circuit judge upon the question is entitled to much consideration, especially as he was acting in his own home county, and saw the witnesses and heard them testify, and who is therefore better able to judge of the weight to be given to their testimony than a stranger would be. The value of the land and of about $300 or $400 worth of personal property, turned over to her at the same time the deed was made, may therefore be safely estimated at $10,350.

The circuit judge found that, at the time the deed was made, the indebtedness due from David L. Phenicie to his wife amounted to $8,181, which was made up largely of money she had obtained from her father's estate, and from other sources, together with the interest thereon. In reducing the indebtedness to that sum, the circuit judge, among other things, deducted from her claim the value of 40 acres of land, which she testified was given to her by her husband as a New Year's present in January, 1875, and which, with the interest, he figures at the sum of $3,917. This should not have been deducted. The transaction occurred many years before the debt to the complainant was contracted. The testimony is that it was a gift to her, and that it was so considered both by herself and her husband at the time. In so far as the complainant is concerned, the husband had a right to make his wife a present at that time if he chose to do so, although he was

then indebted to her, as he undoubtedly was. The testimony of Mrs. Phenicie, who is complainant's witness on that point, is that it was a gift, and nothing else; and, while this is practically undisputed, the court is asked to infer that it was a payment instead. Such an inference cannot be permitted against the undisputed testimony showing that the legal *status* of that transaction was fixed by the parties at the time.

Upon the pleadings alone the case would fail. Testimony to establish the facts alleged was necessary. Acting upon this theory, the complainant has called Eliza A. Phenicie, one of the two defendants charged with the fraud, to prove that the conveyance from her husband to her was fraudulent, and that there was not an adequate consideration for it. When he took this course he placed himself within the rule laid down in *Brigham v. Fawcett*, 42 Mich. 542, which is that "complainants must accept the statements of the defendants when they make them their witnesses, and rest the case on their evidence." In the case of *Darling v. Hurst*, 39 Mich. 765, which was a case almost exactly like this, and in which the same question arose, Mr. Justice GRAVES, in delivering the opinion of the Court, upon that subject says:

"This course is competent, but it is subject to its own risks, and to those considerations which apply wherever one submits to a court to decide between him and his adversary upon the version of the latter. The whole of what is stated must be fairly considered, and while there is no rule which compels courts and juries to put aside their judgments, and blindly accept whatever falls from a person on the witness-stand, so there is none which sanctions arbitrary rejections of testimony. * * * The circumstance that a defendant, on being called by complainant, testifies under the influence of interest, or under imputations of wrong-doing, gives no right to the complainant to accept what appears favorable to himself, and to reject or ignore whatever tends the other way. * * * The testimony of a party who is called by his adversary to dis-

cover fraud cannot be mutilated at the instance of the latter, when there is no better ground for it than conjecture or caprice."

The witness Mrs. Phenicie, therefore, having testified that she received this 40 acres of land from her husband as a present or gift from him, the entire statement must be taken together, and must be received or discarded as a whole. As the indebtedness due her from her husband at the time the deed was made equaled or exceeded the value of the property she received in payment of it, it is not necessary to go into a more minute examination of the account between the parties than has been already stated.

The deed is *prima facie* evidence of title, and there is no preliminary presumption that it is fraudulent, or that it was not given for a valuable and honest consideration. The law makes no original intendment of that kind. On the contrary, it imputes honesty and legality, and leaves it to the complainant to make out by evidence the fraud and dishonesty charged. *Hollister v. Loud,* 2 Mich. 316; *Gay v. Bidwell,* 7 Id. 519; *Robert v. Estate of Morrin,* 27 Id. 306; *Loomis v. Smith,* 37 Id. 595; *Jordan v. White,* 38 Id. 253; *State Bank v. Whittle,* 48 Id. 1. And a debtor, in securing his creditors, may give preference to a relative to whom he is indebted. *Hill v. Bowman,* 35 Mich. 191; *Darling v. Hurst,* 39 Id. 765; *Brigham v. Fawcett,* 42 Id. 542; *State Bank v. Whittle,* 48 Id. 1.

A careful reading of the record shows that the defendant David L. Phenicie was honestly owing his wife a large sum of money at the time the deed referred to was made, and that, after learning of his insolvent condition, she insisted upon having her pay. This she had a right to do, even though, by so doing, there might be little or nothing left for his other creditors. There is nothing to show that in this she acted fraudulently, or in any way except as she had the legal right to do.

The decree of the court below dismissing the bill should therefore be affirmed, with the costs of this Court.

McGRATH, C. J., concurred with DURAND, J.

MAX BAUMANN, ADMINISTRATOR, ETC., v. THE MANISTEE SALT & LUMBER COMPANY.

94 363
149 244

Statute of frauds—Promise to pay the debt of another—Bills and notes—Parol evidence.

1. Where money is loaned upon the credit of the president of a corporation, for which he gives his individual notes, and it is sought to charge the corporation with liability on the ground that it received the money, as shown by certain entries on its books, its liability, if any, is collateral, and its promise must be evidenced in writing, signed by it; citing How. Stat. § 6185; *Ruppe v. Peterson*, 67 Mich. 437.
2. A writing which is relied upon to take the promise out of the statute of frauds must contain all the terms of the contract. Such promise cannot rest partly in parol and partly in writing; citing *Hall v. Soule*, 11 Mich. 494; *Ayres v. Gallup*, 44 Id. 13.

Error to Manistee. (Judkins, J.) Submitted on briefs November 18, 1892. Decided December 23, 1892.

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

McAlvay & Grant, for appellant.

Uhl & Crane, for appellee, contended:

1. The defendant was not a party to either one of the three promissory notes, and no person is liable as a party to a note whose signature is not upon it; citing Benj. Chal. Bills, art. 71.

2. Parol evidence introduced by the plaintiff to show that the defendant, though not a party to the note, was in fact the principal, was incompetent; citing *Sutherland v. Crane*, Walk. Ch. 523; *Jones v. Phelps*, 5 Mich. 218; *Kelsey v. Chamberlain*, 47 Id. 241; *Finan v. Babcock*, 58 Id. 301; *Insurance Co. v. Covell*, 8 Metc. 442; *Fuller v. Hooper*, 3 Gray, 341; *Bass v. O'Brien*, 12 Id. 477; *Williams v. Robbins*, 16 Id. 77; *Slawson v. Loring*, 5 Allen, 340; *Brown v. Parker*, 7 Id. 337; *DeWitt v. Walton*, 9 N. Y. 571; *Brown v. Spofford*, 95 U. S. 474; *Webster v. Wray*, 19 Neb. 558.

3. The liability of the defendant, if any, was collateral to the promise of the maker, and its promise must be in writing, and signed by the defendant; citing How. Stat. § 6185; *Welch v. Marvin*, 36 Mich. 59; *Baker v. Ingersoll*, 39 Id. 158; *Gower v. Stuart*, 40 Id. 747; *Ruppe v. Peterson*, 67 Id. 437.

4. The entries in the defendant's books do not satisfy the statute. The writing must show the whole terms of the contract, and no resort can be had to parol evidence to add to them; citing *Hall v. Soule*, 11 Mich. 494; *Ayres v. Gallup*, 44 Id. 13; *Barry v. Law*, 1 Cranch, C. C. 77.

GRANT, J. Ann McCormick filed a claim against the defendant, which was insolvent, and whose estate was in the hands of receivers. The receivers contested the claim. Two trials were had. Upon the first, Mrs. McCormick was a witness in her own behalf. A new trial was granted, and before the second trial she died. Her testimony was received in evidence upon the second trial. The claim is based upon three promissory notes executed by M. Engelmann to the order of Mrs. McCormick, and aggregating $2,700. The court directed a verdict for the defendant.

At the time these notes were given, Engelmann lived in Manistee, and was reputed to be a man of great wealth. Upon the face of the notes, there is nothing to connect the defendant with them. Engelmann died before two of the notes became due, and his estate proved to be insolvent. Mrs. McCormick presented these notes in the probate court against his estate, and they were allowed. Failing to obtain her money against that estate, she presented

a claim against the company. Mr. Engelmann was president of the company.

It it apparent from this record that she loaned the money to Mr. Engelmann, and, at the time the loans were made, she did not understand that she was loaning it to the defendant. It is now sought to make the defendant liable on the ground that the money was received by it, and to show this by certain entries upon its books. The money, in the first instance, was loaned upon the credit of Mr. Engelmann. The defendant's liability, if any, was therefore collateral, and its promise must be evidenced in writing, signed by it. How. Stat. § 6185; *Ruppe v. Peterson,* 67 Mich. 437, and authorities there cited. A writing which is relied upon to take the promise out of the statute must contain all the terms of the contract. Such promise cannot rest partly in parol and partly in writing. *Hall v. Soule,* 11 Mich. 494; *Ayres v. Gallup,* 44 Id. 13. Under these authorities, the evidence of Mrs. McCormick as to conversations between Mr. Engelmann and herself, or between herself and any other officer of the corporation, for the purpose of connecting the entries upon defendant's books with the notes, was incompetent. Her conversation with Engelmann was also incompetent, under 3 How. Stat. § 7545, since he was an officer of the corporation.[1]

Mr. Engelmann was a member of several other firms, and was also engaged in an extensive business of his own. He borrowed money from the defendant to a large amount, and paid moneys to it from time to time. An account of these receipts and payments by him was kept upon defendant's books under the head of "M. Engelmann, General." At his death the amount due the company on this account was $80,000. An account was also kept on the defendant's books under the head of "M. Englemann." Upon this account were entered his family expenses, and

[1] See *Brennan v. Railroad Co.,* 93 Mich. 156.

similar personal items. Mr. Engelmann also kept a private cash book and journal, upon which were entered up these notes as those for which he was personally liable. The entries under the head of "M. Engelmann, General," which are relied upon by the plaintiff, are as follows:

"M. Engelmann, General. His note to Mrs. Ann McCormick 2–5, one year, 7 per cent.; taken up his demand note 10th, 2nd, $600; currency from her, first, $400; total, $1,000."

"M. Engelmann, General. Received from Mrs. Ann McCormick, against his bills payable, No. 579, first, 29, six months, 7 per cent."

"M. Engelmann, General. Bill payable 799, 7–9, one year from date, Mrs. McCormick, first, $700."

The items received upon these notes appear upon defendant's cash account to the credit of Mr. Engelmann. These entries do not show that Mr. Engelmann borrowed this money as the agent of the defendant, and for its benefit. The natural inference is that he borrowed it on his own account, and placed it to his credit on the books of defendant, to which he was largely indebted. The defendant was not, therefore, an undisclosed principal. As already stated, parol evidence was incompetent to show that the notes were in fact the notes of the company. *Insurance Co. v. Covell*, 8 Metc. 442; *Fuller v. Hooper*, 3 Gray, 334; *Jones v. Phelps*, 5 Mich. 318; *Kelsey v. Chamberlain*, 47 Id. 241; *Finan v. Babcock*, 58 Id. 301; *Wisconsin, etc., Bank v. Filer*, 83 Id. 496.

There is nothing in the case on which to apply the doctrine of estoppel. The benefit to the defendant was not received directly from Mrs. McCormick, but from Engelmann, who had loaned the money from her. By the transaction, defendant became Engelmann's debtor, as to these moneys, and became in no sense her debtor.

Judgment affirmed.

The other Justices concurred.

94 367
103 555
94 367
111 159
94 367
113 326
94 367
115 328
94 367
122 114
94 367
136 1378
136 1383
94 367
142 1132
142 1278

JAY F. FERRIS v. JOHN McQUEEN.

Fraudulent conveyances—Sufficiency of evidence—Instructions to jury.

1. Fraud may be proved, like any other fact, by facts and circumstances which satisfy the mind of its existence, and it is a question for the jury when there is any evidence to warrant the finding; citing *Watkins v. Wallace*, 19 Mich. 77; *Freedman v. Campfield*, 92 Id. 118.
2. A chattel mortgage given for $340 more than the amount actually owing to the mortgagee, for the purpose of delaying and defrauding the other creditors of the mortgagor, is void; but the question whether or not it was so given is one for the jury, when fairly submitted for their consideration.
3. A creditor has a right to extend further credit to a debtor, even though he is largely indebted to the creditor and to others at the time, and he has the right to secure his debt by a mortgage on the debtor's stock in trade in preference to other creditors; but he cannot enter into a fraudulent scheme to hold the debtor out as deserving of credit, and thus enable him to purchase goods of other creditors, for the very purpose of taking security upon them, knowing that they are not paid for.

Error to Kent. (Adsit, J.) Argued November 18, 1892. Decided December 23, 1892.

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

C. O. Smedley (*Blair, Kingsley & Kleinhans* and *Peter Doran*, of counsel), for appellant.

Drury & Wolcott, for plaintiff:

1. Counsel cited, in support of the charge as to the amount of proof required to establish fraud, *Whitfield v. Stiles*, 57 Mich. 410; *Henneberger v. Matter*, 88 Id. 407.

LONG, J. Action of trover for the value of a stock of

goods which defendant, as sheriff, held under certain writs of attachment, issued against one Benjamin A. Fish. Plaintiff claimed under a lien by chattel mortgage. Cause tried by jury. Verdict and judgment for plaintiff. Defendant brings error.

The assignments of error all relate to the refusal to give certain requests to charge, and to the charge as given. The court was asked to charge the jury:

"Where fraud is charged, express proof is not required. It may be inferred from circumstances. And if the jury find from the evidence that Fish started in the grocery business without much capital in comparison with the business he was doing or intended to do; that he was constantly running behind, and unable to meet his debts as they matured; and that in the spring of 1890 he was insolvent, and while in that condition devised the scheme of extending his business by adding to his stock dry goods, boots and shoes, and other articles of merchandise; and if you further find from the evidence that he had no means of purchasing such additional stock, except on credit, and that at the time he devised this scheme he was insolvent, and that he knew he would probably be unable to pay for this additional stock, and that, in pursuance of this plan, Fish added dry goods, boots and shoes, and other articles of merchandise to his former grocery stock, which additions were very considerable in comparison with the amount of the stock which he had previously been carrying, and that such additional stock was obtained on credit from merchants who did not know of his insolvent condition, and that such additional stock remained substantially unpaid for until after the beginning of this suit, and that the indebtedness for the same has only been paid for, if at all, by the execution sales proved in this case,—I charge you that this would be fraud in law on the part of Fish, as against the unpaid creditors from whom he made such purchases.

"And if you further find from the evidence that Ferris knew all these facts and circumstances, and assisted and advised Fish in carrying out this plan, at the same time having a secret understanding with him, which was unknown to the other creditors, that, in case he was pressed by his other creditors, he (Fish) would secure Ferris what he was owing to him in preference to his other creditors; and if

you further find from the evidence that, in pursuance of this secret understanding, Fish did give Ferris a mortgage on substantially all his property, and that the mortgage in this case was for a larger amount than was actually owing to him, and at a time when Ferris had good reason to believe that Fish was insolvent, and was indebted to other creditors,—you may take into consideration these things in determining whether the mortgage was given fraudulently or not, and if the jury find from the evidence in the case that these claims, as made by the defendant, actually existed as facts, then I charge you as a matter of law that such acts would amount to fraud, and the mortgage would be void as against the subsequent attaching creditors, who are represented by the defendant in this case."

These requests were refused, but were fully covered, so far as applicable to the case and proper, by the general charge.

It appears that the plaintiff is a wholesale and retail dealer in teas, coffees, groceries, etc., at Grand Rapids. Fish was a retail dealer in Cedar Springs, and commenced buying goods of plaintiff in February, 1889, getting a line of credit. In April, 1890, he was indebted to the plaintiff in the sum of nearly $4,000, and was slow in making his payments. Up to that time he had not been carrying dry goods. He came to the plaintiff, and told him that the people he got his trade from, the Patrons of Industry, wanted him to increase his line of goods by adding dry goods, and he thought by doing so his trade would be increased. He obtained further credit from the plaintiff, until in June, 1891, his indebtedness to him amounted to $6,644. Mr. Ferris called upon him for security, and took a chattel mortgage for $7,000 on June 3, 1891, which was filed on the same date. The writs of attachment were levied on the store two days later. It was shown upon the trial that the mortgage was for $340 more than the actual indebtedness to plaintiff. The plaintiff claimed, however, that this was done by mistake in overlooking an

indorsement of that amount on one of the notes which plaintiff held. Some testimony was given tending to show this fact.

The fraud claimed in the case was in giving this chattel mortgage for more than the amount actually due, and also in that the plaintiff extended credit from time to time to Fish when he knew Fish was in failing circumstances; that the plaintiff was in the position of a *confidential creditor* with him, knowing his indebtedness, and expecting to be protected, though he knew Fish could not meet his bills; and that he thus enabled him to get credit from others who had no knowledge of his indebtedness to the plaintiff. It is also claimed that there was an agreement between the plaintiff and Fish during this time that the "plaintiff should not be let down a cent." This claim was founded upon the testimony of the plaintiff. He was asked.

"Now, do you mean to say you allowed his line of credit to jump up over $2,000 or $2,500, to $7,000, just to enable him to buy a branch store in Rockford that was worth only $500?

"*A.* Oh, no. I don't mean to say that. I had this confidence in Mr. Fish until it was otherwise shaken,—for he had not made his business successful as he promised me to do,—that, if he found his business was not successful, he would reduce his stock, reduce his account, and not let me down any more than possible; that is, not possible, but use—I did not expect to get let down a cent; but, if things went against him, and he could not make it profitable, he was to close out the business in an honorable way, and refund the money."

It was not shown, however, that any *agreement* was entered into between them "not to let the plaintiff down," and Fish testified that no such agreement was made, and that nothing was done to secure the plaintiff his debt until the chattel mortgage was given. The court submitted these questions to the jury, but defendant claims that the court was in error in certain portions of his charge. The charge

was, in the main, a very fair one. The jury were instructed that, the mortgage being taken for more than the amount of the actual indebtedness, it was a badge of fraud, and unless they found the amount so inserted was by mistake, and with no intent to defraud, that of itself would avoid the mortgage. This was correct.

In speaking of the other claims of fraud made by counsel for defendant, the court stated to the jury:

"Fraud must be proved, and must not be inferred from slight circumstances. Fraud may be proved, however, by circumstantial evidence as well as positive proof. Where fraud is charged, express proof is not required. It may be inferred from strong presumptive circumstances. Fraud will not be presumed upon slight circumstances or mere suspicion, but the circumstances must be such as to amount to clear proof before a party can be held liable for fraud, and it must be consistent with the acts of fraud charged, and inconsistent with honesty and good faith."

It is claimed that this was error; that it was misleading to the jury; that the court was in error in stating that "fraud must be proved, and must not be inferred from slight circumstances;" and, again, in saying that "it may be inferred from strong presumptive circumstances."

In *O'Donnell v. Segar*, 25 Mich. 378, it appears that the jury were told by the trial court that "they could not infer fraud, and that it could not rest upon implication." It was said by this Court:

"We know of no such rule of evidence in reference to the question of fraud. It is, like any other fact, to be proved by any facts and circumstances which satisfy the mind of its existence, and may be, and generally is (when found), inferred from circumstances, and cannot often be proved in any other way."

The court in the present case, however, told the jury that fraud could "be proved by circumstantial evidence as well as positive proof;" and yet a limitation was placed upon this by adding that these facts and circumstances

must not be slight, and the inference could only be drawn from strong presumptive circumstances, which must amount to clear proof. The rule is that fraud may be proved, like any other fact, by facts and circumstances which satisfy the mind of its existence, and it is a question for the jury when there is any evidence to warrant the finding. As was held in *Freedman v. Campfield*, 92 Mich. 118, when there is a *scintilla* of evidence the verdict will not be disturbed. We think the court was not justified in the use of this language, and that the rule laid down is not upheld by the cases.

In *Watkins v. Wallace*, 19 Mich. 77, Mr. Justice CAMPBELL, speaking of the charge in that case, says:

"We think, however, that in charging the jury concerning the proof of fraud, the language used had a tendency to mislead the jury into a belief that more stringent proof was necessary than the law requires. The judge charged them that 'fraud will not be presumed from slight circumstances; the proof must be clear and conclusive.'"

This was held error, and the case reversed. It is a little difficult to see any distinction between such a charge and the one given here. The court did not say that the proof must be conclusive, but did say that it must be clear, and, in effect, that it could not be inferred except from strong presumptive circumstances. As in *Watkins v. Wallace, supra*, it may be said that—

"It might have misled the jury as to the amount and quality of proof required. No such rigid rule prevails in any civil case. Common sense teaches every one to be cautious in arriving at conclusions which are prejudicial to character and honesty; but, if the testimony produces a rational belief, a civil jury cannot be required to discard it because it is not conclusively established."

We think the court was in error in this part of the charge.

If the mortgage was made larger than the amount actu-

ally owing by the sum of $340, and this excess was put in for the purpose of delaying and defrauding the other creditors, it was void; but this was a question for the jury, when fairly submitted for their consideration.

It cannot be said, however, that the court was in error in refusing the requests to charge above set forth. They contained many things which would have been improper, and the general charge covered all that it was proper to give. Plaintiff had the right to extend credit to Fish, even though Fish was largely indebted to him and others at the time, and he had the right to secure his debt by this mortgage in preference to other creditors. It was not a badge of fraud to do so. It is true that he would have no right to enter into a fraudulent scheme to hold Fish out as deserving credit, and thus enable him to get the goods of other creditors, for the very purpose of taking security upon them, knowing that they were not paid for. But this is not shown.

We find no other errors in the record, but for the error in the charge which we have pointed out the verdict and judgment will be reversed, with costs, and a new trial granted.

McGRATH, C. J., DURAND and MONTGOMERY, JJ., concurred with LONG, J.

GRANT, J. I think the charge was correct.

94 374
110 502
94 374
119 692
94 374
140 687

CORNELIUS GILLESPIE AND JOHANNA GILLESPIE v. LUTHER BEECHER.

[See 85 Mich. 347.]

Husband and wife—Joint lease—Right of action for trespass—Estoppel.

1. The married woman's act was passed for the protection of married women, and its purpose was to enlarge their rights, not to contract them, and it was not meant to deprive them of the right, either acting alone or jointly with others, of protecting their interests in property, either real or personal.
2. A lessor who executes a lease to a husband and wife, and insists that the wife shall be a party thereto, and puts the lessees jointly into possession of the leased premises under the lease, is estopped from claiming that they have no right to join in a suit against him when he unlawfully disturbs them in that possession, and they sustain damage by reason of such disturbance.[1]

Error to Wayne. (Hosmer, J.) Argued November 30, 1892. Decided December 23, 1892.

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

James H. Pound, for appellants.

Henry M. Cheever, for defendant, contended:

1. Married women in this State have no general capacity to make contracts, and, when such a contract is counted or relied upon, it is necessary to show the facts, that it may be seen that they were such as would enable her to make it; citing *Tillman v. Shackleton,* 15 Mich. 447; *Campbell v. White,* 22 Id. 178; *DeVries v. Conklin,* Id. 255; *Powers v. Russell,* 26 Id. 179; *Emery v. Lord,* Id. 431; *West v. Laraway,* 28 Id. 464; *Ross v. Walker,* 31 Id. 120; *Gillam v. Boynton,* 36 Id. 236; *Jenne v. Marble,* 37 Id. 319; *Kitchell v. Mudgett,* Id. 81; *Carley*

[1] See *Wineman v. Phillips,* 93 Mich. 223.

v. Fox, 38 Id. 387; *Johnson v. Sutherland*, 39 Id. 579; *Russel v. Savings Bank*, Id. 671; *Gantz v. Toles*, 40 Id. 725; *Insurance Co. v. McClellan*, 43 Id. 564; *Buhler v. Jennings*, 49 Id. 538; *Edwards v. McEnhill*, 51 Id. 166.

2. As to the particular estate which is created by a joint conveyance to husband and wife, see *Fisher v. Provin*, 25 Mich. 347; *Insurance Co. v. Resh*, 40 Id. 241; *Manwaring v. Powell*, Id. 371; *Allen v. Allen*, 47 Id. 74; *Jacobs v. Miller*, 50 Id. 119; *Vinton v. Beamer*, 55 Id. 559; *Speier v. Opfer*, 73 Id. 38; *Dowling v. Salliotte*, 83 Id. 131.

DURAND, J. The declaration in this case charges that the plaintiffs, on August 30, 1888, were in possession of a house and premises which they were using as a dwelling-house and as an hotel and boarding-house, and that, being so in possession, the defendant unlawfully and forcibly entered and took possession thereof, and thereafter maintained his possession as against them, thus putting them in fear, depriving them of their home, and destroying their business as hotel or boarding-house keepers. The defendant by his plea denied liability. The case came on to be tried, and in opening the case to the jury plaintiffs' counsel stated substantially that he intended to show that plaintiffs were husband and wife; that they were possessed of some property, and that in February, 1888, they entered into a joint lease, in which they were the tenants and the defendant was the lessor, of the Globe or Dollar Hotel, on the corner of Jefferson avenue and Brush street, in Detroit, and which are the premises of which it is claimed the defendant unlawfully took possession; that the lessor insisted that the plaintiff Johanna Gillespie should join in the lease with her husband, and would not make the lease if she did not join, and that upon his insistence she did so; that the lease was then made to them jointly; that they entered into possession of the premises, and while in peaceable possession thereof were unlawfully dispossessed by defendant; and that they suffered considerable damage

in consequence. After this statement the circuit judge said:

"I think, with reference to this matter, that you may consider that I will direct a verdict on the ground that it was incompetent for husband and wife to join in the lease for the purpose of carrying on a partnership in the keeping of a boarding-house or hotel. I will enter a direction to the jury to return a verdict for the defendant on the ground that Mrs. Gillespie was not a proper party to the lease."

Exception was taken to this ruling by plaintiffs' counsel, and the only question to be passed upon in the case, therefore, is whether the husband and wife could join as plaintiffs in a suit to recover for an alleged invasion of the rights which they claim under a lease made by the defendant to them jointly.

We have no doubt of their right to do so. The defendant was aware of the relation the plaintiffs sustained to each other at the time he made the lease to them, and insisted that the wife should be a party to it. Having done so, and put them jointly into possession of the premises under it, he is estopped from claiming that they have no right to join in a suit against him when he unlawfully disturbs them in that possession, and they sustain damage by reason of such disturbance. The married woman's act was passed for the protection of married women. It was intended as a shield, and not as a sword. Its purpose was to enlarge her rights, not to contract them, and certainly it was not meant to deprive her of the right, either acting alone or jointly with others, of protecting her interests in property, either real or personal. The authorities referred to in the brief of the defendant's counsel are all cases where it was sought to make a married woman liable upon some executory contract, and it has been uniformly held in this State that she cannot become personally liable upon an executory contract except when it

relates to her sole property, or where the consideration moves directly to her, and it has also been held that she cannot be made liable personally as a surety for the debts either of her husband or any other person, or by reason of being a partner with her husband. In all these cases she is held to be legally incompetent to bind herself. These rules, however, are all intended for her benefit, and are in direct antagonism with the doctrine that she cannot protect her title or possession to property when such title or possession, either as a sole or joint owner, is attacked. To give sanction to such a doctrine would place married women at a serious disadvantage, and one which the law does not inflict upon them.

For the reasons stated the judgment must be reversed, and a new trial granted.

The other Justices concurred.

EMMA RENZ v. JULIUS STOLL, ADMINISTRATOR, ETC., AND CLOTHILDE H. STENDEL.

94 377
151 146

Statute of frauds—Trust in lands—Sufficiency of writing.

While a declaration of trust need not be contained in the conveyance to the trustee, and any form of instrument, whether a letter addressed to a third person or the answer of the alleged trustee in a chancery proceeding (*Patton v. Chamberlain*, 44 Mich. 5), will be sufficient to answer the requirements of the statute, there being no prescribed form of words in which the declaration must be made in order to make it valid (*Ellis v. Secor*, 31 Mich. 185), yet it must contain the substantial terms of the trust, or at least sufficient to identify the subject-matter by writing; citing Perry, Tr. § 83; Browne, Stat. Fr. § 108; *Gault v. Stormont*, 51 Mich. 636.

Appeal from Wayne. (Gartner, J.) Argued December 2, 1892. Decided December 23, 1892.

Bill to enforce a trust in lands. Decree dismissing bill affirmed. The facts are stated in the opinion.

M. B. Breitenbach (*William B. Jackson* and *B. T. Prentis*, of counsel), for complainant.

John G. Hawley, for defendants.

MONTGOMERY, J. The complainant filed a bill in the Wayne circuit, in chancery, to have certain lands in the city of Detroit decreed to have been held in trust by Baumeister for her, and to enforce the trust. Since the filing of the bill Baumeister has died, and the case proceeds against his administrator and codefendant, who was Baumeister's grantee.

The history of the legal title is as follows: On September 1, 1873, Henry Renz deeded the land to his wife, Emma Renz, the complainant. On August 10, 1874, complainant deeded the same to John Winterhalter. January 11, 1875, John Winterhalter deeded the land to John Baumeister, subject to all mortgages. There were at that time three mortgages on the land,—one to William Krenning, for $2,500; one to the Detroit Building & Savings Association, for $1,000; and one to Henry Wineman, for $1,500, upon which it would appear, however, that there was but $480 due at the time of the transfer to Baumeister. The consideration named in the deed from complainant to Winterhalter was $6,000, and the value of the property at this time is not otherwise shown. The answer denies that the conveyance was made to Baumeister charged with any trust.

The complainant seeks to establish the trust by parol

testimony. Rosa Haag, a daughter of complainant, testifies:

"Mother had a conversation with Winterhalter in the forenoon. In the afternoon Mr. Baumeister came over to the house, and said, 'Well, Emma, I will take the papers, and do you the favor; and I will have a new deed made out, and deed it back to you, whenever you want it.' Mother said, when she handed him the papers: 'Here is everything in this envelope that belongs to the property; * * * now, you see that I get them all back like this.' And he said: 'I will; and I will have a new deed made out, and deed it back to you, whenever you want it.'"

The complainant also called Frederick Haag as a witness, who testified that in 1887 he had a conversation with Baumeister, in which Baumeister admitted to him, in substance, that he held the property in trust for complainant, and his only claim against it was for moneys that he had paid out to discharge the mortgages and tax liens. This witness further testified that he subsequently wrote Mr. Baumeister, and received a letter in reply, which letter he was unable to produce, but stated the contents, in answer to the question, "What did he write?" as follows:

"He wrote me that promise was all right, but he didn't know all the matters in the case. He says, 'I lost considerable by Renz,' and something to the effect that he got even with him now. That is it."

The circuit judge held that under this testimony the complainant was not entitled to the relief prayed, and dismissed the bill. Complainant appeals.

How. Stat. § 6179, provides that—

"No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party

creating, granting, assigning, surrendering, or declaring the same, or by some person thereunto by him lawfully authorized by writing."

Unless we ignore the express provisions of this statute, we are compelled to hold that the conclusion of the circuit judge was correct. It may be conceded, as contended by complainant, that the declaration of trust need not be contained in the conveyance to the trustee, and that any form of instrument, whether a letter addressed to a third person or the answer of the alleged trustee in a chancery proceeding (*Patton v. Chamberlain*, 44 Mich. 5), will be sufficient to answer the requirements of the statute, and that there is no prescribed form of words in which the declaration must be made, in order to make it valid. *Ellis v. Secor*, 31 Mich. 185. But the declaration in writing must contain the substantial terms of the trust, or at least sufficient to identify the subject-matter by writing; otherwise, the provisions of the statute would be rendered nugatory.

The rule is well stated in Perry on Trusts (chapter 3, § 83):

"The objects and nature of the trust must always appear from such writings with sufficient certainty, and also their connection with the subject-matter of the trust. Indeed, courts require demonstration on the latter point; and the trust will not be executed if the precise nature of it, and the particular persons who are to take as *cestuis que trustent*, and the proportions in which they are to take, cannot be ascertained. When all these particulars properly appear from writings signed by the party, the trust will be executed."

And again, in Browne on Statute of Frauds (chapter 7, § 108), it is said:

"The words used * * * must distinctly relate to the subject-matter, and must serve to show the court that there is a trust, and what that trust is."

See, also, *Gault v. Stormont*, 51 Mich. 636.

The decree will be affirmed, with costs.

McGRATH, C. J., DURAND and GRANT, JJ., concurred with MONTGOMERY, J.

LONG, J. *(dissenting).* I think there was sufficient evidence of the declaration of the trust to bring the case out of the statute, and that defendants should account with the complainant for the value of the property, and the rents and profits.

---

94 381
113 430

94 381
114 408

94 381
119 449

94 381
f156 [2]248

GEORGE T. SMITH, FOR THE USE AND BENEFIT OF CHARLES H. PLUMMER, v WILLIAM D. THOMPSON ET AL.

Fraud—Right of action—Assignment—Pleading—Trover—Conversion of shares of stock.

1. A declaration charging, in effect, that the defendants have procured the stock and control of a corporation by deception and fraud, and for the purpose of wrecking the corporation, is a declaration in case for fraud.[1]
2. The right to complain of a fraud is not assignable; citing *Final v. Backus*, 18 Mich. 218; *Finn v. Corbitt*, 36 Id. 318; *Brush v. Sweet*, 38 Id. 574; *Dickinson v. Seaver*, 44 Id. 631; *Dayton v. Fargo*, 45 Id. 153; *Lewis v. Rice*, 61 Id. 104; *Stebbins v. Dean*, 82 Id. 385.
3. A right of action for the conversion of property is assignable; citing *Final v. Backus*, 18 Mich. 218; *Brady v. Whitney*, 24 Id. 154; *Grant v. Smith*, 26 Id. 201.
4. Trover lies for the conversion of shares of stock; citing *Morton v. Preston*, 18 Mich. 60; *Daggett v. Davis*, 53 Id. 35.[2]
5. It is not necessary to set forth, in a declaration in trover, in what way or by what means the conversion was accomplished; citing *Hutchinson v. Whitmore*, 90 Mich. 255.

---

[1] See *Hanley v. Balch*, *ante*, 315.
[2] See *Hubbell v. Blandy*, 87 Mich. 209; *McDonald v. McKinnon*, 92 Id. 254.

Error to Ingham. (Person, J.) Argued December 1 and 2, 1892. Decided December 23, 1892.

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

George W. Weadock and *John Atkinson,* for appellant.

Cahill & Ostrander and *Montgomery & Lee* (*Thomas A. Wilson,* of counsel), for defendants.

McGRATH, C. J. This is an appeal from a judgment sustaining a demurrer to a declaration in case.

The declaration alleges, in substance, that on the 27th of December, 1889, Smith owned 8,000 shares in the George T. Smith Middlings Purifier Company of Jackson, of the par value of $200,000, and which represented two-thirds of the entire capital, and that the defendants owned a majority of the stock of the Knickerbocker Company; that the two companies were engaged in making and selling machines known as "purifiers," "reels," and "scalpers," used in manufacturing flour, and were active competitors; that the George T. Smith Company was doing a large business, and possessed assets of the value of $1,000,000, and that the shares owned by the plaintiff were worth $500,000; that it was indebted to sundry persons, and was in need of $100,000 to meet immediate obligations; that the defendants, knowing the premises, and maliciously and fraudulently designing to obtain control and management of the George T. Smith Company and ruin it by destroying its business, and maliciously and fraudulently intending to injure the plaintiff by destroying the value of his shares, so as to destroy competition between the companies, maliciously and falsely represented to Smith that if he would assign 4,000 of his shares of stock to defendant Thompson, and consent to his voting upon them at all elections, general or special, and consent that defendants

Emerson and Peck should, with the plaintiff, become the directors of the company, and Emerson become its financial manager and Peck its secretary, and would give Thompson an option to buy the 4,000 shares at any time within two years at par, to wit, at $100,000, then Thompson would advance to the company all moneys necessary to meet the immediate obligations, and to make its business prosperous and its credit higher than before, thus making the shares of stock still owned by Smith of greater value than those owned by him at the time; that Smith, relying upon these representations, surrendered a certificate for 4,800 shares of stock, partly in lieu of which a certificate for 4,000 shares was issued to Thompson and delivered to defendants; that defendants secretly entered into contracts with other shareholders for the voting power upon their shares, so that with these 4,000 shares they obtained the control and management of the company; that they procured Francis D. Bennett and Frank M. Smith, who were then directors, to resign, and had Emerson and Peck elected in their stead, and that plaintiff, who was then treasurer, relying upon the statements of defendants, and ignorant of their purpose, voted for Emerson and Peck, and resigned his office as treasurer, and Emerson was elected in his stead, and Peck became secretary; that defendants assumed management and control January 1, 1890, and at once refused to make the advances agreed upon or any advances, and refused to reassign the 4,000 shares, and on the 13th of January, 1890, caused a meeting of the stockholders to vote for an assignment for the benefit of creditors to Emerson and Eldred; that the plaintiff, Smith, was told that the defendants represented a sufficient number of shares to carry the resolution, whether he voted for or against it; that he declined to vote, but defendants declared the resolution carried; that immediately afterwards a directors' meeting was held, and Emerson and Peck ordered an assignment executed to Emer-

son and Eldred, and requested the plaintiff to sign it as president; that, he having lost control of the company by his assignment to Thompson, and the defendants having, by the assignment of the 4,000 shares and the conversion of the stock to their own use, and their fraudulent contract with other shareholders, obtained control of the company, and destroyed its credit and business and the value of its shares, and having refused to return the 4,000 shares, plaintiff executed an assignment for the benefit of creditors, as requested.

The declaration alleges that all these acts were done in pursuance of the design formed by the defendants to ruin and destroy the George T. Smith Company, and to injure and defraud the plaintiff, and that by defendants' acts they utterly destroyed the value of the shares in the company, and made the shares retained by the plaintiff after transferring the 4,000 shares utterly worthless.

The declaration alleges that Emerson and Peck are still directors, and constitute a majority of the board of directors, and that there is no one competent to bring suit against them for their injuries to the corporation, or to the stock held by the shareholders, except the individual stockholders therein.

The declaration concludes with an ordinary count in trover for 4,000 shares of the capital stock of the George T. Smith Middlings Purifier Company, of the value of $250,000. The *ad damnum* clause at the end of the declaration claims $500,000.

It was conceded upon the argument that the use plaintiff is the assignee and the real party in interest, and it appears from the case stated in the first count that the assignment has been made since the cause of action accrued. The first count must be treated as a count in case for fraud, and cannot be regarded as a count in trover. The gist of this count is that the defendants procured the stock and control

of the corporation by deception and fraud, and for the purpose of wrecking the corporation. It is well settled that the right to complain of a fraud is not assignable. *Final v. Backus,* 18 Mich. 218; *Finn v. Corbitt,* 36 Id. 318; *Brush v. Sweet,* 38 Id. 574; *Dickinson v. Seaver,* 44 Id. 631; *Dayton v. Fargo,* 45 Id. 153; *Lewis v. Rice,* 61 Id. 104; *Stebbins v. Dean,* 82 Id. 385. The demurrer must be held good as to the first count.

The second count is one in trover. It has been repeatedly held that a right of action for the conversion of property is assignable. *Final v. Backus, supra; Brady v. Whitney,* 24 Mich. 154; *Grant v. Smith,* 26 Id. 201. There is no force in the contention that there is no allegation that the shares had been indorsed so as to enable defendants to transfer them. A count in trover is purely a fiction. It is not necessary to set forth specially how or in what way or by what means the conversion was accomplished. In *Beebe v. Knapp,* 28 Mich. 53, it was held that the declaration need not set forth the false representations by which plaintiff was induced to part with his property. *Hutchinson v. Whitmore,* 90 Mich. 255. Trover lies for the conversion of shares of stock. *Morton v. Preston,* 18 Mich 60; *Daggett v. Davis,* 53 Id. 35. We think a cause of action is stated in the second count.

The judgment is therefore reversed, defendants will have 20 days in which to plead, and the record will be remanded.

The other Justices concurred.

94 386
107 32

94 386
116 92
117 306

94 386
119 636

94 386
d128 607

94 386
141 1 95

94 386
148 1 99

148 1270

94 386
f155 1643

THE BOARD OF SUPERVISORS OF CHEBOYGAN COUNTY v. THE SUPERVISOR OF THE TOWNSHIP OF MENTOR, THE SUPERVISOR OF THE TOWNSHIP OF NUNDA, AND THE SUPERVISOR OF THE TOWNSHIP OF TUSCARORA.

Mandamus—Illegal tax—Duty of supervisor.

1. The writ of *mandamus* is a discretionary writ, and will not be granted to accomplish a confessedly illegal purpose, even though the officer against whom it is invoked is charged with an express duty under the statute; citing *Common Council v. Schlich*, 81 Mich. 405.
2. A writ of *mandamus* will not be granted to compel a supervisor to spread upon his roll that portion of the county tax certified to him which, while purporting to have been voted for the purchase of a poor farm, is really being raised to aid in securing a location for a tannery in the county.

Mandamus. Argued December 2, 1892. Granted in part December 3, 1892, and opinions filed December 23, 1892.

Relator applied for *mandamus* to compel respondents to spread upon the assessment rolls of their several townships the county tax as apportioned for 1891. The facts are stated in the majority opinion.

Henry G. Dozer, Prosecuting Attorney, for relator.

George E. Frost (*Watts S. Humphrey,* of counsel), for respondents.

GRANT, J. The petition for the writ of *mandamus* in this case is filed by the prosecuting attorney of Cheboygan county in behalf of the relator to compel the respondents to spread upon the assessment rolls of their respective townships the county taxes apportioned thereto for the

year 1891. The respondents refused to spread such taxes, for the reason that the apportionment was fraudulent, illegal, and void.

The facts upon which they based such refusal, as set up in their answers, are as follows: Certain citizens of the county of Cheboygan petitioned the board of supervisors to vote financial aid to secure the location for a tannery in the county. A resolution was offered before the board to appropriate $2,000 for that purpose. Knowing that such action upon the part of the board would be illegal, and would vitiate every tax in the county, such resolution was finally withdrawn, and another resolution substituted in its place to expend $2,000 for the purchase of 14 acres of land for a county poor farm. The piece of land so ordered purchased was never intended to be used for that purpose; was wild, uncultivated, and not accessible by any road, and was comparatively worthless. This resolution was passed by a majority of the board, the respondents voting against it. An order was ordered drawn by the chairman and clerk of the board for that amount, with the evident purpose of speedily accomplishing this illegal object, and preventing the interference of the courts to enjoin it. The board instructed their temporary chairman—the regular chairman being absent at that meeting—to sign the order, and deliver it. The resolutions to accomplish this object were carried by a vote of 14 to 5. The minority filed a written protest against such action, setting forth the facts and their reasons for the protest. This $2,000 was included in the county taxes to be raised, and apportioned among the various townships.

These facts are admitted by the relator; but it is insisted that the provisions of the statute requiring the supervisors to spread the tax upon their respective assessment rolls are mandatory, and that the duty of the supervisors was imperative to spread the tax, and leave the tax-

payers to the remedy provided by law for relief against illegal taxation. It must be conceded that this is ordinarily the rule, and that, where the board of supervisors has acted in good faith in determining the amount of county tax to be raised, and in apportioning it to the several townships, the supervisors must proceed to place it upon their respective rolls. But it must be remembered that the writ of *mandamus* is a discretionary writ, and that those who invoke its aid must come into court with clean hands. This writ cannot be invoked to accomplish a confessedly illegal purpose, even though the officer against whom it is invoked is charged with an express duty under the statute. Similar misconduct on the part of municipal officers was involved in *Common Council v. Schlich,* 81 Mich. 405. It was there said:

"Courts cannot be successfully invoked to assist parties in taking advantage of their deliberate wrong and willful misconduct."

The action of the petitioner in the present case was not only intentionally and willfully fraudulent, but it was criminal, and a gross outrage upon the rights of tax-paying citizens.

It would, in my judgment, be a reproach upon the law if courts were, under the circumstances of this case, compelled to issue the writ of *mandamus,* and thereby compel the imposition of a fraudulent tax. The circumstances must be exceptionally extraordinary which will justify a supervisor in refusing to comply with his statutory duty, but we think the respondents in this case were justified in so doing.

The facts before us show that there is no difficulty in separating the amount of this fraudulent tax from the other. The writ will therefore issue directing the respondents to spread upon their respective rolls the balance of the tax. No costs will be allowed.

McGRATH, C. J., and LONG, J., concurred with GRANT, J.

MONTGOMERY, J. While agreeing in the main with what is said in the opinion of Mr. Justice GRANT, I dissent from the conclusion reached, on the ground that it is not the province of these defending supervisors to question the legality of a tax which has been ordered spread by the board of supervisors, by refusing to obey the mandate of the board, and that, therefore, the question of the legality of such tax is not properly before the Court at this time for consideration. In my judgment, it would be most unseemly if a supervisor could refuse to spread any tax whatever in his township, upon the ground that the board of supervisors had, in his judgment, exceeded their authority, no matter in how slight a degree. He is not invested with judicial authority to review the action of the board of supervisors. When the certificate comes to him directing the spreading of a tax, he has no other than a ministerial duty to perform, and it is unseemly for him to assume to exercise any other power.

DURAND, J., concurred with MONTGOMERY, J.

---

94 389
98 611

94 389
f118 282

THE MICHIGAN SHINGLE COMPANY v. THE STATE INVESTMENT AND INSURANCE COMPANY OF SAN FRANCISCO.

Fire insurance—Knowledge of agent—Promissory warranty—Waiver—Estoppel.

Where an insurance agent, with full knowledge of the exact amount of continuous clear space kept and to be kept by the assured between the insured property and adjacent mills, decides that such clear space, in consideration of the situation of the prop-

erty and its surroundings, is equivalent to a certain number of feet, as ordinarily understood by insurance men, and inserts that distance in a clause in the policy by which the assured warrants that such clear space shall be maintained, and receives the premium, the rate of which is fixed in view of the premises, the company is estopped from avoiding the policy under the claim that the warranty as to clear space must be literally construed, without regard to the knowledge of the agent as aforesaid.

Error to Muskegon. (Dickerman, J.) Argued October 5, 1892. Decided December 24, 1892.

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

Bunker & Carpenter and *R. W. Barger*, for appellant.

Smith, Nims, Hoyt & Erwin, for plaintiff.

DURAND, J. This case was brought to recover upon an insurance policy, by which the defendant had insured the plaintiff upon certain lumber, lath, and shingles, owned by it, or held in trust or on commission, or sold but not delivered, piled on its mill docks Nos. 3, 4, and 5, at Muskegon, Mich. Among other things, the policy contained a clause as follows:

"Warranted by the assured that a continuous clear place of 150 feet shall hereafter be maintained between the property hereby insured and any wood-working or manufacturing establishment, and that said space shall not be used for handling or piling of lumber thereon for temporary purposes, tramways, upon which lumber is not piled, alone being excepted; but this shall not be construed to prohibit loading or unloading within, or the transportation of lumber and timber products across, such clear space; it being specially understood and agreed by the assured that any violation of this warranty shall render this policy null and void."

Within a few days after the policy was given, the insured property was destroyed by fire. At the time the policy was issued the agent who insured it knew the exact condition

and location of the insured property, and knew that the clear space of 150 feet, actual measurement, did not exist, and he also knew that the assured did not have it in its power to control a clear space for 150 feet, as mentioned in the policy. He knew that the adjoining docks 1 and 2 were being used for the purpose of piling lumber and shingles upon, and that it was not the intention of the assured to make any change in its method of conducting the business, or in the use of the space as it was used at the time the policy was given. He also knew, as stated in the brief of defendant's counsel, that in a narrow straight line from the lumber on the docks to the plaintiff's sawmill there was, perhaps, a clear space of 150 feet, but that out of a straight line this was not so, and that between the lumber on the docks and Hovey & McCracken's mill there was not a continuous clear space of even 100 feet. The rate of premium to be paid for insurance upon the different docks was fixed by defendant's agent with reference to the supposed risk in view of the manner in which the docks were used, and the distance from other exposure. The record shows that although the clear space referred to was not 150 feet, actual measurement, yet on account of the situation of the property, the manner of its use, and its proximity to water, it was considered equivalent to that distance by insurance men, and the testimony clearly shows that it was so considered in the office of the defendant's agent, who, with full knowledge of the actual distance maintained and to be maintained, wrote the policy referred to, and placed that distance at 150 feet. No change was made by the assured after the issuing of the policy, and of this fact, also, the defendant's agent had full knowledge. He resided in Muskegon, had examined this property with special reference to its location and to its desirability as insurable property, and, knowing these facts, issued the

policy referred to, and took the premium which he charged for the insurance.

The defendant insists that the clause, "that there shall be hereafter maintained 150 feet clear space," must be rendered literally, and without regard to the knowledge of the agent as to what the actual distance was, thereby asserting that it has the right to accept the money of the assured, issue its policy therefor, and lead it to understand that it has a valid insurance until a loss occurs, and then to repudiate its liability. Such a rule as this would enable it to affirm a contract, entered into by it with full knowledge of all the facts, in so far as such contract might be of advantage to it, and to repudiate it the moment it ceased to be advantageous. This is inequitable, and contrary to the well-established rule in reference to when and how the repudiation of a contract shall be made. The knowledge of the agent is the knowledge of the company.

"If the insurer receives the premiums with full knowledge of facts constituting a breach of one of the conditions of the policy, the right to insist that the policy is forfeited for that cause is gone." *Mershon v. Insurance Co.*, 34 Iowa, 87.

In *Plumb v. Insurance Co.*, 18 N. Y. 392, where the agent of a company had incorrectly filled in the measurements, he himself knowing that they were incorrect, it was held that his knowledge bound the company,—that it was estopped to deny the assertion.

In *Rowley v. Insurance Co.*, 36 N. Y. 550, the application stated: "I own the property; there is no incumbrance." There was, however, a mortgage upon the property, of which the insurer's agent had notice; but, notwithstanding that notice, the agent filled up the policy, setting forth falsely that there was no incumbrance. It was held that the insurer was estopped to set up the incumbrance as a defense to the action.

In *Hodgkins v. Insurance Co.*, 34 Barb. 213, the application stated: "The above property is owned and occupied by me." As a matter of fact these words were inserted by the defendant's agent after plaintiff had informed him as to the particular nature of his title and interest, which was a contract for the purchase of the land, and for which a deed was not demandable at the time the fire occurred. It was held that the knowledge of the agent was the knowledge of his concern, and that the insurer was estopped to defend on the ground that the interest was misstated.

In *Insurance Co. v. Bruner*, 23 Penn. St. 50, the description and survey were made a part of the policy and a warranty on the part of the assured, and one of the conditions was that a false description should vitiate the policy. The application failed to disclose mortgages to the amount of $6,000 which were upon the property. It stated that the works were operated by the proprietor, and lighted by closed lamps. The proof showed that an open light was used to light up with; that the works were not exclusively operated by the proprietor. But it was proved that the company's agent knew how the building was occupied, and knew of the mortgages, and it was held that the plaintiff was entitled to recover.

In *Mutual Protection Co. v. Schell*, 29 Penn. St. 31, the insurer's agent examined the premises, and wrote the description in the application, but nothing was said about an oven contained in the building. Held, that it would not void the policy if the material matter was open to view, or if the insurer's agent had notice of it. The same rule was held in *Insurance Co. v. Cooper*, 50 Penn. St. 331.

In *Insurance Co. v. Spencer*, 53 Penn. St. 353, the policy stated that the risk should not be increased without the consent of the insurer. The assured did increase the risk

by using the property for the purpose of distilling whisky. It was held a question of fact for the jury whether the agent ought to have known from the examination he made, or was told, that the premises would be used for distilling, and, if he did know it, the company must be held to have taken the risk with its eyes open.

In *Insurance Co. v. Merritt,* 47 Ala. 387, the application described the property as a frame steam saw-mill and machinery contained therein. As a matter of fact there was a planing machine in the building, which was a class of property for which a higher rate of premium would have been charged. The insurer pleaded that the presence of the planing machine was concealed. The plaintiff replied that the application was written by the defendant's agent after an inspection of the property. It was held that the replication was good.

In *Franklin v. Insurance Co.,* 42 Mo. 456, it was stipulated that the interest of the assured in the property must be an entire, unconditional, and sole ownership. The company's agent was informed that the assured was only a part owner, and that the property was incumbered. It was held that the company was estopped to set up the conditional interest as a defense to the action.

In *Insurance Company v. Wright,* 22 Ill. 462, it was stipulated that, if the interest of the assured was other than absolute, the insurance should be void. The fact was that the absolute title was held by trustees for the use of his wife, which fact was not stated in the policy, but the particulars of the title were made known to the company's agent. It was held that the company was estopped to contradict the description stated in the policy.

In *Insurance Co. v. Garfield,* 60 Ill. 124, it was stipulated that if the interest of the assured was less than a fee it must be stated in the policy. The assured stated that it was a fee. The agent of the company knew that he had

made a mortgage upon the premises to secure $10,000, and the policy was made payable to the mortgagee. It was held that to permit the company to defend on that ground would countenance the perpetration of a gross fraud. The same rule is held in *Insurance Co. v. Nelson,* 65 Ill. 415; *Insurance Co. v. Shipman,* 77 Id. 189.

In *McBride v. Insurance Co.,* 30 Wis. 562, the application was filled up by the company's agent, stating the title to be in the plaintiff. It was held that if the agent was informed in regard to the title, and he inserted in the application an untruth in respect to it, the misrepresentation would not affect the plaintiff's right to recover. And in *Winans v. Insurance Co.,* 38 Wis. 342, where the assured was prohibited, among other things, from using gasoline within the insured building, except by writing indorsed on the policy, it was proved that the agent consented that the premises might be lighted with gasoline until a change in the manner of lighting could be effected. The premises were consumed by fire before the change was made. It was held to be settled law in that state that an agent of an insurance company, authorized to take risks and issue policies against fire, may waive by parol any conditions in the policies issued by him.

The agent who has power to accept applications and issue policies, but who with knowledge of the facts fails to state them correctly, binds the company to the misdescriptions made by him; and although the statements made in the application were untrue, yet if the insurer was informed of and knew the truth, and after such knowledge received the application and premium and issued the policy, he must be held liable, and the knowledge of the agent is the knowledge of the insurer. *Miller v. Insurance Co.,* 31 Iowa, 216; *Ayres v. Insurance Co.,* 21 Id. 185.

In *Peoria Ins. Co. v. Hall,* 12 Mich. 202, the policy prohibited keeping gunpowder without permission written

upon the policy. It was held that, if the agent who issued the policy knew that gunpowder was kept and to be kept, the contract was valid, whether permission was indorsed or not, notwithstanding the printed condition in the contract showing the agent's authority was limited, for the company must be regarded as having known that gunpowder was and would be kept, the knowledge of the agent being the knowledge of the principal; it would be a fraud to permit him to issue a policy which it intended to treat as void if loss occurred.

In *Ætna Live Stock, etc., Ins. v. Olmstead*, 21 Mich. 246, the application was required to state what, if any, incumbrances were upon the property insured, and the amount. There were two mortgages upon it. The company's agent admitted that he knew of the mortgages when he drew up the application. The application was made part of the contract, and the answers were expressly made warranties. It was held that the failure to disclose the mortgages was to be attributed either to the agent's ignorance, negligence, or fraudulent pretense of giving an indemnity when he knew he was giving none, and that it was a fraud on the assured to take the premium; hence the insurer was estopped on that ground. The same rule was laid down in *Mich. State Ins. Co. v. Lewis*, 30 Mich. 41; *Hall v. Insurance Co.*, 90 Id. 403; *Haire v. Insurance Co.*, 93 Id. 481.

In commenting on this subject, in *Insurance Co. v. Olmstead, supra*, Mr. Justice COOLEY says:

"It is true that in this case the paper in question was drawn by an agent, but we do not think that in a legal point of view the rights of the parties are any different from what they would be had the agent himself been insurer. The insurance business of the world is done through agents almost exclusively, and the maxim, *qui facit per alium facit per se*, applies with special force to their acts. These agents assume to have, and generally do

have, much more intimate knowledge of the business than those with whom they deal; * * * and when an agent, who at the time and place is the sole representative of the principal, assumes to know what information the principal requires, and, after being furnished with all the facts, drafts a paper, which he declares satisfactory, induces the other party to sign it, receives and retains the premium moneys, and then delivers a contract which the other party is led to believe, and has a right to believe, gives him the indemnity for which he paid his money, we do not think the insurer can be heard in repudiation of the indemnity, on the ground of his agent's unskillfulness, carelessness, or fraud. If this can be done, it is easy to see that community is at the mercy of these insurance agents, who will have little difficulty, in a large proportion of the cases, in giving a worthless policy for the money they receive."

Act No. 149, Laws of 1881, which is an act to provide for a standard form of fire insurance policy, was evidently intended by the Legislature to prevent some of the abuses complained of by Mr. Justice COOLEY, for it is expressly stated in the act that the form of policy contemplated by it was for the purpose, among other things, of "securing fairness and equity between the insurers and assured," and for the "avoidance of conditions, the violation of which by the assured would, without being prejudicial to the insurer, render the policy void, or voidable at the option of the insurer." If the end sought for by the Legislature has not been accomplished it is no fault of the act. It is certain, however, that it was not thought desirable that the insurer should be furnished with any more avenues for the avoidance of its policies than had already been recognized by the courts, when dealing with the forfeiture clauses usually contained in policies of insurance. No different rule should be adopted in this class of cases than is in others, and the same rules in relation to estoppel and waiver should be applied.

In this case the agent of the company knew the exact

amount of continuous clear space kept, and to be kept, by the plaintiff, and decided that such clear space, in consideration of the situation of the property and its surroundings, was equivalent to 150 feet, as ordinarily understood by insurance men. He wrote the distance in the policy himself. He took the plaintiff's money for a supposably valid insurance, and led it to believe it was such. He knew that no change was made by the plaintiff to increase the actual amount of continuous clear space after the policy was issued, and that it was not expected by either party that it should do so. Yet, knowing these facts, no steps were taken by him to cancel the policy, or to refund the money obtained from plaintiff on account of it. The benefits of the transaction were all retained by the defendant so long as no liability was impending, and it was not until after the loss occurred that a forfeiture was claimed by it. To allow this to be done under these circumstances would be to permit a person to keep silent when he should speak, and to enable him to reap the benefit of his own wrongdoing after having himself led his victim into a trap. It must be held that the defendant is estopped from avoiding the policy for the reasons claimed by it.

The judgment is affirmed, with costs.

McGrath, C. J., and Long, J., concurred with Durand, J.

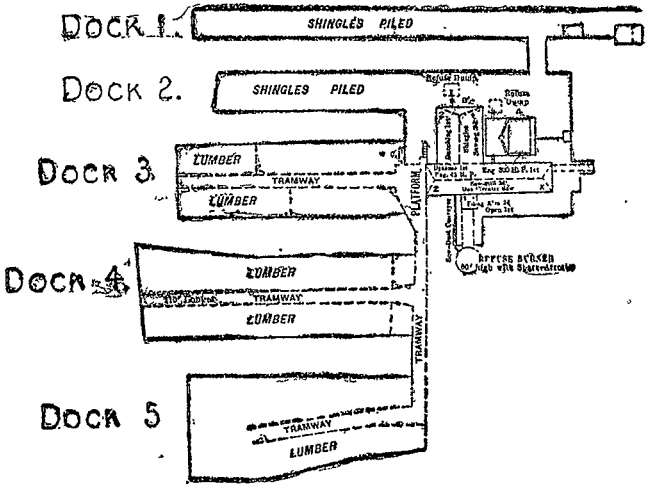
Grant, J. (*dissenting*). This is a suit upon a policy of insurance dated September 2, 1890, and covering the same property as that in the case of *Mich. Shingle Co. v. London & Lancashire Fire Ins. Co.*, 91 Mich. 441.

The policy is one known as the "Michigan Standard," being the one required by the Michigan statute. Its terms are identical in language with that of the London & Lancashire Fire Insurance Company. The warranty for the maintenance of 150 feet clear space is the same. The

only difference between the facts of the two cases is that in this case the policy covered the lumber upon docks 3, 4, and 5, while in the former case the policy covered the lumber upon all the docks. The declaration was in the usual form, and alleged that the plaintiff had in all respects complied with the terms of the policy. This, of course, was an allegation that it had preserved 150 feet clear space between the property insured and "any wood-working or manufacturing establishment, and that said space had not been used for handling or piling of lumber thereon for temporary purposes, tramways alone being excepted." The policy also provided that this clause should not be construed to prohibit loading or unloading within, or the transportation of lumber and timber products across, such clear space. The defendant introduced no testimony.

The situation of the property will be better understood by the diagram on following page.

The evidence on the part of the plaintiff tended to show that it maintained a clear space of 150 feet in a direct line from its lumber on docks 3, 4, and 5 to its mill; that it had been carrying on business there for several years; that it had never paid any attention to space between material stored on docks 1 and 2 and its mill; that the customary rate of insurance on docks 1 and 2 was 5 per cent., and on docks 3, 4, and 5, $2\frac{3}{4}$ per cent.; that to the east of dock 1 were situated the docks and saw-mill of another company, with a clear space of less than 100 feet between; that the agent of the defendant company visited the premises in the fall of 1889, and while both of these mills were in operation, for the purpose of examining the risk; that he was frequently upon the premises in the summer of 1890, and was familiar with the use made of docks 1 and 2, upon which shingles manufactured at plaintiff's mill were piled for shipment. Plaintiff's agent was asked to state


DOCK 1.
SHINGLES PILED
DOCK 2.
SHINGLES PILED
DOCK 3.
LUMBER
TRAMWAY
LUMBER
PLATFORM
DOCK 4.
LUMBER
TRAMWAY
LUMBER
TRAMWAY
DOCK 5
TRAMWAY
LUMBER

how insurance men regarded and treated the space maintained by the plaintiff between the material piled on docks 3, 4, and 5 and the mill. His reply was:

"Why, if we maintained a space between the material piled on docks 3, 4, and 5 and our own mill, that was full vindication of the requirements of the policy."

One Easton, a local insurance agent, testified that he knew the use to which these docks were put, and that the rate of $2.75 per hundred on docks 3, 4, and 5 was because there was 150 feet space from the mill. On cross-examination the witness was asked:

"*Q.* When you say that that rate was fixed because it was more than 150 feet from any wood-working or manufacturing establishment, you mean because there was more than 150 feet of clear continuous space between the property rated and such an institution, do you not?
"*A.* I mean to say that there was 150 feet space between the shingle company's mill and this lumber.
"*Q.* In fixing the rate at $2.75 on lumber, it is established only in such cases where there is at least a continuous clear space of 150 feet between the property rated and such an establishment, is it not?
"*A.* I don't think there was 150 feet space.
"*Q.* You don't answer my question.
"*A.* That is the basis the rate is fixed."

One Wood, another local insurance agent, testified that he thought the space between dock 1 and the westerly dock of the adjoining mill-owners, which was less than 100 feet, was considered equivalent to 150 feet. He further testified that sometimes docks 1 and 2 were covered with shingles, and sometimes they were not, and that they varied at different times in amount and in places where they were piled, according as they were manufactured and shipped. In reply to the question whether in placing insurance under the circumstances it would be expected by insurance men that the material on docks 1 and 2 should be removed, or

whether he would simply expect to maintain substantially the same conditions as existed at the time the insurance was effected, this witness said:

"That would be considered as maintaining it at the time the insurance was effected by some insurance men. I don't know that all would consider it so."

All this testimony was received under objection and exception. At the time of the fire, shingles were piled upon docks 1 and 2 to within 25 or 30 feet of the mill, and lumber was also piled upon the docks of the adjoining mill-owners to the east. The above is a substantial statement of all of the material testimony.

The court submitted the case to the jury, and the theory upon which this was done appears in the following portion of his charge:

"The main controversy in question for you to decide is whether or not the plaintiff did maintain, during all the time this policy of insurance was in force,—that is, from the time it was issued up to and including the time of the fire,—this continuous clear space of 150 feet between the property insured on these three docks and any wood-working or manufacturing establishment, according to the true intent and meaning of that language as employed in that policy, and as the parties understood it. The plaintiff claims that it did. The defendant claims it did not. To entitle the plaintiff to recover, it must have satisfied you by a fair preponderance of the testimony in the case that it did maintain that clear space. Now, the contention is right there. The plaintiff says, 'We did maintain it; we made the contract; we don't deny it; it is there just as it reads; but we insist that we did maintain that space just as we understood it, and just as you understood it,—just as you knew we understood it.'"

The jury found a verdict for the plaintiff.

The facts were undisputed, and the question was one of law to be determined by the court. The jury must have found that the plaintiff and defendant's local agent under-

stood and agreed that 25 or 30 feet between docks 1 and 2 and the mill was the equivalent of the 150 feet provided by the contract, and that the space of 96 feet between dock 1 and the next dock to the east was also the equivalent of 150 feet. The warranty was not one as to existing facts, but of conditions to be maintained in the future. There is nothing upon this record to show, nor is it claimed, that the plaintiff did not fully understand the terms of its contract. It knew that it had agreed to maintain 150 feet clear space. The condition was not impossible of performance. The result of this holding would be to set aside the plain and unmistakable terms of a contract, and substitute therefor by implication another and entirely different contract. The warranty was not affirmative, but promissory, in its character. If this be the rule, then if plaintiff had been in the habit of keeping a pile of lumber midway, and in a direct line, between these docks and its mill, and the defendant's local agent had known this when the policy was issued, the subsequent maintenance of such a pile of lumber would not have vitiated the policy, and the space would be held to be the equivalent of 150 feet clear space. Again, if there had been another mill or wood-working establishment situated 20 feet, or any number of feet less than 150, to the northward of docks 3, 4, and 5, this must in law be held to have been the like equivalent. Many other illustrations will readily suggest themselves to show the consequences of such a rule.

Mr. May, in his work on Insurance (section 156), says:

"One of the very objects of the warranty is to preclude all controversy about the materiality or immateriality of the statement. The only question is, has the warranty been kept? There is no room for construction, no latitude, no equity. If the warranty be a statement of facts, it must be literally true; if a stipulation that a certain act shall or shall not be done, it must be literally performed."

Plaintiff averred that it had kept 150 feet clear space. It did not allege that in one direction it kept only 25 or 30 feet, or that in another it kept but 96 feet, and that this was understood and agreed to be the equivalent of 150 feet. No such issue was framed for trial. If this clause had been inserted in the contract by fraud or mistake, plaintiff's remedy would have been in equity to reform the contract. The testimony admitted to change the express terms of the contract was incompetent. It did not tend to show any fraud or mistake, nor refer to any statements of the agent of either party affecting the question. When a principal has received a contract, made in his name by his agent, which on its face has but one meaning, such contract cannot be changed or avoided by showing a custom of business prior to the contract, and leaving a jury or court to infer that something else was meant. This case is, in my judgment, clearly ruled by *Mich. Shingle Co. v. Insurance Co.*, 91 Mich. 441.

It is the duty of courts to interpret contracts, not to make them. When the language is susceptible of but one meaning, courts have no right to say that the parties meant something else. This is not a case where the assured disclosed his title to the agent of the insurer, and the agent neglected to disclose it to his principal, as was the case in *Rowley v. Insurance Co.*, 36 N. Y. 550; *Hodgkins v. Insurance Co.*, 34 Barb. 213; *Franklin v. Insurance Co.*, 42 Mo. 456; *Insurance Co. v. Wright*, 22 Ill. 462; *Insurance Co. v. Garfield*, 60 Id. 124; *Ætna Live Stock, etc., Ins. Co. v. Olmstead*, 21 Mich. 246; *McBride v. Insurance Co.*, 30 Wis. 562; nor of the failure of the agent of the insurer, who wrote the application and took the risk, to insert in it that a planing mill was used in the mill, as was the case in *Insurance Co. v. Merritt*, 47 Ala. 387; nor of the parol waiver of a condition in the policy by the agent till a change could be made to correspond

with its terms, as in *Winans v. Insurance Co.*, 38 Wis. 342; nor where the assured was induced by the agent to believe that he could keep gunpowder, which was prohibited by the policy, as in *Peoria Ins. Co. v. Hall*, 12 Mich. 213. These cases, and may like them, are based upon the fact that there was a difference between the representations in the policy and the actual facts existing at the time, or that there was an express waiver by the agent of a condition in the policy. In the present case there was no misrepresentation, no misunderstanding, no statement made to induce the assured to believe that its contract meant other than it read, or that it would be relieved from the full performance of its provisions. Plaintiff's warranty was not that a certain state of facts existed, but that a certain state of facts should exist *in futuro*. If it did not desire such a contract it should have declined to make it. It cannot now be heard to say to the defendant: "You knew that I did not intend to keep my warranty, and therefore are estopped to say that I did not keep my contract."

Judgment should be reversed, and no new trial ordered.

MONTGOMERY, J., concurred with GRANT, J.

---

94 405
101 529

94 405
105 188
105 520

WILLIAM H. STEVENS v. WILLIAM E. PENDLETON AND WILLIAM D. MORTON.

[See 83 Mich. 342; 85 Id. 137.]

Burden of proof—Instructions to jury—Requests to charge—Evidence—Bill of particulars—Error without prejudice.

1. Jurors generally understand that the burden of proof is upon the plaintiff in all cases, and it is reversible error to refuse to

instruct them, in a case involving that question, when, and under what circumstances, the burden shifts to the defendant.

2. While a party is ordinarily entitled to have his proper requests to charge given as proposed by him, or nearly so, yet, if they are substantially given in the general charge, even though in somewhat different language, error cannot be properly claimed.

3. The admission in evidence of plaintiff's bill of particulars, against his objection, is held to have been non-prejudicial error, if error at all, the Court failing to see how such admission could have influenced the jury against the plaintiff, and the defendants having the right to read and comment upon the bill of particulars to the jury, or in their presence, even though not in evidence.

Error to Wayne. (Hosmer, J.) Submitted on briefs October 26, 1892. Decided December 24, 1892.

Assumpsit. Plaintiff brings error. Reversed. The facts are stated in the opinion, and in 83 Mich. 342.

Barbour & Rexford, for appellant.

Dickinson, Thurber & Stevenson, for defendant Morton.

DURAND, J. This case has been in this Court once before, and the facts are so fully reported in *Stevens v. Pendleton,* 83 Mich. 342, that it is not necessary to do more than to state that on December 21, 1886, the plaintiff and the defendant Pendleton entered into an agreement that, after the completion of certain hotel buildings, the plaintiff was to lease the same to Pendleton for 10 years at a certain rental, which was to be paid quarterly, on the *first* day of each quarter. The defendant Morton became surety that the defendant Pendleton would pay the rent as agreed upon. Afterwards, and on May 1, 1887, a lease was entered into between the plaintiff and the defendant Pendleton; but instead of the rent being made payable in the lease on the *first* day of each quarter, as was stipulated and agreed upon in the contract first referred to, it was made payable on the *last* day of each quarter. After this suit was begun,

the plaintiff, who claims there was a mistake in the lease in that particular, filed a bill in chancery against the defendant Pendleton to have the lease reformed so as to have it read that the payments of rent were to be made, as expressed in the original agreement, on the *first*, instead of the *last*, day of each quarter, and a *pro confesso* decree to that effect was duly made. The defendant Morton was not made a party to that proceeding, nor did he have anything to do with the making of the lease which was thus reformed.

Upon the first trial, which was reviewed as above stated, the circuit judge held that the surety was discharged, and directed the jury to find a verdict for the defendants, which action was affirmed here; but, upon a more careful examination of the scope of the testimony, this Court became satisfied that the question of whether the change in the time of payment of rent was agreed upon between the plaintiff and defendant Pendleton, or was the result of a mistake, should have been submitted to the jury, and upon a rehearing of the case, which is reported in *Stevens v. Pendleton*, 85 Mich. 137, it was so ruled, and the case was remanded for a new trial, which has resulted in a verdict and judgment in favor of the plaintiff as against the defendant Pendleton, and of no cause of action as against the defendant Morton.

The plaintiff claims error, and insists that the chancery decree, reforming the lease so as to make it correspond with the original agreement in respect to the time when payments of rent should be made, is binding upon the defendant Morton, although he was not made a party to that suit, and that he is not entitled to show in this suit that the change was the result of an agreement, instead of a mistake. The same principle was contended for on the first argument, but this Court then held that, as between the parties to the chancery suit, the decree is conclusive

that the change as to the time of the payment of rent was made by mistake, but that the same rule does not apply to the surety, who, if made a party, could have shown in the chancery suit, and may show in the suit of law, that the change was intentionally made, and he thereby discharged from liability. Upon the rehearing, it was again held that the proceedings to reform the lease were not conclusive as against the defendant Morton; and the case was remanded, so that the contention in reference to whether the change in the lease was made by mistake, or intentionally, could be submitted to the determination of a jury. We see no reason to change the rule as laid down. The plaintiff cannot be heard to say that, because of a litigation between himself and the defendant Pendleton, he can conclusively bind the defendant Morton, who was not a party to that suit, and had no opportunity to be heard in it, and thereby preclude him from his day in court to contest that or any other fact in regard to his liability as a surety upon the agreement signed by him.

Upon the last trial of this case, evidence was introduced by both parties upon the subject in controversy, some of which tended to show that the change was the result of a mistake, and some of which tended to show that it was not, but that, on the contrary, it was agreed upon between the plaintiff and the defendant Pendleton. That some of the testimony is peculiar or unsatisfactory may be true, but that is a subject to be addressed to and considered by the jury, who are the sole judges of the weight to be given to the testimony, and over which this Court has no control.

The verdict of the jury upon a simple question of fact will not be disturbed by a court of review where there is some evidence upon which the jury can base their finding, even though that evidence may not satisfy the reviewing court of the justice of the verdict.

Upon the trial, objection was made by plaintiff's counsel to the introduction of plaintiff's bill of particulars in evidence, but which was permitted, notwithstanding the objection. We have examined the bill of particulars, and we cannot discover how or in what way its introduction in evidence could in any manner have influenced the jury against the plaintiff; and inasmuch as the defendants' counsel had the right to read and comment upon it to the jury, or in their presence, we are satisfied that, if the admission of it in evidence was error, it was error without prejudice.

Plaintiff's counsel also objected to certain questions propounded to plaintiff's witness Woodruff on his cross-examination, in reference to the time when rent was first collected under the lease, and also in relation to what he had sworn to on the first trial. Objection was also made to certain questions put to defendants' witness Pendleton, in reference to what the agreement was at the time the lease was executed as to when the rent was to be payable, and also in reference to when rent was first demanded. We think the admission of this testimony was proper. It was all germane to the subject in controversy, and the answers might have tended to throw more light upon the transaction than could have been obtained in any other way.

Neither do we think there is error of which the plaintiff can complain in the charge to the jury, except in the matter referred to later on. While a party is ordinarily entitled to have his proper requests given as proposed by him, or nearly so, yet, if they are substantially given in the general charge, even though in somewhat different language, error cannot be properly claimed; and, with the exception referred to, we think the charge to the jury was quite as favorable to the plaintiff as he had a right to claim. The court charged that the chancery decree was conclusive upon the defendant Pendleton, and that the

plaintiff was entitled to recover as against him, at all events. As to the defendant Morton, the court charged the jury as follows:

"So far as Mr. Morton is concerned, the question for your determination in this case is whether there was a change in the terms of the lease, for which he had perhaps already become surety. If you find in this case that, at the time of the execution of this lease in question, the terms were known to both parties, and were what both parties intended at that time, then your verdict would be for defendant Morton; but if you find that it was contemplated to be executed with reference to the preliminary agreement, and both parties in fact supposed it corresponded at that time to the terms of the preliminary agreement, or if you find that, under a mistake of fact on the part of Capt. Stevens, he supposed at that time that it did in fact correspond to the terms, and that the first of the quarter had been inserted in the lease for the payment of the rent instead of the last of the quarter, why then, and in that case, there would be that mistake of fact which would authorize a court of equity to reform the lease; and your verdict, in that case, would be for the plaintiff, as against both defendants."

The charge upon the points raised was as favorable as the plaintiff was entitled to, and the fact that he was permitted to have a verdict as against the defendant Pendleton is not a matter of which the plaintiff can complain; and the defendant Pendleton, who is the only one entitled to raise that question, does not complain.

The circuit judge was, however, in error in this: The court was requested to instruct the jury that the plaintiff had proved a *prima facie* case against defendant Morton in respect of the change of the date of payment in the lease, and that the burden of proof was upon him to show that Pendleton and Stevens mutually intended to make the rent payable on the last, instead of the first, day of the quarter. The court refused this request, and in his oral charge said nothing whatever as to the burden of proof. Jurors generally understand that the burden of proof is

upon the plaintiff in all cases, and it is certainly of importance, generally, that they be instructed when, and under what circumstances, the burden shifts to the defendant.

For this error the judgment is reversed, with costs, and a new trial granted.

The other Justices concurred.

---

94 411
104 89
94 411
120 377
94 411
d146 1 35

In the Matter of the Estate of Harvey King, Deceased. George B. Nye v. George H. Lothrop, Administrator, etc.

Bills and notes—Consideration—Interest—Statute of limitations—New promise.

1. Interest does not begin to run on a demand note until an actual demand of payment is made, or a suit is instituted, which is treated as a sufficient demand.
2. In response to the request of a payee that the maker give him a new note for the principal and interest of the old one, made a day or two before its outlawry, the maker indorsed on the note, "the within note shall not be outlawed," and signed the indorsement, and delivered the note to the payee, with the remark that that would make it all right with him. And it is held that the effect of the indorsement was to renew the original promise to pay, and that it was a sufficient acknowledgment to take the case out of the statute of limitations; citing *Crane v. Abel*, 67 Mich. 242.
3. The following propositions are summarized from the opinion of Mr. Justice Durand:

   a—An employer has a right to place his own value upon the services of an employé, and, having once done so upon some consideration, its mere inadequacy cannot be used by his administrator to defeat the claim of the employé therefor, when presented for allowance against the employer's estate.

   b—The presumption of the law is in favor of honest rather

than dishonest motives; and if it is claimed that an employé has misappropriated money with which he has been intrusted, such misappropriation must be shown before a claim can be established against him on account of it.

Error to Wayne. (Brevoort, J.) Argued November 2 and 3, 1892. Decided December 24, 1892.

Claim against the estate of decedent. Defendant brings error. Judgment modified and affirmed. The facts are stated in the opinion of DURAND, J.

Cyrus E. Lothrop (*Levi T. Griffin* and *Otto Kirchner*, of counsel), for appellant.

C. H. Freeman (*F. A. Baker* and *John D. Conely*, of counsel), for claimant.

DURAND, J. In this case an issue was framed in the circuit court for the county of Wayne on an appeal from the probate court of the same county. The claim asserted was for services of the claimant for Harvey King, the intestate, from October 21, 1881, to August 15, 1887, at $2,500 per year, and amounting, with interest, less certain cash acknowledged in payment on the account, to the sum of $15,667.74; also upon a promissory note given by the intestate to the claimant, of which the following is a copy:

"14,000.00. DETROIT, Oct. 21, 1881.

"On demand after date I promise to pay to the order of George B. Nye fourteen thousand dollars, at McLellan & Anderson's banking office, value received, with interest at the rate of seven per cent. per annum after maturity.

"HARVEY KING."

Indorsed upon the note is the following:

"DETROIT, Oct. 20, '87.

"The within note shall not be outlawed.

"HARVEY KING."

The administrator pleaded the general issue and the

statute of limitations, and gave notice of set-off and inadequacy of consideration for the note. The case was on trial for about 25 days, and the claims as finally submitted to the jury were—First, for the note and interest, amounting to $23,519.61; and, second, for services from June 19, 1883, to August 17, 1887, less the credits, amounting to $4,575.06,—both together amounting to $28,094.67, and which by the verdict of the jury were allowed at $25,366.78.

The intestate died June 14, 1889. He had been four times married. His second wife was Mrs. Nye, the mother of the claimant, by whom he had two children, Russell and Florence Bessie King, who survive him, as do also three children by his first wife and two children by his third wife. His fourth wife also survives him, but there were no children born of that marriage. At an early day he was engaged in a general farming and dairy business on the Holden road on Cass farm, which he continued until 1867. About 1855 he established stock yards at the corner of Second and Grand River avenues, in the city of Detroit, and continued to run them until September, 1885. In 1862 he built the "Brighton House" at the stock yards, and changed his residence to it from the Holden road. In 1884 he began the erection of new stock yards on Twelfth street, to which the stock and business were transferred in September, 1885; and he continued to run these yards until August, 1887, when he leased them to a firm, of which claimant was one, at a rental of $100 per week, and who continued the business thereafter at the same place. In 1875 he purchased a large tract of pine timber lands in Lapeer county, on which he erected houses and mills known as "King's Mills," to which place he removed that year, and where he continued to reside and carry on the lumbering and farming business until he commenced the construction of the new stock yards, in 1884, when he changed his residence to the new yards, where he con-

tinued to reside, except that at certain portions of each year he would go to live on his estate in Lapeer county. It will thus be seen that he was a man of affairs and conducting large business interests of various kinds during his life.

Nye, the claimant, began to work for King, peddling milk, collecting moneys, and assisting him about the farm and dairy business, when he was quite young, and some time prior to the time when King married his mother. He continued in King's employment until 1867, when he went into business for a short time on his own account. In July, 1870, he again entered the service of King as clerk, bookkeeper, barkeeper, and general overseer of the hotel and stock business, and continued performing those duties until Mr. King removed to Lapeer, in 1875. From that time until August, 1887, he continued in the same service, performing the same duties, and also collecting rents and looking after the rented property, consisting of stores and dwelling-houses, belonging to Mr. King. The record shows that during all the time claimant was in Mr. King's employment, from 1855 to 1887, he worked from very early in the morning to very late at night, during every day of the week; that he was very attentive to the business, economical in his habits, and that for many years he was only absent from his labors for a short time upon one occasion, when he accompanied Mr. King on a trip east. He was therefore in the constant and faithful service of Mr. King for a period of about 30 years, exclusive of the time he was in business for himself; and his service finally ended in August, 1887, as stated.

The record shows that in October, 1881, King went to the banking office of McLellan & Anderson, and said to Mr. McLellan: "Andrew, I would like to have you fill out a note for $14,000: I want to give it to George Nye." Mr. McLellan testifies that he thereupon filled out the note

as requested, and handed it to Mr. King, who said it was all right, and started away with it. This note must have been delivered to the claimant shortly afterwards, for Florence Bessie King, a daughter of the intestate, testifies that, about a month after the note was made out, Mr. Nye brought it to her for safe-keeping, as he was accustomed to do with his other valuable papers; that she retained its possession until her father's death, in June, 1889, with the exception of a few days, when she left it with her father under the following circumstances, as she relates them:

"At the time I was living at the stock yards, and I thought I would make my father a visit at King's Mills, because I was accustomed to go up there about once a year for a few days or a week, and I spoke to George about taking the note up with me. I took the note to father, and with the other papers that George had given me, and told him that George wanted a new note made out; that the old note would be outlawed in a few days, and he wanted a new note made out. George had made out an account on this note of $14,000; he had reckoned the interest on it for six years; and then he had made out a new note for the full amount, which was about $21,000, I believe, and he gave the three papers to me, and wanted me to have father sign the new note, and keep the old note. * * *

"*Q.* Detail the circumstances of leaving the note with your father at the mills,—what took place with reference to the note?

"*A.* I went into the room where father was sitting, and I gave him the three papers, and told him George wanted the new note; and he took the papers, and he looked at the amount of the new note, and he seemed surprised at the amount. I do not remember exactly what he said, but he seemed very much surprised at the amount, but he said he would keep it, and he would bring them down with him when he came down in a few days, and he did not tell me whether he would sign the new note or not. At that time that was all that passed between my father and me in regard to it.

"*Q.* Did he state anything about the interest?

"*A.* He gave the reason why he wanted to keep the papers.

"*Q.* What did he say as a reason?

"*A.* That he would examine the papers.

"*Q.* The three papers?

"*A.* Yes, sir; and then before I came to Detroit I asked him for the new note, and he said he would bring it down with him when he came in a day or two.

"*Q.* This new note George had written and sent up there?

"*A.* Yes, sir.

"*Q.* And you came away and left the papers in his possession?

"*A.* Yes, sir; I did.

"*Q.* When did you again see this note?

"*A.* Well, a few days afterwards father came down, and the next day, I think it was, he brought me that note with the writing on the back, and he said, as he handed it to me: 'There, that will make it all right with George.' He did not say anything about the new note. That was all he said. * * * * * * * * *

"*Q.* Upon what day of the month was that?

"*A.* Well, I could not say. I know it was very near the 21st, because I had the thought in my mind if it had been the 22d it would have been outlawed; there would have been one day, I had thought in my mind. It may have been the 20th, or it may have been the 21st.

"*Q.* What did you then do with the note?

"*A.* I put it away in this box that I had always kept it in.

"*Q.* Did you inform your brother of the fact it had been returned to your possession?

"*A.* Yes, sir; I told him father had."

Under the issue framed, the claimant insisted upon the trial that the note was based upon a sufficient consideration; that it was given to him by his step-father, Mr. King, in payment for valuable and long-continued services rendered by him; that Mr. King had placed his own value upon those services, and placed it at $14,000; that the indorsement, "The within note shall not be outlawed," written upon the back of the note by Mr. King, under the circumstances related, was in effect a new promise, which prevented it from being barred by the statute of limitations, and that it was a valid, subsisting claim,

enforceable against the estate of the intestate. On the other hand, the contestant insisted that there was no adequate consideration for the note, and, if there were, that it was outlawed, notwithstanding the indorsement referred to. Proof was also introduced to show that Mr. King was sick on the day the note bears date, and unable to be at the banking office where the witnesses swear it was signed; but this question was settled by the verdict of the jury in favor of the claimant.

In relation to the claim for services after the note was given, the claimant withdrew the claim for services from October 21, 1881, to June 19, 1883, which period was over six years before the death of Mr. King, and claimed that under the proof he was entitled to $100 per month for his services after that date, so long as those services continued, and that with the exception of certain credits, for which he gave an account, the balance of the claim was unpaid. On the other hand, the contestant insisted that there was an agreement between the claimant and the intestate that his services were to be at $50 per month, which view the jury seem to have taken as the correct one. He also insisted that, inasmuch as the claimant had the handling of a good deal of Mr. King's money, he had a right to pay himself out of it, and that it was a fair presumption he had done so. Testimony was also given tending to show that at times both the intestate and the claimant were without much ready money, and that their debts were not always paid at maturity; that the claimant was not always desirous of paying his debts promptly; and that sometime in the year 1884 he had transferred some of his land to his brother without consideration, in order to delay or defraud his creditors.

The case seems to have been tried with a great deal of spirit and ability upon both sides, and everything which

counsel thought would tend to give the jury a full insight into the character, habits, relationship, motives, and condition of the parties, or which would fairly tend either to sustain or defeat the claim, the circuit judge admitted testimony to be given in relation to. That this is so is apparent when it is seen that the attention of this Court is only called to certain objections which are the basis of the 1st, 2d, and 3d assignments of error in relation to the admission of testimony, and which were made by the contestant in reference to the competency of the witness E. W. Voigt to testify in relation to the value of some of claimant's services. This objection was overruled by the circuit judge, and we think his ruling on that point was correct. It certainly was not prejudicial, as the verdict of the jury shows clearly that the value put upon the services by him was not adopted by them.

It would be impossible, and it is certainly quite unnecessary, to detail all the facts contained in the record, and which are referred to and commented on through 289 pages of the printed briefs, to which the attention of this Court has been challenged by the counsel for the respective parties to this contest. So many of the facts have been stated, however, as are necessary to be considered in arriving at a decision.

The remaining objections relate to the charge to the jury. The 9th, 10th, 11th, 12th, 13th, and 14th assignments of error all relate to the charge of the court in reference to the consideration for the note. Upon this point the court charged substantially that the claimant was not entitled to recover upon the note unless it was based upon a valuable consideration, such as services, money, or the like; that the note imported upon its face that it was given for a valuable consideration, yet if all the evidence in the case failed to satisfy the jury, by a preponderance of proof,

that value was in fact received for the note, no recovery could be had upon it; that the sufficiency of the consideration could not be inquired into; that it was sufficient if there was a consideration; and that when parties have fixed their own price upon services, and have put that price into a note, it is immaterial whether the price fixed is large or small; that, if Mr. King chose to allow that price for the work, neither his heirs nor courts or juries could set it aside. There is much more on that point of the same character embodied in the charge, but all of the same general tenor. We see no error in this part of the charge. There is no proof of fraud, nor of a total lack of consideration, nor of any facts which would warrant the jury in saying that it was a mere gift, by Mr. King, of an executory promise to pay. Mr. King had a right to place his own value upon the services of the claimant, and, having done so upon some consideration, the mere inadequacy of that consideration could not be used in this proceeding to defeat the note, even though there were proof of such inadequacy, which is not at all clear.

The eighth assignment of error relates to the substitution of the words "Does the evidence tend," for "There is evidence tending to," found at the beginning of contestant's thirteenth request to charge. As given by the court it reads as follows:

"Does the evidence tend to show that the claimant, in the latter part of the year 1884, made a transfer of the real estate owned by him to his brother Theodore W. Nye, with the intent to defraud his creditors, and that such transfer was wholly without consideration? If the jury find the fact so to be, such conduct on the part of the claimant would necessarily imply a lack of honesty and integrity on his part, and the jury would be justified from that fact alone in regarding the claim made by him with suspicion."

Again, the judge charged the jury:

"If you find from the evidence that the claimant has been guilty of transactions involving moral turpitude and dishonesty on his part, you are justified in discrediting any claim made by him that on its face appears to be out of the ordinary and usual course of business methods."

Had the verdict been against the claimant, he would, as we conceive it, have had much better reason for complaining of this part of the charge than has the contestant. It having been given, however, at the request of the contestant, though slightly altered in phraseology, he certainly has nothing to complain of.

The court declined to give contestant's fifth request to charge, which was, in effect, that "there is evidence tending to show that the claimant's claim was fully paid, and, if the jury so find the fact to be, the claimant is not entitled to recover;" and in this connection the court charged:

"Before the jury can allow any set-off against the claim proven in this cause, the estate must show by competent testimony that Nye at the time of Harvey King's death was indebted to King, and merely showing that Nye received moneys in the course of King's business, which the records of the business, under the manner of the dealings shown by the testimony, may not disclose as having been paid out by Nye, does not establish any indebtedness from Nye to King. The checks offered in evidence cannot be allowed as a set-off in this case, as it has not been shown that they were received as payment, or not properly accounted for to King."

And this is claimed as error under the seventh and fifteenth assignments of error. We do not think this was error, and, if it were, it was not prejudicial, for afterwards the circuit judge, at the request of the contestant, charged the jury as follows:

"The general presumption of law is that when a person is proved to have received moneys for the use and benefit of another, in the absence of showing to the contrary, he has not accounted for them, and it devolves upon him to

show that he has done so. In the case of the master and the servant, where the servant is working and receiving the money under the immediate care of his employer, this presumption would be but slight, if it obtained at all; but where the servant resides, receives, and collects the moneys of his employer at a considerable distance, and not immediately under the superintendence and guidance of his employer, the presumption would be much stronger, if not, indeed, as strong as if the relation of master and servant had not existed between the two. But where the servant is claimed to have been the creditor of his employer during the time that the moneys were collected and received by him, this fact is sufficient to establish the presumption that he applied the moneys received by him to the payment of his claims, in the absence of any showing to the contrary. If, therefore, you should find that the claimant, being the creditor of Mr. King, as claimed by him, received sums of money for the use and benefit of Mr. King sufficient to pay and satisfy his claim over and above the moneys he is shown to have paid to or for the accounts of Mr. King during his life-time, the presumption must be that he applied such moneys to the payment and satisfaction of his claim, and your verdict must be for the estate.

"If Nye was the creditor of Mr. King, as claimed by him, during the time he is shown to have received moneys for the use and benefit of Mr. King, he had a perfect and absolute right, legally and morally, to appropriate such moneys to his own use up to an amount sufficient to satisfy and extinguish the indebtedness due from Mr. King to him, and his action in so doing could not have been questioned civilly or criminally."

The charge in that particular was much more liberal than the contestant had a right to, for the presumption of the law is in favor of honest rather than dishonest motives; and, if it is claimed that an employé has misappropriated money with which he has been intrusted, such misappropriation must be shown before a claim can be established against him on account of it.

The fourth assignment of error is based upon the request for the circuit judge to charge that the claimant was not entitled to recover upon the note. Presumably this

request was founded on the claim that the indorsement of October 20, 1887, that "the within note shall not be outlawed," written by the intestate on the back of the note, and signed by him, was of no avail to continue or renew the promise to pay, and to be of effect as against the statute of limitations. We do not agree with this contention. It is plain that the intention of Mr. King was that the words employed by him should be considered as a written renewal of the promise contained in the note, and that the effect of the indorsement was to renew the promise at that date. To put any other construction upon it would be to impeach the fairly expressed words of an honorable man, and to brand the statement, "There, that will make it all right with George," which he made to his daughter when he handed the note back with the indorsement written upon it, as a cunningly devised falsehood, coolly and deliberately planned for the purpose of lulling the claimant into a fancied security, until by the delay of a single day his right would be lost and his claim forever barred. The conduct of Mr. King upon that occasion was open, fair, and honest beyond criticism. He did not see fit to give a new note for the amount, with accumulated interest added, but it is plain that he did wish that his original promise should not outlaw; and it would be monstrous for a court to put any other than an honest construction upon what he did and said, or to say that his heirs or personal representatives should not accept as true and binding that which the intestate not only did not deny, but which he led the claimant to believe was a liability against him which he fully recognized and reasserted. Without citing the long list of authorities *pro* and *con* upon this question, to which our attention has been called by the briefs, if there were any doubt upon the question, we would, as we do, consider it ruled by the principle asserted in the case of *Crane v. Abel*, 67 Mich. 242, in which a similar indorse-

ment was held to be a sufficient acknowledgment to take the case out of the statute.

The sole remaining question is one which relates to the time at which interest began to run upon the note. The claimant insists that it bore interest from its date, and the circuit judge so charged the jury. The contestant insists just as strenuously that it did not, and also insists that interest did not begin to accrue upon it until it was presented to the commissioners for allowance; and this question is raised by the 5th, 6th, and 16th assignments of error.

The note in question is payable on demand after date, with interest at the rate of 7 per cent. after maturity. By its terms, therefore, interest begins to run at the maturity of the note, or, in other words, as soon as it is due, for that is the meaning of the term as employed in reference to promissory notes and other commercial paper. If it has not already been settled in this State, the question should be settled now, whether a note payable upon demand is due as soon as it is signed and delivered, or whether it does not mature until after payment upon it has been demanded. It is of great importance, not only to the profession, but also to the great body of business men throughout the State, who are daily engaged in giving, receiving, and dealing in that class of paper. As was said by Chief Justice Parker in *Field v. Nickerson,* 13 Mass. 135:

"It is remarkable that the law relating to so familiar a species of written contract as a promissory note of hand, payable on demand, should at this late period be doubtful. * * * Opinions of respectable lawyers and others among us differ widely respecting the character and legal qualities of this contract. * * * In this state of uncertainty it is highly necessary that the rule of law should be made known, for contracts of this kind are in daily use in all parts of the state, and the rights and duties of parties who may hold or be liable upon them ought to be precisely

ascertained, if possible. The nature of the contract must be inquired into for this purpose. Between the promisor and promisee there is no difficulty. * * * As it respects the promisor himself, he is answerable immediately to the promisee or indorsee, and he may be sued the instant he has given his signature, even without a previous demand."

In *Hitchings v. Edmands*, 132 Mass. 338, it was held that a note payable "on demand after date" was payable instantly. This doctrine was approved and adopted in *Fenno v. Gay*, 146 Mass. 118 (15 N. E. Rep. 87).

In the case of *Wheeler v. Warner*, 47 N. Y. 519, Mr. Justice Peckham, in discussing the question of when a demand note becomes due, says:

"There is no divided opinion here or in England that upon such a note, with or without interest, an action may be maintained against the maker without any demand because it is due. No demand can be sued before due. No action will lie upon any claim of any description arising upon contract before it is due. To say that the suit is the demand is to repeat an unmeaning phrase, as thus used, which no number of repetitions can make sensible. A demand note is due forthwith, and hence may be sued without demand."

In support of his opinion he cites *Howland v. Edmonds*, 24 N. Y. 307; *Herrick v. Woolverton*, 41 Id. 581; Ang. Lim. § 95; Darb. & B. Lim. 20, and cases cited.

In *McMullen v. Rafferty*, 89 N. Y. 456, the court say:

"'The word 'demand' is not treated as part of the contract, but is used to show that the debt is due."

If a note or bill is payable on demand, it is always mature, and may at any time be demanded. As between the maker and the holder, so far as maintaining an action on the note is concerned, no other demand than serving the writ is necessary, nor need any demand be averred in the declaration, nor, if it be averred, need it be proved. 1 Pars. Notes & B. 374. Bills and notes payable on demand are due immediately, without grace, unless the rule is

changed by statute. A demand note is payable instantly, and upon such notes interest accrues and the statute of limitations runs from date. 2 Amer. & Eng. Enc. Law, 327, 396, and cases cited.

We think, also, that this rule has already been adopted as settled law in this State by the doctrine asserted in the well-considered case of *Palmer v. Palmer*, 36 Mich. 487. The action in that case was upon a note payable 30 days after demand. No demand was made until 6 years and 7 months after its date; and, the statute of limitations being pleaded, the question to be decided was whether the statute began to run at the end of the 30 days mentioned in the note, or whether it only ran from the date of the demand. If the latter, then the suit was in time, as a demand had been made within the prescribed period before the suit was brought. It was held that the action was barred; and Mr. Justice CAMPBELL, in delivering the opinion of the Court, says:

"It is now well settled that a note payable on demand is payable at once and without demand, so that the statute runs from its delivery. And this rule has been applied where, from the form of the contract, it is manifest that immediate payment was not expected."

The claim that it was not necessary to assert this rule, or that a decision of that case could have been properly made without asserting it, or something equivalent to it, is not well founded. It was the real reason given for the conclusion arrived at, and numerous authorities were cited in support of its soundness. The claim that other language was used in that opinion, from which it might be inferred that the case could have been decided without the application of the rule, is not well taken, as it is apparent that the conclusion was based upon the fact that a note payable upon demand is due as soon as signed and delivered, and that whatever else was said was by way of argument

against the impropriety and injustice of permitting the holder of such a note to determine for himself when it should be considered due. Had the rule stated always been adhered to, and if no attempt had been made by courts to meet the exigencies of a particular case, by intimating that a note payable on demand can be due for one purpose, but not for another, much confusion might have been avoided, and the "unmeaning phrases upon that subject, which no number of repetitions can make sensible," complained of by Mr. Justice Peckham in *Wheeler v. Warner, supra,* would not now confront both the bench and bar with their uncertainties. While there are cases which have appeared to hold otherwise, yet the great weight of authority is in favor of the rule enunciated, and, it having been recognized as the correct one in *Palmer v. Palmer,* as quoted, we think that case decisive of the question here.

Applying that rule to this case, it is clear that interest must be allowed upon the amount of the note from its date. While the note bears date October 21, 1881, yet the promise to pay contained in it expired in six years from that date, and the note is only saved from the bar of the statute by reason of the indorsement made upon it on October 20, 1887. Mr. King had declined to sign a new note for the principal and accumulated interest added, but was willing to and did sign the agreement reading, "The within note shall not be outlawed." The effect of this indorsement, under the circumstances attending the transaction as shown by the testimony, was to renew the promise contained in the note to pay $14,000 on demand, with interest from the date of the indorsement. In other words, it must be considered as a new promise, made at that date, to pay the amount of the principal, with interest thereafter, but not a promise to pay interest already accumulated, for that was not the intention of Mr. King

in making the indorsement, and we do not think it should be given an effect contrary to his intention, when the indorsement itself does not require that this construction shall be put upon it. Interest should therefore be allowed on the note at 7 per cent. from the date of the new promise made on October 20, 1887, and which, for the purposes of this case, must be held to be the date of the note. For this reason the court was in error in permitting interest to be given upon the note from October 21, 1881, as it should have been allowed only from the time of the new promise. As the error can be remedied by a mere computation, it is not necessary to send the case back for a new trial.

Under the view we have taken, the judgment should have been for the amount allowed by the jury, less $5,880 of interest allowed for six years on $14,000 at 7 per cent., which would leave the sum of $19,486.78 as the amount which should have been allowed by the jury at the time of their verdict, on July 8, 1891. Adding interest from that date to the present time would make the amount $21,454.94, and a judgment for that sum will be entered here for the claimant. For the error shown, the contestant will recover the costs of this Court.

GRANT, J., concurred with DURAND, J.

MONTGOMERY, J. I concur in the result reached by Mr. Justice DURAND in his opinion, but I place my concurrence on the ground that interest did not begin to run on the note until demand was made. 2 Daniel, Neg. Inst. § 1458; *Hunter v. Wood*, 54 Ala. 71; *Breyfogle v. Beckley*, 16 Serg. & R. 264; *Wallace v. Wallace*, 8 Ill. App. 69; *Nelson v. Cartmel's Adm'r*, 6 Dana, 8; *Cannon v. Beggs*, 1 McCord, 370; *Scovil v. Scovil*, 45 Barb. 517; *Crim v. Starkweather*, 88 N. Y. 339. In this case demand must be treated as having been made at the date when the

indorsement was made upon the note by Mr. King in his life-time.

The cases cited by Mr. Justice DURAND are mainly cases where the question arose as to whether the note involved was barred by the statute of limitations, and it was held that the note became due for the purpose of setting the statute of limitations running at once. The basis of this holding apparently is that it rests with the holder of the note to make the note due at once by bringing suit, the institution of suit being treated as a sufficient demand. It may well be held that the cause of action accrues to a plaintiff at the earliest time when he may, of his own volition, institute proceedings, as was said in *Palmer v. Palmer*, 36 Mich. 487. It is an apparent anomaly in the law to treat the institution of suit as a sufficient demand, but the doctrine has become too firmly fixed to be now questioned. There are no cases, however, which I have been able to find, except such as depend upon statute in Ohio and Arkansas, which hold that interest begins to run upon a demand note prior either to an actual demand before suit, or the institution of suit, which is treated as a sufficient demand.

McGRATH, C. J., and LONG, J., concurred with MONTGOMERY, J.

The Gladstone Exchange Bank v. Patrick W. Keating and Thomas P. Sheehan.

Banks and banking—Overdrafts—Unauthorized payment—Partnership—Limitation upon authority of members.

1. Either member of a copartnership has the power to protect himself by stipulating that the other member shall not have authority to bind the firm by signing checks, if notice is given to the bank which is the depository of the firm.
2. Where, in a suit by a bank against copartners to recover for overdrafts paid on the defendants' checks, it appears from the plaintiff's own testimony that it had been instructed by the defendants to pay no checks not countersigned by their bookkeeper, and that the checks in suit were not so countersigned, the plaintiff, in order to recover, must show that the firm received the benefit of the money so paid, and it has the burden of making such showing.
3. In a suit by a bank to recover for overdrafts paid on the defendants' checks in violation of their instructions to the bank, the defendants are not estopped from relying upon such fact as a defense on the ground that it was their duty to examine the checks when returned to them, and notify the bank of its violation of said instructions.
4. Testimony objected to as "incompetent" is properly admitted if competent for any purpose.
5. One partner drew his individual check, payable to the order of the bookkeeper of the firm, for the firm. The bookkeeper indorsed the check, and deposited it to the credit of the firm in the bank where it kept its account. The check, not being paid, was charged back in the firm account. And it is held that recovery can be had on the check in a suit brought by the bank against the firm to recover for overdrafts paid on the firm checks, it having been sent as a firm asset, and received and deposited as such to the knowledge of the drawer; citing *Bank v. Morgan*, 117 U. S. 96.

Error to Wayne. (Reilly, J.) Argued November 4, 1892. Decided December 24, 1892.

Assumpsit. Defendants bring error. Reversed. The facts are stated in the opinion of GRANT, J.

Brennan, Donnelly & Van DeMark, for appellants.

Wells, Angell, Boynton & McMillan, for plaintiff.

MONTGOMERY, J. I think the judgment in this case should be reversed.

It appears that the two defendants joined in a letter to the plaintiff, instructing it to pay no checks on the part of defendants unless they were countersigned by Robert C. Sheehan, son of the defendant Sheehan, and the bookkeeper of the firm. Notwithstanding this direction, the plaintiff paid 22 checks, for the amount of which defendants deny liability. There was no showing by the plaintiff that the defendants derived any benefit from the moneys received upon these checks. It rests its claim of liability upon the contract implied from the signing of the checks in the firm name.

It is suggested that the burden of proof would rest upon the defendants to show that the moneys did not go to the benefit of the firm. In my judgment, this is not the correct rule in such a case. The plaintiff seeks to recover, notwithstanding it appears affirmatively that the money was paid out by it upon checks which were drawn without the requisite authority of the firm. There can be no doubt about the power of either member of a copartnership to protect himself by stipulating that the other member shall not have the authority to bind the firm by signing checks, if notice is given to the bank which is the depository of the firm; and when, on the affirmative showing of the bank, as in this case, it appears that the bank has disregarded the notice, how can it be said that a *prima facie* case is shown, without further showing that some benefit

was derived by the firm from the payment of the money?

It is also suggested that the defendants are estopped from relying upon this defense, for the reason that there was an opportunity for an examination of the account and checks, and that the defendants should have examined these checks, and notified the plaintiff of the excess of authority and of the invalidity of the checks; and the case of *Bank v. Morgan*, 117 U. S. 96, is cited to sustain this position. But in the case cited the party drawing the check had *prima facie* authority to draw it; the bank acted in good faith in making the payment; the check passed back into the hands of the drawer, with opportunity to examine and observe the error; it appeared charged in the account of the drawer. Under these circumstances, it was held that there was a duty to notify the bank, in order that it might protect itself. But what notice was requisite in this case to enable the bank to protect itself? The moment it paid one of these checks its officers knew from direct notification that they were violating the express instructions and directions of defendants. Why notify them of what they already knew? If either party was entitled to notice of this transaction from the other, it was certainly the two defendants, as individuals, who were entitled to notice from the bank that some person connected with the firm was assuming to violate the express instructions of the firm, of which the bank as well as the defendants was apprised.

As to the other questions discussed, I agree with Mr. Justice GRANT.

McGRATH, C. J., LONG and DURAND, JJ., concurred with MONTGOMERY, J.

GRANT, J. The defendants were partners, and took a contract for the construction of a system of water-works for the village of Gladstone. Keating was the managing

partner, while Sheehan resided in Wayne county, and was engaged in other business for the firm elsewhere. Keating went to the bank, and stated that, as they were doing business elsewhere, he desired to run the business at Gladstone without paying any capital into it. Plaintiff agreed with him to advance money on the firm checks, upon security of the checks of the city treasurer as the work advanced, charging interest for advances. An account was opened with the plaintiff, the first deposit being made June 1, 1889, and the last July 29 of the same year. Plaintiff brought suit to recover for overdrafts, claimed to amount to $1,140.27, for which it recovered verdict and judgment.

1. On July 2 the defendants took to the bank a city check for $809.55. This was entered upon the books of the bank at the time as a deposit. Plaintiff gave evidence tending to show that this check was not put into the bank as a deposit, but that it paid the money thereon at the time of presentation for the purpose of paying defendants' employés, and that its entry on the books as a deposit was a mistake. This is denied by the defendants, who claim that at the time of depositing this check they issued their own check, and drew thereon the money to pay their men.

2. On June 15 defendant Sheehan issued his check for $500, payable to the order of R. C. Sheehan, who was the clerk for defendants at Gladstone, and which was signed, "T. P. Sheehan, for Keating & Sheehan." This check was drawn upon the Peninsular Savings Bank of Detroit, was indorsed by R. C. Sheehan, and was deposited in plaintiff's bank to the credit of Keating & Sheehan. Defendant Sheehan did not have funds in the bank to meet the check, and upon non-payment it was charged back by the bank to the defendants in their account.

3. Defendants gave evidence tending to show that about

June 4, 1889, they signed and delivered a letter to the plaintiff, instructing it to pay no checks on account of the defendants unless they were countersigned by Robert C. Sheehan, son of the defendant Sheehan, the bookkeeper of the firm. Twenty-two checks were paid by the plaintiff, signed, "Keating & Sheehan," without the indorsement of R. C. Sheehan, the clerk. Other checks were also paid, which were not countersigned by the clerk, but which were admitted to have been used in the partnership business. Of the disputed checks some were payable to the order of bearer, and others to the order of individuals. These checks had all been surrendered to the defendants, and were produced by defendant Sheehan upon the trial. The purpose of this instruction does not appear. The letter was signed by each of the partners, and there is no means of determining whether this was for convenience in bookkeeping or for the protection of defendant Sheehan. There is nothing in the record to indicate that these checks were not drawn and used for the benefit of the firm.

The main controversies in the case arise upon these three points.

I. The only error assigned in regard to the check for $809.55 is that the court erred in admitting in evidence deposit checks for other deposits made by the defendants; it appearing that, contrary to the usual custom, no deposit check was made for this item. The record shows that they were objected to as incompetent. They were competent as part of the plaintiff's case, to show the amount received from the defendants. Whether counsel for plaintiff made an improper use of them in his argument to the jury does not appear. If competent for any purpose, they were properly admitted. But it is not entirely clear that they were not competent evidence bearing upon the disputed question in regard to this city check.

II. Defendant Sheehan alone defends in this case, the defendant Keating not having appeared, and not having been produced as a witness. It is now insisted on behalf of Sheehan that the check for $500, which he sent as a part of the partnership assets, can form no basis for a recovery against the firm; that Keating & Sheehan did not hold to this check the relation either as makers, indorsers, or guarantors; and that therefore plaintiff had no right to charge it back against the firm when not paid. The check itself showed that it was for the benefit of the firm. It was sent as a firm asset, was received by Keating, and deposited as such to the credit of the firm, and this was known to Sheehan. He has ratified the transaction, the correctness of which he cannot now question. *Bank v. Morgan*, 117 U. S. 96. Furthermore, the correctness of this charge was not questioned in the court below, and cannot be raised here for the first time.

III. It is unnecessary to determine, under the facts in this case, whether the plaintiff was justified in cashing checks signed by the firm, but not countersigned by their bookkeeper. Two considerations are, in my judgment, conclusive against this defense. Defendant Sheehan testified that he learned on August 4 that checks were being cashed which were not countersigned by the bookkeeper; that he then wrote the bank to cash no more checks unless so countersigned, and none so drawn were afterwards paid. It is apparent that he obtained this information either by a letter from the bookkeeper or from the pass-book and checks which had been returned by the bank to the firm. He went to Gladstone August 15, and then certainly the pass-book and checks were subject to his inspection. About this time difficulty evidently arose between the defendants, but what it was does not appear. It was then the duty of defendant Sheehan to examine the account and checks, and

notify the plaintiff if these checks were issued without authority, and not for firm purposes, in order that it might promptly pursue such remedy as it was entitled to against the party or parties responsible. The circuit judge so instructed the jury. This instruction was correct. *Bank v. Morgan,* 117 U. S. 96. In that case the checks had been forged by raising the amounts. The pass-book and checks were returned in the due course of business to Morgan, who did not examine them, but trusted his clerk, who committed the forgery. It was held that after a reasonable time to inspect the account, and a failure to do so, and to inform the bank of the forgeries, he could not dispute its correctness. It was there said:

"While it is true that the relation of a bank and its depositor is one simply of debtor and creditor, and that the depositor is not chargeable with any payments except such as are made in conformity with his orders, it is within common knowledge that the object of a pass-book is to inform the depositor from time to time of the condition of his account as it appears upon the books of the bank. It not only enables him to discover errors to his prejudice, but supplies evidence in his favor in the event of litigation or dispute with the bank. In this way it operates to protect him against the carelessness or fraud of the bank. The sending of this pass-book to be written up and returned with the vouchers is therefore, in effect, a demand to know what the bank claims to be the state of his account. And the return of the book with the vouchers is the answer to that demand, and, in effect, imports a request by the bank that the depositor will, in proper time, examine the account so rendered, and either sanction or repudiate it."

The authorities on this subject are there collated and discussed in a long and able opinion. Of course, errors and mistakes are at any time subject to correction as between the bank and its depositors; but where checks issued, though without authority, are paid by the bank, and returned to the depositor, he must seasonably object and notify the bank. This rule is founded in good sense and

fair dealing. In the present case the checks were signed by the parties authorized to sign them, and were returned to the defendants. Neither of them made any protest after they received them. Defendant Sheehan was upon the ground, and remained there and in the vicinity for several months afterwards, and took no steps to inform the bank. If he had been defrauded by his partner, of which there is no evidence, and these checks were not given and the money obtained thereon used for the benefit of the firm, he could easily have ascertained that fact, for they were all made payable to the order of the payee; 12 being payable to payees therein named, and the others payable to the order of bearer. It does not appear that he made any objection to their validity until this suit was brought. He testified that the bank book was twice written up, and each time showed a balance in his favor; but this does not affect the question of his duty to examine the checks, and notify plaintiff if he claimed that they were improperly paid.

The burden of proof, under the circumstances of this case, even if the above defense were open to defendants, was upon them to show that the checks were not used for the benefit of the firm. Defendant Sheehan admits that some of these checks were drawn and used for partnership purposes, and specifies two,—one issued to one Hammer, the other to one Jackson. He does not know but that all were so used. One of the disputed checks specifies that it was for labor. Presumably Mr. Keating was honest, and made a proper use of the funds. The evidence was peculiarly within the knowledge of the defendants. They had the checks with the payees' names indorsed thereon. They did not produce their books of account, nor make any effort whatever to show that the money was not honestly used. The checks were for small amounts, were such as would naturally be issued in the prosecution of business, and were properly signed.

Under such circumstances, the law does not cast the burden of proof upon a banker to show that the funds obtained were properly used.

Judgment should be affirmed.

---

94 437
99 88
94 437
s54NW 171
129 638

THE PEOPLE v. FRANK STEELE.

Criminal law—Justices' courts—Jury trial—Waiver.

A respondent has the right under How. Stat. §§ 7097, 7099, to be tried, for an offense cognizable by a justice of the peace, by a jury, or by the justice without a jury, as he may elect.

Certiorari to Ionia. (Smith, J.) Submitted on briefs November 17, 1892. Decided December 24, 1892.

Respondent was convicted in justice's court of the crime of larceny, which conviction was affirmed in the circuit court on *certiorari*. Conviction reversed, and respondent discharged. The facts are stated in the opinion.

Geo. E. Nichols and *F. C. Miller*, for respondent.

A. A. Ellis, Attorney General, and *F. D. M. Davis*, Prosecuting Attorney, for the people.

GRANT, J. The respondent was convicted in justice's court of the larceny of property of the value of $3. He waived a trial by jury, and demanded to be tried by the court without a jury. The court, against his protest, ordered a jury. The sole question is whether respondent possessed the right, under our statutes, to choose the mode of trial.

The statute provides that, if no jury be demanded by

the accused, the court shall proceed to try the issue. How. Stat. § 7097. It also provides that, if "the accused shall not have waived his right to a trial by jury," a jury shall be summoned. 3 How. Stat. § 7099. Justices of the peace have such criminal jurisdiction as is prescribed by the Legislature. Const. art. 6, § 18. The statute clearly gives the accused his choice of the two modes. This is a substantial right, and we do not think that the court can deprive him of it.

While this precise point was not before the Court in *Ward v. People*, 30 Mich. 116, yet the general right of accused persons under this statute was before it, and we think the Court intended to and did settle the right of accused persons under the Constitution and the statute. The Court said:

"The law secures to him the right of being tried in either way, as he may prefer, and * * * he may sometimes prefer to be tried by the court without a jury."

Express authority is conferred upon circuit courts to order a jury in civil cases, though no jury be demanded. How. Stat. § 6485. But no such authority is conferred upon justices of the peace, either in civil or criminal cases.

In *City of Grand Rapids v. Bateman*, 93 Mich. 135, the superior court of Grand Rapids ordered a jury, notwithstanding the respondent was willing to be tried by the court; but there was no statute which gave to him the right to be tried in the manner he chose, as in the present case, and the statute was there cited conferring upon the court the authority to order a jury.

Judgment reversed, and prisoner discharged.

The other Justices concurred.

94 439
98 516

94 439
99 545
99 572

94 439
104 483

94 439
108 422

94 439
119 53
119 55

94 439
120 595

THE ATTORNEY GENERAL, EX REL. JOHN SEAVITT, JR., v. PETER McQUADE.

Elections—Secret ballot—Mandatory provisions of statute—Fraud—Rejecting vote of precinct.

1. The election law of 1891 is designed to secure absolute secrecy to the elector, and thus prevent all opportunity for corrupt practices; and no voter can be compelled to remove the secrecy of his ballot, and state how he voted.
2. Under our statutes, no unregistered person possesses the right to vote. If unable to attend the meetings of the board of registration for reasons specified in the statute, he may be registered on election day upon taking the prescribed oath; citing How. Stat. § 93.
3. The provisions of section 26 of the election law of 1891, requiring the elector to enter the voting booth alone, after receiving his ballot from the inspector, and there prepare it concealed from the view of all persons, and then fold it so that no part of its face shall be exposed, and with the initials of the inspector on the outside, and hand it to the inspector, who shall deposit it in the ballot-box; and of section 32, for the marking of ballots of illiterate or physically disabled electors by an inspector to be designated by the board of inspectors for that purpose, who is not a candidate on the ticket, in the presence of at least two of the inspectors,—are mandatory.
4. The action of the chairman of the board of inspectors, in receiving and depositing in the ballot-box the ballots of 13 unregistered persons, and the ballots of a large number of persons who had shown them after they had been marked, and in allowing and instructing third persons to enter the voting booths with a large number of electors, and, after their ballots had been marked by such third persons, depositing them in the ballot-box, is held to have vitiated the vote of the election precinct.

Quo warranto. Argued November 17, 1892. Decided December 24, 1892.

Information in the nature of *quo warranto* to test the right of respondent to hold the office of township clerk of

the township of Ecorse, Wayne county. Cause remanded for trial. The facts are stated in the opinion.

A. A. Ellis, Attorney General (*Charles C. Stewart* and *John B. Corliss,* of counsel), for relator.

George H. Prentis, for respondent.

GRANT, J. This is a *quo warranto* proceeding to test the right to the office of township clerk of the township of Ecorse, in Wayne county.

The answer to the information alleges that respondent was duly elected to said office at the township election held April 4, 1892; that relator and respondent were the two opposing candidates for said office; that there were two election districts; that respondent received 340 votes and relator 331; that respondent was declared elected by the board of canvassers; that certain illegal votes were cast for relator; and that respondent duly qualified, and entered into said office.

The relator, in his replication, alleges that a good and valid election was held in district No. 1, where he received 260 votes and respondent 201. The replication then proceeds as follows:

"The returns from district No. 2 showed 139 votes for the respondent, and 71 for the relator, whereas, in truth and in fact, there was no valid election in said district No. 2, because of the willful and fraudulent conduct of the chairman of said board, Hyacinth Riopelle, who openly and fraudulently put into the ballot-box 13 ballots or votes of persons who were not registered, and a large number of ballots or votes of persons who had shown their ballots after the same had been marked, to wit, 75; that the same was done by said Hyacinth Riopelle willfully and maliciously for the purpose of injuring the said relator; that the said Riopelle refused to swear an inspector for the purpose of marking ballots of incompetent voters in the presence of two inspectors, as required by law, and allowed and instructed third parties to enter the polling booths with a

large number of electors, to wit, 75, and that after the tickets of voters, to wit, 75, had been so marked by third parties in the polling booths, the said Riopelle fraudulently and willfully, and to injure the relator and others on the ticket with him, placed said ballots, to wit, 75, in the ballot-box; that a large number of such votes thus illegally and fraudulently put into the ballot-box by the said Hyacinth Riopelle, to wit, 65, were counted in favor of the respondent; that, by reason of the aforesaid conduct of the said Hyacinth Riopelle, the returns of precinct No. 2 are utterly invalid, and the election in said precinct vitiated, and unworthy of any credit whatever, and the said relator is justly and legally elected by a majority of 59 votes."

It is unnecessary to state any other allegations in the replication, since the question involved arises upon those above stated, the relator insisting that, if these allegations be true, the vote in district No. 2 was void, and must be thrown aside. To this replication the respondent did not demur, but interposed a rejoinder. The above allegations in the replication are neither traversed nor confessed and avoided. The matters therein stated, being traversable, must therefore be taken as confessed and true. Steph. Pl. 217; 1 Chit. Pl. (16th Amer. ed.) *652; McCrary, Elect. § 405. To this rejoinder the relator demurred.

The question, therefore, presented for our determination is, did the conduct of Chairman Riopelle, and those acting under his direction, vitiate the vote of district No. 2? Under our statutes no unregistered person possesses the right to vote. If such person is unable to attend the meetings of the board of registration for certain specified reasons, he may be registered on election day upon taking the prescribed oath. How. Stat. § 93. The election in this case was held under Act No. 190, Laws of 1891, the title to which reads:

"An act to prescribe the manner of conducting, and to prevent fraud and deception at, elections in this State."

A similar law was before this Court in *Common Council*

v. Rush, 82 Mich. 532, in which certain defects in the then law were pointed out. The present act was evidently passed to cure those defects, and to provide more stringent regulations to preserve the purity of elections. What was there said in regard to the necessity, wisdom, and validity of such a law applies equally to the present case, and no repetition is necessary.

The elector is required to enter the booth alone, after receiving his ballot from the inspector, and prepare his ballot concealed from the view of all other persons. He must then fold his ticket so that no part of its face shall be exposed, and with the initials of the inspector on the outside, and hand the same to the inspector, who shall deposit it in the box. If he expose his ballot to any person, aside from the inspector authorized to assist him, it must be rejected. Section 26. If the elector shall make oath that he cannot read English, or if it shall be made to appear that from physical disability he cannot mark his ballot, his ballot shall be marked for him, in the presence of at least two of the inspectors, by an inspector designated by the board for that purpose, who is not a candidate on the ticket. Section 32.

The facts upon this branch of the case were before this Court in *McQuade v. Furgason*, 91 Mich. 438, and it was there said:

> "If the statements made in the answers of the respondents and the affidavits accompanying them are true, the election law of this State was most grossly violated."

The importance which the Legislature attached to the provisions of the law is manifest in section 45, by which any violation of them is made a felony, punishable by a fine not exceeding $1,000, or imprisonment in the State prison not exceeding two years, or by both. These provisions of the law must be held mandatory, or else the purpose of the law is defeated, and the opportunities for fraud are

increased, rather than diminished. If an inspector or other person be permitted to enter the booths with the voters, the danger is far greater than under the old system, where there was some opportunity to see and detect fraud. Under this practice venal voting could be readily accomplished. The law is designed to secure absolute secrecy to the elector, and thus prevent all opportunity for corrupt practices.

The law does not permit parties to profit by such frauds, though they may not have participated in the fraud. The rule laid down by the text-writers is as follows:

"When fraud on the part of the officers of election is established, the poll will not be rejected, unless it shall prove to be impossible to purge it of the fraud. When the result at a poll, as shown by the returns, is false and fraudulent, and it is impossible to ascertain the actual vote from the other evidence in the case, the vote of such poll must be wholly rejected." Paine, Elect. § 499; McCrary, Elect. §§ 190, 192.

This rule is founded in good sense, and is sustained by the authorities. *Mann's Case,* 2 Phila. 320; *McKinney v. O'Connor,* 26 Tex. 5; *Knox Co. v. Davis,* 63 Ill. 405; *Van Amringe v. Taylor,* 108 N. C. 196 (12 S. E. Rep. 1005); *Heyfron v. Mahoney,* 9 Mont. 497 (24 Pac. Rep. 93); *Londoner v. People,* 15 Colo. 557 (26 Pac. Rep. 135); *Chamberlain v. Woodin* (Idaho), 23 Pac. Rep. 177; *Jones v. Glidewell,,* 53 Ark. 161 (13 S. W. Rep. 723); *Blue v. Peter,* 40 Kan. 701 (20 Pac. Rep. 442).

In *Mann's Case,* the law provided that no person should be permitted to vote whose name was not contained on the list of taxable inhabitants; but a large number of persons whose names were not upon the list were permitted to vote. Under the Michigan statute no voter is permitted to vote who exposes his ballot to the view of others, and under the averments in the replication in the present case 75 voters did so expose their ballots, which were

therefore illegally received. The court in *Mann's Case* said:

"Where the conduct of election officers is such as to destroy the integrity of their returns, and to avoid their *prima facie* character, due and adequate proof must be produced of each vote relied on by the respondent."

In *Heyfron v. Mahoney,* 66 illegal votes were cast at one of the precincts, and the vote of the entire precinct was thrown out in consequence.

"Fraud does not invalidate the legal votes cast, but, by destroying the presumption of the correctness of the returns, it makes it necessary that any person who claims any benefit from the votes shall prove them; and, where no proof is offered, and the frauds are of such a character that the correct vote cannot be determined, the return of the precinct will be rejected." 6 Amer. & Eng. Enc. Law, 353.

In *Jones v. Glidewell,* the entire vote was rejected because certain voters were intimidated by being compelled either to show their ballots or be ostracised by others.

It is of far more consequence to the people of this State and to the stability of our form of government that these provisions should be held mandatory than is the fact that occasionally the will of the people may be defeated by adhering to them, and rejecting the entire precinct so tainted with fraud. Whatever may have been the rule under former election laws, it is evident that under this statute no voter can be compelled to remove the secrecy of his ballot, and state how he voted. If these provisions are held directory only, it follows that the intent of the people to pass a law to preserve the purity of elections is defeated, and the statute instead provides sure means to protect and cover up corruption and venality. If the averments of the replication are maintained by proof, it follows that the receiving of 13 votes of unregistered persons, and permitting persons to enter the booths with voters, contrary to law, tainted the vote of the whole precinct.

The charges made are so grave that we do not think it proper to determine the question upon the pleadings. The case must therefore be remanded to the circuit court for the county of Wayne for trial. The respondent will be allowed 20 days within which to amend his rejoinder and complete the issue. The case may then be noticed for trial by either party upon 10 days' notice, and be given preference over the other calendar causes.

The other Justices concurred.

94 445
98 181
94 445
134 2497
94 445
j149 2300

HARRIET A. WHEELER v. HOMER L. STEWART.

Pleading—Amendment—Privity of contract—Right of action.

1. Where a widow sues in her individual capacity to recover a demand belonging to her husband's estate, but which she claims as her own, evidence that she is administratrix and sole heir of the estate is properly excluded, no amendment being asked permitting her to maintain the suit as administratrix.
2. A husband bought an interest in a celery farm, and agreed to live on and work the farm. The vendor agreed that, if the husband became unable to attend to the business before his interest was paid for, he would refund the money paid, and pay him a fair compensation for his services, and, in case of his death, he would make such payment to the vendee's wife. The husband died while living on the farm, and the wife brought suit in her individual capacity to recover the moneys paid and for the services rendered by the husband. And it is held that the case comes within the general rule that a promise made by one person to another for the benefit of a third person, who is a stranger to the consideration, will not support an action by the latter; citing *Pipp v. Reynolds*, 20 Mich. 88; *Hunt v. Strew*, 39 Id. 368; *Hidden v. Chappel*, 48 Id. 527; *Edwards v. Clement*, 81 Id. 513.

Error to Lenawee. (Lane, J.) Argued November 17, 1892. Decided December 24, 1892.

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

John B. Shipman, for appellant.

Wood & Bird, for defendant.

GRANT, J. Plaintiff is the widow of Charles M. Wheeler, deceased. December 20, 1888, Wheeler entered into a written contract with the defendant to buy a one-third interest in his celery farm. Wheeler agreed to live upon the farm, and give his undivided attention to the business conducted thereon, and this was stated in the contract to be a large inducement for Stewart to make the sale. It was further agreed that, if Wheeler became unable to attend to the business before his interest was paid for, Stewart should refund to him all money paid by him, one-third of the expense money paid by Wheeler, and a fair and just compensation for his time and services; and, in case of Wheeler's death, it was agreed that such payments should be made to Wheeler's wife, if living; if not, then to his executors and administrators. Under this contract Wheeler lived on the celery farm from July, 1889, to the close of the season. He returned to the farm in January, 1890, where he continued to live until his death, in June of that year. Meanwhile he had made certain payments. It was conceded that Wheeler's services were worth $35 per month. For the value of these services, and the amounts paid upon the contract by her husband, Mrs. Wheeler brought suit in her individual capacity. At the conclusion of the evidence the court directed a verdict for the defendant, upon the ground that the plaintiff could not maintain the suit.

We think the instruction was correct. She was not a party to the contract, and had paid none of the consideration. If the contract were abandoned during Mr. Wheeler's life, the payments were to be made to him. At the time of his death, therefore, the title to the money was in him. It must, therefore, be held to belong to his estate. This case comes within the general rule that a promise made by one person to another for the benefit of a third person, a stranger to the consideration, will not support an action by the latter. *Pipp v. Reynolds,* 20 Mich. 88; *Hidden v. Chappel,* 48 Id. 527; *Edwards v. Clement,* 81 Id. 513; *Hunt v. Strew,* 39 Id. 368.

Hidden v. Chappel is especially applicable to the present case. Hidden was guardian of one William H. Fairman, an incompetent. Fairman's brother, Hiram, had obtained from him some money to enable Hiram to purchase a piece of land. Hiram sold the land to Chappel, who retained from the purchase price the amount due William, and agreed with Hiram that he would pay it to William whenever there was a person who could properly and legally receive it. The guardian was, of course, entitled to receive the money. In that case the promise was to William's brother. In this case the promise was to plaintiff's husband. If the promise to a brother will not support an action, for the same reason the promise to a husband will not support an action on the part of his wife.

Testimony was introduced showing that plaintiff was the administratrix of her husband's estate, and that neither she nor he had any children. On motion of defendant's attorney, this evidence was stricken out. This is claimed as error, under the following authorities: *Peet v. Knights of Maccabees,* 83 Mich. 92; *Wood v. Circuit Judge,* 84 Id. 521; *Smith v. Pinney,* 86 Id. 484. The answer to this is that plaintiff sued in her individual capacity, claiming the property as her own, and no amendment was asked per-

mitting her to maintain the suit as administratrix. An amendment cannot now be allowed, since the amount due is not conceded, and the case cannot, in this Court, now be disposed of upon the merits. She may, of course, still bring suit in her capacity as administratrix.

Judgment affirmed.

The other Justices concurred.

94 448
94 517
94 448
95 463
94 448
112 503
94 448
f155 46

A. OREN WHEELER v. THE BOARD OF CANVASSERS OF MANISTEE COUNTY.

Elections—Members of Legislature—Recount.

Act No. 208, Laws of 1887 (3 How. Stat. § 234*a*), which provides for the correction of frauds and mistakes in the canvass and returns made by inspectors of elections, does not apply to the office of State Senator.

Mandamus. Argued December 23, 1892. Denied December 24, 1892.

Relator applied for *mandamus* to compel respondent to order a recount in certain precincts of Manistee county for the office of State Senator. The facts are stated in the opinion.

McAlvay & Grant, P. T. Glassmire, and *E. E. Benedict,* for relator.

A. J. Dovel, George L. Hilliker, and *Morse, McGarry & McKnight,* for respondent.

PER CURIAM. Petition is made for *mandamus* to compel the board of canvassers of the county of Manistee to

order a recount of the ballots in certain precincts of that county. Relator was a candidate on the Republican ticket for the office of State Senator. He filed a petition with the board of county canvassers for a recount, under the provisions of Act No. 208, Laws of 1887. This was refused, and we are now asked to issue the writ of *mandamus* to compel the board to take such action.

The case falls directly within the ruling of this Court in *Naumann v. Board of Canvassers*, 73 Mich. 252. It was there said that—

"The statute does not apply in those cases where the city council, by whatever name it is called, is made the absolute judge of the election and right to office of its members. * * * It has been very common in this State, for obvious reasons, to prevent delay and litigation, to vest in the legislative boards of municipal corporations the same power of determining the claims of persons to belong to them that is vested in Congress and the State Legislature."

In the present case, under section 9, art. 4, of the State Constitution, each house of the Legislature is empowered to judge of the qualifications, elections, and returns of its members. It was shown in *Naumann v. Board of Canvassers, supra*, that the charter of the city of Detroit contained a provision that the board of aldermen should be the judges of the election and qualifications of its own members, etc. We can see no distinction in principle in these cases. The same question arose in *Weston v. Probate Judge*, 69 Mich. 600, and the writ of *mandamus* was refused for the same reason. We feel bound to follow these cases.

The writ must be denied.

94 450
94 453
94 450
e148 515

LUTHER M. PACKARD v. THE BOARD OF CANVASSERS OF MENOMINEE COUNTY.

Elections—Recount—Duty of board of canvassers—Quo warranto.

1. Should a board of canvassers refuse to recount under Act No. 208, Laws of 1887 (3 How. Stat. § 234*a*), when the application is filed in time, a writ of *mandamus* would issue to set the board in motion; but when they have recounted and declared the result, and made their return and adjourned, they become *functus officio*, and the remedy of the party claiming to be aggrieved is by a *quo warranto* proceeding to test the validity of the election.
2. The provision of the act requiring the recounting committee to make a return to the board of canvassers, "showing the whole number of votes given, the names of the candidates, and the number of votes given to each, written out in words and figures as upon the ballots," cannot be construed as calling for a statement of every contested ballot, showing the reasons for which it was rejected, so that the contestant may take advantage of any error by writ of *certiorari* to the circuit court.

Mandamus. Argued December 23, 1892. Denied December 24, 1892.

Relator applied for *mandamus* to compel respondent to reassemble, and make a full and detailed report of all ballots claimed to have been improperly counted for his opponent, and of those in his favor rejected by said board, and for an order to count certain ballots and reject others. The facts are stated in the opinion.

Sawyer & Waite, for relator.

B. J. Brown, for respondent.

PER CURIAM. The petitioner was a candidate for the office of county treasurer of Menominee county at the last November election. His opponent was declared elected by

the board of county canvassers. He, in season, filed his demand for a recount, under Act No. 208, Laws of 1887. Such recount was had, the committee appointed reported to the board of county canvassers that his opponent was elected, and the board so declared the result. He now asks for the writ of *mandamus* to compel the board to reassemble, and make a full and detailed report of all the ballots which he claims were improperly counted for his opponent, and the rejection of certain ballots in favor of himself, and that said board be directed by this Court to count certain ballots for himself, and to reject some counted for his opponent.

Should the board of canvassers refuse to recount under this statute, when the application is filed in time, the writ would issue to set the board in motion; but when they have recounted and declared the result, and made their return and adjourned, they then become *functus officio*, and the remedy of the party claiming to be aggrieved is by a *quo warranto* proceeding to test the validity of the election.

The claim of relator is that the board and committee appointed in accordance with the law to recount the votes should return a statement of every contested ballot, showing the reasons for which it was rejected, so that the contestant may take advantage of any error by the writ of *certiorari* to the circuit court. The statute cannot be so construed. The provision reads as follows:

"Said committee shall, in some public place, where such candidates and their counsel may be present if they so desire, without unnecessary delay, proceed to open the ballot-boxes from such districts, townships, or wards, and to make a recount thereof as to such candidates, and make correct and full returns in writing under their hands to said board, showing the whole number of votes given, the names of the candidates, and the number of votes given to each, written out in words and figures as upon the ballots."

The recount was had publicly, as the law provides, and

each party inspected the disputed ballots, and therefore obtained the evidence by which the election can be contested. This Court cannot, in this proceeding, be called upon to determine whether these ballots were in fact ballots; that is, whether they were properly cast or not. The ballots themselves and the witnesses should be produced before the court where the contest is made. These ballots cannot be produced here, nor photographs made of them, so as to put this Court in possession of all the facts.

It follows that the relator's remedy is by *quo warranto*, and the writ must be denied.

---

94 452
148 515

JAMES HENDERSON v. THE BOARD OF CANVASSERS OF MANISTEE COUNTY.

Elections—Recount.

This case is ruled by *Packard v. Board of Canvassers, ante*, 450.

Mandamus. Argued December 23, 1892. Denied December 24, 1892.

Relator, who was candidate for sheriff of Manistee county at the last general election, applied for *mandamus* to compel respondent to reassemble, and to count certain ballots for himself, and to reject others counted for his opponent.

McAlvay & Grant, P. T. Glassmire, and *E. E. Benedict,* for relator.

A. J. Dovel, George L. Hilliker, and *Morse, McGarry & McKnight,* for respondent.

PER CURIAM. The facts in this case are similar to

those in *Packard v. Board of Canvassers, ante,* 450, and the questions of law are identical.

This case will therefore be ruled by it, and the writ will be denied.

94 453
e134 532

THE COMMON COUNCIL OF THE CITY OF MUSKEGON v. JAMES GOW, MAYOR.

Municipal corporations—Issue of bonds—Limit—Vote of electors.

Under section 12, tit. 9, of the charter of the city of Muskegon (Act No. 304, Local Acts of 1889), the common council has power, without a vote of the electors, to raise money for general purposes by the issue of bonds of the city, provided that the amount thereof, with that ordered to be raised by tax for such purposes, does not exceed the limit fixed by section 5 of that title.

Mandamus. Argued December 23, 1892. Granted December 24, 1892.

Relator applied for *mandamus* to compel respondent to execute and deliver certain bonds. The facts are stated in the opinion.

Bunker & Carpenter, for relator.

Smith, Nims, Hoyt & Erwin, for respondent.

PER CURIAM. The common council of the city of Muskegon, in the general appropriation bill for the year 1892, determined by resolution to raise certain specified sums by loan instead of by tax, and directed the issue of bonds for the purposes named. The mayor questions the authority

to issue the bonds without a vote of the electors authorizing such issue, and refuses to execute said bonds.

Section 5 of title 9 of the charter[1] provides that—

"The aggregate amount which the common council may raise by general taxation upon the taxable real and personal property in the city of Muskegon for the purposes of defraying the general expenses and liabilities of the corporation, and for all purposes for which the several general sums mentioned in section three of this title are constituted (exclusive of the taxes for schools, library, and schoolhouse purposes), shall not, except as herein otherwise provided, exceed in any one year three per cent. on the assessed value of all the real and personal property in the city, made taxable by law, as shown by the last preceding assessment roll."

Section 12 provides:

"The common council shall also in said month of June pass a resolution, to be termed the 'annual appropriation bill,' in which it shall make provision for and appropriate the several amounts required to defray the expenditures and liabilities of the corporation for the next fiscal year, payable from the several general funds, and from the street district funds, as estimated and determined upon, as provided in section 10 of this title, and order the same, or so much of said amounts as may be necessary, to be raised by tax with the next general tax levy, or by loan or both, and to be paid into the several general funds and street district funds of the city; but the whole amount so ordered to be raised by tax or loan, or by both, shall not, except as herein otherwise provided, exceed the amount which the city is authorized by sections five, six, and nine of this title to raise by general tax during the year."

Section 19 provides:

"Should any greater amount be required in any year for the purpose of erecting public buildings, or for the purchase of ground therefor, or for any other public improvements or purposes, to be paid for from the general funds of the city, than can be raised by the common council under the foregoing provisions of this title, such amounts may be raised by tax or loan, or partly by tax and

[1] See Local Acts of 1889, page 120.

partly by loan, if authorized by a majority vote of all the electors voting upon the question at an annual city election, or at a special election called for that purpose."

The aggregate amount to be raised for general purposes, including the purposes for which it is proposed to make this loan, shall not, except as therein otherwise provided, exceed in any one year 3 per cent. upon the assessed valuation. It is conceded that the total amount proposed by the appropriation bill to be raised by both tax and loan did not exceed the 3 per cent. fixed as the maximum to be raised by the council. We think it clear under these sections that the council has the authority to issue the bonds in question without the aid of a vote of the electors.

The *mandamus* must therefore issue as prayed.

94 455
94 517
94 455
95 464
94 455
106 118

WILLIAM NEWTON v. THE BOARD OF CANVASSERS OF WAYNE COUNTY.

Elections—Recount—Authority of board of county canvassers—State officers.

1. An application by a candidate for Supreme Judge to the board of county canvassers for a recount under Act No. 208, Laws of 1887 (3 How. Stat. § 234*a*), made on the last day on which the Board of State Canvassers can, if the direction of the statute is to be observed, canvass the returns and issue the certificate of election, is not in time, and *mandamus* will not lie to compel such recount.
2. The evident purpose of the act of 1887 was to provide for a recount antecedent to the determination by the board of county canvassers of the number of votes cast for the office as to which a recount is applied for.
3. It is clearly intended by the act that, in case of various contests

arising before the board, different committees may be appointed, and the recount in all cases proceed at once.

4. The board of county canvassers acting on a contest may well be held to constitute a special tribunal when in session only for the purpose of considering such contest, and it was not the legislative intent that the presentation of an application for a recount to the body when so acting, and after a full determination of the result as to the candidates for other offices, should entitle the party presenting such petition to a recount.

5. Relator has an ample remedy in this case under section 5, art. 8, of the Constitution, which provides that, when the determination of the Board of State Canvassers is contested, the Legislature in joint convention shall decide which person is elected; citing *Royce v. Goodwin*, 22 Mich. 501.

6. It will be assumed that the Legislature will deal fairly in case of such a contest, and there can be no doubt of its right in joint session to ascertain, by means of the best evidence attainable, the actual state of the vote.

Mandamus. Argued December 23, 1892. Denied December 24, 1892.

Relator applied for an order to show cause why *mandamus* should not issue compelling respondent to grant relator a recount of the ballots cast for Justice of the Supreme Court. The facts are stated in the opinion.

Black & Dodge, for relator.

Cahill & Ostrander, for respondent.

PER CURIAM. The relator was a candidate for Justice of the Supreme Court at the late election. On the 20th day of December, instant, relator presented to the board of county canvassers for the county of Wayne a petition for a recount of the ballots cast in certain of the precincts of the city of Detroit, under Act No. 208, Laws of 1887.

This recount was refused, and the present application is for an order to be directed to the board of canvassers to show cause why a *mandamus* to compel such recount should not issue. In view of the importance of the ques-

tions involved, counsel on both sides have been given an opportunity to be heard upon this application.

The petition shows that the canvass and return of the votes cast for State officers in Wayne county has been filed with the State Canvassing Board by the board of county canvassers. The question which meets us at the threshold is whether the application for a recount was in time.

The statute relating to the duties of the board of county canvassers evidently contemplates that the board shall proceed promptly to determine the result of the election, and that no adjournment, except for the purpose of having returns corrected, be made. How. Stat. §§ 179, 181, *et seq.*

Section 203 provides that the Secretary of State shall, on the receipt of the certified copies of the statement of votes given in the several counties directed by law to be sent to him by the county clerks, record the same in a book to be by him kept for that purpose; and if, from any county clerk, no such statement shall have been received on or before the second Monday of December next after a general election, he shall call upon the Governor and State Treasurer for the statement, which the law provides shall be sent to them respectively. The term of State officers is made to commence January 1 after the election, and it is evident that it was the intent that the Board of Canvassers should conclude their action before January 1. This the provisions relating to the duty of the State Board clearly show. Section 206 provides that the Board of State Canvassers shall meet for the purpose of declaring the result of the election on or before the 15th day of December, and section 217 is as follows:

"The said Board of State Canvassers shall have power to adjourn from day to day for a term not exceeding five days."

It appears, therefore, that the application for a recount in the present case was made on the last day on which

the Board of State Canvassers could, if the direction of the statute is to be observed, canvass the returns and issue the certificate of election.

The evident purpose of the act of 1887 was to provide for a recount antecedent to the determination of the number of votes cast. The provision is that the board of canvassers, upon receiving the report of the committee, shall accept the same as correct, anything in the previous returns from such township, ward, or district to the contrary notwithstanding. Accept this report for what purpose? Evidently for the purpose of some action by the board. This action is simply the determination of the votes, and such determination has been made in this case, and must have been made before such petition was presented, in order that the Board of State Canvassers could act within the time accorded them by statute. The next provision of the act of 1887 is that any candidate not receiving a certificate of election may, for errors apparent on the face of the returns, have the same examined and corrected by *certiorari* to the circuit court of the county. If the statute be held to apply to State officers at all, it is clear that the determination is open to review by *certiorari*, and what is open to review is evidently the proceedings which have antedated the determination or issue of the certificate.

It is urged, however, that the relator is in time, as the statute states that the application may be made on or before the last day on which the board of canvassers meet. The provisions of this statute are, as we have shown, incongruous, and seemingly conflicting. We do not feel justified in giving such a construction to the statute as will render nugatory some of the provisions of the act itself, as well as so disarrange the system of canvassing votes for the State officers as to prevent such officer from receiving his certificate until after his term begins. We

think that, at the latest, the application must be made on or before the last day on which the board is in session for the purpose of taking action relating to the petitioner's claim to the office in controversy, and that it was not contemplated that each candidate could, one after another, await the final determination of a preceding contest before applying for a recount. This would render the canvass next to interminable, and not only this, but would enable a contestant, in a case like the present, to withhold his application until his opponent is deprived of a recount in all other counties in the State, by reason of the canvassing boards having adjourned. It was clearly intended that, in case of various contests arising before the board, different committees could be appointed, aud the count in all cases proceed at once. The board acting on a contest may well be held to constitute a special tribunal when in session only for the purpose of considering such contest. We think it was not the legislative intent that a presentation of the application to the body when so acting, and after a full performance and determination of the result as to the candidates for other offices, should entitle the party presenting such petition to a recount.

The relator has an ample remedy in this case under section 5, art. 8, of the Constitution. See *Royce v. Goodwin*, 22 Mich. 501. It has been suggested that the legislative precedent is against the opening of ballot-boxes for the purposes of a recount. We are bound to assume, however, that the Legislature will deal fairly in case of a contest, and, in our opinion, there can be no doubt of the right of the Legislature, in joint session, to ascertain, by means of the best evidence attainable, the actual state of the vote.

JANUARY TERM, 1893.

94 461
108 202
94 461
s53NW1098
130 2701
94 461
156 2644

SPENCER D. BISHOPP, PROSECUTING ATTORNEY, v. VICTOR H. LANE, CIRCUIT JUDGE OF HILLSDALE COUNTY.

Liquor traffic—Druggists—Local option law.

1. Druggists in local option counties are governed as to the sale of liquor therein by the provisions of the general liquor law of the State.
2. A druggist in a local option county, who has filed his bond, and who sells liquor in violation of the restrictions and requirements of the general liquor law, should be prosecuted under the local option law.

Mandamus. Argued January 3, 1893. Denied January 11, 1893.

Relator applied for *mandamus* to compel respondent to vacate an order quashing an information. The facts are stated in the opinion.

Spencer D. Bishopp, in pro per.

Lockerby & Kinney, for respondent.

PER CURIAM. The sole question presented by this application is whether a druggist who has filed his bond as required by the statute, and who violates the restrictions imposed by law in selling intoxicating liquors, in a county in which the provisions of the "Local Option Law," so called, are in force, is to be prosecuted under such local

option law or the general statute (Act No. 313, Laws of 1887).

The second section of the local option law (Act No. 207, Laws of 1889) provides that—

"On and after the first day of May next following after the adoption by the board of supervisors" and the vote of the people required by the statute, the general laws of the State relating to the regulation of the business of selling intoxicating liquors "shall be, and the same are hereby declared, suspended and superseded so far as relates to the territory and municipalities within the limits of any such county: *Provided*, however, that all sales of liquors by druggists or registered pharmacists in such counties shall be under the restrictions and requirements imposed upon them by the general laws of this State."

Section 1 of the act provides—

"That it shall be unlawful for any person, directly or indirectly, * * * to sell * * * any vinous, malt, brewed, fermented, spirituous, or intoxicating liquors, * * * or to keep a saloon or any other place where any such liquors are manufactured, sold, stored for sale, given away, or furnished, in any county of this State, on and after the first day of May next following after the adoption by the board of supervisors of such county of a resolution prohibiting the same, as provided in section thirteen of this act, so long as such resolution remains unrepealed: *Provided*, however, that the provisions of this section shall not apply to druggists or registered pharmacists in selling any such liquors under and in compliance with the restrictions and requirements imposed upon them by the general laws of this State."

These provisions refer to the general laws of the State as fixing the restrictions and requirements imposed upon druggists; but section 1 does not in terms exempt druggists from the provisions of the act, but only druggists who sell under and in compliance with the restrictions and requirements imposed upon them by the general laws of the State. To hold that druggists are not punishable

under Act No. 207, it is necessary to enlarge the proviso which exempts them. There could be no doubt, if the restrictions were embodied in the proviso itself, that a prosecution would lie if compliance with such restrictions were negatived in the information; nor do we think the fact that such restrictions and requirements are imposed by another general law of the State changes the rule of construction. We hold, therefore, that the prosecution should have been under Act No. 207, Laws of 1889. See *People v. Murphy*, 93 Mich. 41.

As the learned circuit judge reached the same conclusion, it follows that the writ of *mandamus*, asking for the vacation of his order, should be denied, without costs.

---

94 463
107 151
94 463
114 114

ALEXANDER FOURNIER v. THE MAYOR AND COMMON COUNCIL OF WEST BAY CITY.

Municipal corporations—Appropriating money—Salaries of officers—Resolutions.

1. Strictly speaking, a resolution fixing a salary cannot be termed an act appropriating money, but it is, nevertheless, an act making an appropriation of the compensation so fixed obligatory.
2. A provision of a city charter that no resolution appropriating money shall be passed, except by a majority of all of the aldermen elect, applies to a resolution fixing a *per diem* compensation for the street commissioner, under a provision requiring the council to determine annually the salary to be paid to the several city officers.

Mandamus. Argued January 3, 1893. Granted January 18, 1893.

Relator applied for *mandamus* to compel the respondent

to allow his claim for compensation as street commissioner. The facts are stated in the opinion.

Lee E. Joslyn, for relator.

G. H. Francis, for respondent.

PER CURIAM. Relator was appointed as street commissioner of West Bay City in April, 1891, for a period of two years. The fiscal year commences on the second Monday in April. The charter provides that the council shall annually determine the salary to be paid to the several city officers, and that the compensation so fixed shall not be increased or diminished, after having been so determined and fixed, until the next annual determination. In April, 1891, the council fixed the compensation of the street commissioner at three dollars per day.

In April, 1892, a resolution was offered in the council fixing the compensation for the year 1892 at three dollars per day. The council was composed of twelve members. The mayor is also a member *ex officio,* but without the right to vote except in case of a tie. When the resolution was acted upon, but eleven aldermen were present. Six voted in favor of the resolution, and five against it. The mayor, presiding, declared the resolution lost. Subsequently, on May 2, 1892, a resolution was offered fixing the rate at two dollars per day. But eleven aldermen were present. Six voted in favor of the resolution, and five against. The mayor, presiding, declared the resolution carried.

The charter provides that no resolution appropriating money shall be passed or adopted except by a majority of all the aldermen elect. It is contended that the resolution by which the salary was attempted to be fixed was one appropriating money, and, failing to receive the votes of a majority of the aldermen elect, it was a nullity, and that

the street commissioner is entitled to receive the compensation fixed in April, 1891.

The charter provides that it shall be the duty of the council, on the first Monday in May of each year, to determine, by resolution to be termed the "annual appropriation bill," the amount necessary to be raised by tax for general purposes, for contingent purposes, the erection of public buildings or parks, etc. In May, 1892, such a resolution was adopted by the council by the requisite majority of all the aldermen elect, in which the sum of $460 was designated as the amount necessary to be raised for the purpose of paying the compensation of the street commissioner.

It is contended by the respondent that the resolution fixing the salary was not a resolution appropriating money, within the meaning of the charter provision referred to, and that the provision requiring a majority vote of all the aldermen elect refers to the resolution termed the "annual appropriation bill." This is a very narrow construction of this charter provision. It certainly was not the intention that a majority vote of all the aldermen elect should be required to get money into the treasury, and but a majority vote of a quorum to get the same money out of the treasury, or to fix the liability of the city; or that the vote upon the resolution determining the amount to be raised by taxation for general purposes should render a like vote unnecessary when the council should come to the appropriation of the sums so raised to the specific purposes for which they were raised. In other words, it cannot be said that a contract to build a public building, and to fix the city's liability thereunder, although the moneys were to be paid out of the sums so raised, would not require a majority vote of all the aldermen elect. It will not be contended that the mere determination of the sum neces-

sary "for contingent purposes" affords the protection intended to be secured by this provision, and excepts that sum from the application of this inhibitory provision. Strictly speaking, a resolution fixing a salary cannot be termed an act appropriating money, but it is, nevertheless, an act making an appropriation of the compensation so fixed obligatory. It follows that the resolution acted upon May 2, 1892, having failed to receive the necessary vote under the charter, must be treated as a nullity.

It does not follow, however, that relator is entitled, without any action of the council, to receive the *per diem* fixed in April, 1891. The charter makes it the duty of the council to fix the compensation annually. It was in the power of the relator, by proper proceedings, to compel action to that end by the council. There is a clear distinction between the present case and that class of cases where the salary is fixed for an indefinite period.

In August, 1892, relator presented a bill to the council for 91 days' services, at three dollars per day. On the 15th day of August, 1892, the council, by a vote of seven to five, ordered the payment of the bill as presented. The mayor and recorder, however, relying upon the resolution acted upon in April, and treating that as valid, refused to draw the order upon the treasurer. Subsequently the relator presented bills at the rate of three dollars per day, but the council allowed such bills at two dollars per day.

None of these allowances can be treated as fixing the annual compensation under the charter. It is the duty of the common council to proceed at once to the determination of relator's compensation for the year 1892, as well for that portion of the term already expired as for the unexpired portion, and, when such determination shall have been made, to pay relator accordingly, deducting

any sums which have been received by relator for such term.

A *mandamus* will issue in accordance with these views, with costs to relator.

94 467
f119 56

JOHN A. LINDSTROM v. THE BOARD OF CANVASSERS OF MANISTEE COUNTY.

Elections—Irregularities—Ballots—Directory provisions of statute.

1. The provision of section 36 of the election law of 1891, voiding all ballots "which shall bear any distinguishing mark or mutilation," was intended to provide against voters marking the individual ballot which they cast, in such manner as to distinguish it.
2. But one vignette is provided for, to be printed on ballots to be used at a general election, under the election law of 1891.
3. A voter who votes a ticket appearing upon the official ballot, duly certified by the board of election commissioners, cannot be disfranchised by the action of the board in printing a separate vignette at the head of the county ticket, or by a failure to have a proof copy of the ballot on file at the office of the county clerk, and open for inspection, at least 10 days prior to the election; nor can a candidate who is not shown to have participated in any fraud be defeated of his election on these grounds.

Mandamus. Argued December 23, 1892. Denied December 24, 1892, and opinion filed January 18, 1893.

Relator applied for *mandamus* to compel a recount of the votes cast at the November election for the office of county treasurer. The facts are stated in the opinion.

McAlvay & Grant and *P. T. Glassmire,* for relator.

A. J. Dovel and *Morse, McGarry & McKnight*, for respondent.

PER CURIAM. The relator asks for a *mandamus* to compel a recount of the votes cast at the late election for the various candidates for the office of county treasurer. The relator was a candidate for the office, but on the official returns is shown to have received less than a plurality.

Among other statements in the petition is the following:

"Your petitioner further shows that the said inspectors in all of said wards and townships counted votes for said Peter Friske [relator's opponent] which were voted upon tickets which were printed upon ballots that bore distinguishing and distinctive marks, other than the legal and recognized vignette, and were void and illegal, and should not have been counted."

Attached to the return of the respondent is a copy of the official ballot furnished to the voters of Manistee county, upon which was printed six tickets,—a Republican ticket, Democrat ticket, Regular Independent Democrat, Independent Democrat, Prohibition, and People's Party ticket. At the head of the Regular Independent Democrat ticket is printed the regular Democratic vignette. At the head of the county ticket, however, appears an additional vignette, not corresponding to the one placed at the head of the ticket. So at the head of the so-called "Independent Democrat" ticket is placed the regular Democratic vignette, and at the head of the county ticket another vignette, not corresponding to the one placed at the head of the ticket.

It is contended by the relator that these two tickets are illegal, and that the votes cast for the candidates appearing thereon should not, in any instance, have been counted; and it was conceded at the argument that, if these votes were not to be counted, relator had received a plurality of the legal votes cast; and by the relator it is conceded that,

if these votes are to be counted, his competitor received a majority of the votes cast, and therefore a recount would not aid him. The return shows that the official ballot was properly certified under the law by the election commissioners, and it is also claimed that it was duly certified by the proper committees. It is the contention of the relator that but one vignette is provided for, to be printed on ballots which are to be used at a general election, and this would appear to have been the legislative intention. Act No. 190, §§ 9, 10, Laws of 1891. It is also claimed by the relator that the ballots were not open to inspection, as required by section 11 of the act, for 10 days before the election.

The question presented is whether the voter who votes a ticket appearing upon the official ballot, duly certified by legal authority, can be disfranchised by the failure of the election commissioners to comply strictly with the statute, and whether a candidate who is not shown to have participated in any fraud can be defeated of his election on the same ground.

It may be stated, as a general rule, that the provisions of law relating to the manner of conducting elections will not be held so far mandatory as that a departure therefrom will result in the disfranchisement of a district or a class of voters, or the defeat of a candidate himself free from fraud, except in cases where the legislative intent that such departure shall have that effect is clearly and unequivocally expressed. This is a rule which has been applied in this State.

In *People v. Bates*, 11 Mich. 364, it appeared that tickets cast for city officers were not found in the box provided for that purpose, but were found in the State and county box, and were counted by the inspectors. It was said by the Court that the two elections, though held upon the

same day, were distinct and independent of each other, as much as if they had happened on different days.

"But, though thus distinct, and the ballots to be deposited in separate boxes, yet, as both were held together under the supervision of the same inspectors, with both boxes before them for the reception of ballots, the inspector receiving the ballot might be liable, by honest mistake, occasionally to deposit a ballot in the wrong box; and, if he understood that the ballots found in the wrong box were in no case to be counted, he might do the same thing for a fraudulent purpose. But the elector is not to be deprived of his vote either by the mistake or fraud of the inspector in depositing it in the wrong box, if the intention of the voter can be ascertained with reasonable certainty. To hold otherwise would be to give more effect to the letter than to the manifest purpose of the statute."

In *Adsit v. Secretary of State*, 84 Mich. 420, it was held that the vote of the people could not be defeated by the failure on the part of the Secretary of State to give notice of an election, and that the provision requiring such notice was directory, merely, and not mandatory.

So it is stated generally in McCrary on Elections (section 193):

"Those provisions of a statute which affect the time and place of the election, and the legal qualifications of the electors, are generally of the substance of the election, while those touching the recording and return of the legal votes received, and the mode and manner of conducting the mere details of the election, are directory. The principle is that irregularities which do not tend to affect results are not to defeat the will of the majority. The will of the majority is to be respected, even when irregularly expressed. The officers of election may be liable to punishment for a violation of the directory provisions of a statute, yet the people are not to suffer on account of the default of their agents."

But it is said that section 36 of the act provides that in the canvass of the votes any ballot which shall bear any distinguishing mark or mutilation shall be void, and shall

not be counted, and it is insisted that the ballot in question bears a distinguishing mark. The evident intent of this provision was to provide against voters marking the individual ballot which they cast, in such manner as to distinguish it. To place the construction upon this provision contended for by relator would result in excluding from the count all the ballots cast in Manistee county; for upon every ballot appeared these so-called distinguishing marks, namely, the unauthorized vignettes.

An announcement in accordance with the views herein expressed has been heretofore made, and the writ denied.

DURAND, J., who has retired since the formal decision, took no part in the preparation of this opinion.

94 471
94 473

HENRY A. ROBINSON, GUARDIAN OF MAY FRENCH, v. F. H. CHAMBERS, JUDGE OF THE RECORDER'S COURT OF DETROIT.

Witnesses—Detention to await criminal trial—Fees.

A witness who is required to recognize for his appearance to testify on behalf of the people, and is committed to jail on his failure to enter into such recognizance, must be held to have been in attendance upon the court during the time of his commitment, and is entitled to the fees allowed by law to witnesses for the people in criminal cases.[1]

[1] How. Stat. § 9472, authorizes an examining magistrate, upon an adjournment of the examination or the admission of the prisoner to bail or his commitment, to bind by recognizance the complainant and all material witnesses against such prisoner to appear and testify on the adjourned day, or at the next court in which the prisoner shall be held to answer; and, under section 9473, the magistrate is authorized, if satisfied by due proof that there is good cause to believe that any such witness will not perform the condition of his recognizance unless other security be given, to order the witness to enter into a recognizance, with one or more

Mandamus. Argued January 10, 1893. Granted January 19, 1893.

Relator applied for *mandamus* to compel respondent to enter an order for the payment of certain witness fees. The facts are stated in the opinion.

Edward S. Grece, for relator.

O. F. Hunt, for respondent.

PER CURIAM. May French was committed by the recorder's court of Detroit, in default of bail, to appear as a witness in a criminal cause in said court. Under this order she was confined from March 11 until the 21st of May following. The court allowed her $25 for such detention. She subsequently petitioned, through her guardian, for $57 more, claiming the statutory witness fees for the time that she was detained. The court denied the prayer of the petition.

This was erroneous. The inability to give bail and consequent detention were the misfortune, rather than the

---

sureties, for his appearance at court; and section 9475 empowers the magistrate, on the refusal of the witness to recognize, to commit him to prison, there to remain until he complies with the order requiring such recognizance, or is discharged according to law.

How. Stat. § 9058, provides that whenever any person shall attend any court of record as a witness in behalf of the people, upon request of the public prosecutor, or upon subpœna, or by virtue of a recognizance for that purpose, and it shall appear that such person has come from any other state or territory of the United States, or is poor, the court may, by an order entered on its minutes, direct the county treasurer of the county in which the court may be sitting to pay to such witness such sum of money as shall seem reasonable for his expenses. This section further provides that "no fees shall be allowed or paid to witnesses on the part of the people in any criminal proceeding or prosecution, except as in this section above provided."

How. Stat. § 9064 (Act No. 77, Laws of 1849, as amended by Act No. 192, Laws of 1875), provides that whenever any person shall attend any court as a witness in behalf of the people, upon request of the public prosecutor, or upon a subpœna, or by virtue of any recognizance for that purpose, he shall be entitled to one dollar for each day's and fifty cents for each half day's attendance in a court of record.

fault, of the witness. She was detained by the court, and must be held to have been in attendance upon the court, within the meaning of the statute providing for the payment of witness fees. *Hutchins v. State,* 8 Mo. 288; *State v. Stewart,* 1 N. C. L. Rep. 524; *Higginson's Case,* 1 Cranch, C. C. 73.

Mandamus must issue as prayed, but without costs.

HENRY A. ROBINSON, GUARDIAN OF JULIA COLLINS, v. F. H. CHAMBERS, JUDGE OF THE RECORDER'S COURT OF DETROIT.

Witnesses—Fees.

This case is ruled by *Robinson v. Chambers, ante,* 471.

Mandamus. Argued January 10, 1893. Granted January 19, 1893.

Relator applied for *mandamus* to compel respondent to enter an order for the payment of certain witness fees. The facts are stated in *Robinson v. Chambers, ante,* 471.

Edward S. Grece, for relator.

O. F. Hunt, for respondent.

PER CURIAM. This matter is ruled by *Robinson v. Chambers, ante,* 471, and a similar order will be entered.

94 474
103 38
94 474
s54NW 175
132 656

FANNY B. LANE ET AL. v. JOHN F. RUHL.

Landlord and tenant—Notice to quit.

Where a tenant in possession under a lease for one year assents to its termination, and continues to hold from day to day under a new arrangement, which he afterwards repudiates, and claims the right to hold for another year under the terms of the prior lease, to which holding the landlord does not assent, he is not entitled to notice to quit; citing *Benfey v. Congdon*, 40 Mich. 283.

Error to Wayne. (Brevoort, J.) Argued January 5, 1893. Decided January 20, 1893.

Summary proceedings to recover possession of land. Defendant brings error. Affirmed. The facts are stated in the opinion.

George X. M. Collier, for appellant, contended:

1. Though an oral lease for more than one year is void, if it reserves an annual rent, and the tenant has been put into possession under it, it will be a good lease from year to year until terminated by notice; citing *Morrill v. Mackman*, 24 Mich. 279; *Huntington v. Parkhurst*, 87 Id. 38; and a tenant who enters into possession under a void lease becomes a tenant from year to year; citing *Coudert v. Cohn*, 118 N. Y. 309; and where, after the expiration of a parol tenancy for a year, the tenant remains in possession for several years under a verbal agreement that he will go when requested by the landlord, he is either a tenant at will or from year to year, and entitled to notice to quit before an action to oust him can be sustained; citing *Coomler v. Hefner*, 86 Ind. 108; and a tenancy without limitation as to time, though the rent is payable monthly, is a tenancy from year to year; citing *Laughran v. Smith*, 75 N. Y. 205; *Scully v. Murray*, 34 Mo. 420; *Coomler v. Hefner*, 86 Ind. 108; *Rothschild v. Williamson*, 83 Id. 387; and notice to quit is necessary to terminate a tenancy from year to year; citing *Dumn v. Rothermel*, 112 Penn. St. 272; and a tenant for a year, holding over, is a tenant from year to year, and not a

tenant at will, but, if the latter, he is entitled to notice to quit; citing *Schneider v. Lord*, 62 Mich. 141.

2. A notice to quit must be explicit and positive; citing Taylor, Land. & Ten. § 483; and the defendant, remaining in possession after the receipt of the letter, is supposed to have assented to the new condition that he held from day to day, and is therefore entitled to notice to quit; citing *Roberts v. Hayward*, 3 Car. & P. 432; *Benfey v. Congdon*, 40 Mich. 283; and where a tenant at sufferance is allowed to continue in possession under a new arrangement, he becomes a tenant at will; citing *Ramsdell v. Maxwell*, 32 Mich. 285.

Wells, Angell, Boynton & McMillan, for plaintiffs.

GRANT, J. The following is an agreed statement of the case:

"The defendant, Ruhl, had been plaintiff's tenant of the store in question for a number of years. In 1883 a written lease was entered into for three years from and including May, 1883. This lease expired with April 30, 1886. No new lease was made for the next period of two years. The defendant held over upon the terms of the former lease. But during this period of two years, and before April 30, 1888, the plaintiffs and the defendant agreed upon a new lease for a further term of two years, to wit, from May 1, 1888, to and including April 30, 1890. This lease was prepared for signature, but, through some inadvertence, was not signed. The rent, payable monthly, was the same, and the other terms substantially the same, as under the lease of May, 1883. Some time before April, 1890, the defendant was informed that the plaintiffs were contemplating changes in the ground floor of the Russell House; that the hotel people desired more room; and that, in order to make the changes, it would be necessary for the plaintiffs to use the store in question, and for that reason no extension could be given him of his then present term. He was then holding for two years under the agreement for a lease for two years from May 1, 1888, for which term the written lease was prepared, but not signed, as already related. The changes were postponed for a year, and before April, 1890, the plaintiffs notified the defendant of it, and told him he could remain another year, but, as the changes would probably be made the following year, the plaintiffs could only let him remain one year more.

To this the defendant assented. In February, 1891, the defendant was informed that the improvements were going to be made in the Russell House, of which he had been told before, and that he could not occupy the store after April 30, 1891. There were one or two other conversations to the same effect between the representative of the plaintiffs and the defendant before April 30, 1891. Further, on April 29, 1891, the plaintiffs sent the defendant a letter which expressly notified him that his right to occupancy could not be extended beyond April 30, 1891, and stating that if he occupied after that date it must be upon the understanding that it was from day to day. In the early part of June, 1891, the improvements in the hotel had so far progressed that it became necessary to have possession of the store. The defendant was told so, and said, 'Very well;' that he would look up another store. A few days afterwards, he was seen again. He said he had not been able to find a store. He was told of some stores in the next block which were vacant. He said, 'Yes, but the rent is too high.' At the next interview, which was on June 18, 1891, he said he had had great difficulty in finding a place to move to, and finally declared that he had decided not to move. He was told his position was very strange, after what he had done about the matter theretofore, but he rejoined that he had had a lawsuit once which had cost him $1,400, and he knew the law, and that he knew he had the right to stay there another year, and that he was going to do it. The plaintiffs' agent offered to submit the matter to defendant's lawyer, Mr. S. S. Babcock, and they repaired to the latter's office. The case was stated to him substantially as above. There was no contradiction upon the part of the defendant, and Mr. Babcock advised that upon that statement he thought the defendant had no right to stay in. Mr. Babcock consulted further with Mr. Ruhl, and later telephoned that Ruhl still declined to go. Thereupon this suit was at once begun before a circuit court commissioner."

Defendant requested the court to charge—

1. That defendant was a tenant from year to year, and was entitled to a notice in writing, of three months, before the expiration of the year upon which he had entered.
2. That the letter was not sufficient notice to quit.
3. That, if the agreement was that the defendant might

occupy the premises from day to day, he was entitled to a notice of one month.

These requests were refused, and the court instructed the jury that under the plaintiffs' evidence no such notice was required, and that, if they found the agreement and notice to be as the evidence on behalf of the plaintiffs showed, they should find for them.

The ruling of the court was correct. This case is within the rule of *Benfey v. Congdon*, 40 Mich. 283. There was no evidence from the plaintiffs of any express or implied assent to defendant's continuation under the terms of the former lease. On the contrary, if the jury believed plaintiffs' witness,—and the verdict shows that they did,—defendant assented to the termination of the one-year lease, and continued to hold from day to day under a new arrangement. The instructions were not as clear and explicit as they might have been, but the issue was so clear that we do not think the jury could have been misled.

Judgment affirmed.

The other Justices concurred.

94 477
141 214

GEORGE KERN v. FREDERICK MYLL.

[See 80 Mich. 525.]

Nuisance—Landlord and tenant—Evidence.

Where, for 10 or 11 years after the filling up of an old well under a dwelling-house, the premises are continuously occupied, and no complaint is made to the landlord that, through the settling of the filling and the accumulation of water, the well has become a cesspool, or that disagreeable odors exist on the

premises, he is not chargeable with such negligent ignorance as is equivalent to actual knowledge of such facts.

Error to Wayne. (Reilly, J.) Argued January 5, 1893. Decided January 20, 1893.

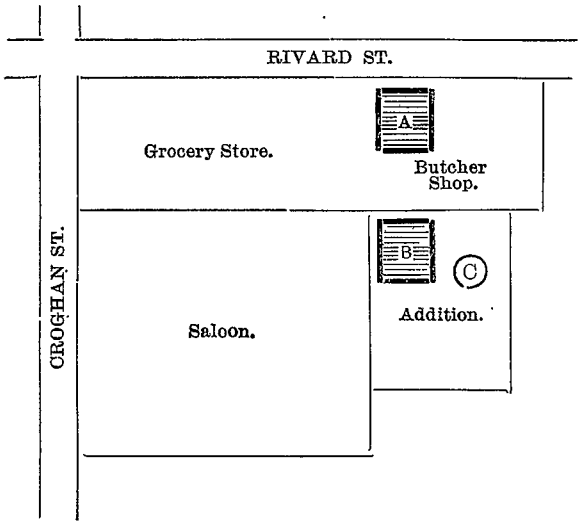
Case. Defendant brings error. Reversed. The facts are stated in the opinion.

William Look and *H. F. Chipman (Henry M. Duffield,* of counsel), for appellant.

George X. M. Collier, for plaintiff.

McGRATH, J. This is an appeal from a second trial. At the conclusion of the first trial the court took the case from the jury on the ground that the declaration did not set forth a cause of action. On appeal this Court held the declaration good; that it disclosed a cause of action in tort, resting upon the duty of defendant to disclose to the plaintiff defects in the premises, amounting to nuisances, known to defendant and concealed from plaintiff, which were calculated to impair, and which did impair, the health of the plaintiff. The case is reported in 80 Mich. 525, where the declaration is fully set forth. It will be observed that the declaration is not founded upon a breach of duty on the part of defendant to keep the premises in a condition fit for occupancy or in repair, nor upon his negligence in that regard, but solely upon the construction and maintenance by defendant of a nuisance, and the concealment of its existence from the plaintiff.

The premises are located on the corner of Croghan and Rivard streets, and consist of a grocery store, butcher shop, and saloon, with living apartments over the grocery and butcher shop. The following is a sketch of the ground floor:



Plaintiff rented the premises in May, 1885, and occupied the grocery, butcher shop, and saloon until June, 1888, at which time he moved his family into the dwelling apartments. An old abandoned well had existed upon the premises prior to 1873, at the point C. At the instance of a tenant, a shed or lean-to had, in 1873, been erected over this old well. In 1877, one Ludwig, a tenant under defendant, with the consent of defendant, and at defendant's expense, tore down this shed or lean-to, and built the present one-story addition, and used it as a kitchen. Ludwig testifies that at that time he filled up this old well, that the filling was pounded down, and that the spot was filled up even with the surface. Up to the time that plaintiff moved his family into the dwelling apartments, in June, 1888, there was no stairway leading to those apartments, except the stairway from Rivard street, at the point A; but plaintiff, of his own motion, connected the addition with the dwelling rooms by the stairway at the point B.

The premises were occupied continuously by tenants from 1873 until plaintiff took possession, and the upper rooms had been occupied as dwelling rooms up to the time that plaintiff's family moved in. Plaintiff used the addition as a dining-room.

Plaintiff testifies that in October, 1888, he had a portion of the floor taken up, and discovered the old well, in which there were stagnant water and dead animals; that before this time he had discovered bad odors in the house; that his "first experience upon waking up in the morning was a sort of moisture. A smell was the first thing that came to my nostrils, but I could not locate it. I made diligent search through the premises to locate it. My family had been there about two weeks before I was obliged to call a physician." That his help would not stay, because of the noxious odors in the dwelling rooms; that his own health was seriously affected by them. Plaintiff's wife testified to "terrible smells" in the house, and that the doctor ordered them to take up the floor to see if the origin of the foul odors could not be discovered. Upon the discovery of the condition of the old well, plaintiff notified defendant, who suggested that the hole be cleaned out and filled with cinders and ashes; and plaintiff did so, and continued to occupy the premises until June of the next year, when he was proceeded against for non-payment of rent, and ejected.

There is no testimony tending to show that any complaint was made to defendant from 1873 to 1885, by any tenant, of any disagreeable or noxious odors about the premises. Indeed, there is positive evidence given by tenants that none existed. Although plaintiff occupied the premises for three years before he moved his family into them, and for five months afterwards, and now testifies that noxious and disease-breeding odors existed, he admits that no complaint thereof was made to defendant by him, or by any one for him, notwithstanding the rent was pay-

able monthly, and defendant was engaged in business in the immediate vicinity.

The testimony relied upon by plaintiff is that of one Ginster and plaintiff's wife. Ginster says that in 1873 he built a summer kitchen over the well; that there was water in the well; that he "worked at the time for Mr. Helpman, and he was working for Mr. Myll." Mrs. Kern says that when they made the discovery, in October, 1888, defendant said he knew that there was a well there.

Defendant says that—

"In the fall of '88, in October, I came into Mr. Kern's saloon, and Mrs. Kern came from the store, and she said, 'Did you know there was a well under this house?' And it struck me all at once, and I said, 'There used to be, but it was filled up at the time the addition was built.' And she said, 'We have the floor open, and we find there is some water in it; come and see it.' I saw it, and I said to Mr. Kern: 'George, the best thing that you can do is to have it drained, and have the water pumped out, and filled up, and make a good job of it. I will pay for it. I can't attend to it myself, for I have got to go away to-night to be gone nine or ten days.' I went up there when I came back, and asked him how about the well, and he said: 'It is all right. I filled it up, and it is all nice and dry.'"

Ludwig's testimony was not disputed, and it appeared that defendant at that time suggested the filling up of the old well; and it was filled up by Ludwig, in the manner stated, to Ludwig's satisfaction, and with defendant's knowledge. Ludwig used and occupied the addition for two years afterwards. Other tenants succeeded, and used and occupied it for six years thereafter. Plaintiff had occupied the premises for three years before bringing his family to them, and it must be presumed that he regarded the premises as fit for habitation, or he would not have brought his family into them. The discovery of the condition of this well was made in October, 1888. Eleven

years had elapsed since the filling in by Ludwig, and no suggestion had come to defendant that, through the settling of the filling and the accumulation of water, the old well had become a cesspool, nor had it been intimated to him that disagreeable odors existed on the premises, so as to put him upon inquiry, or suggest to him their possible or probable origin.

In view of the fact that, in 1877, this well had been filled up, and that for 10 or 11 years these premises had been continuously occupied, and no complaint or suggestion of imperfect condition had come to the defendant, he is not chargeable with such negligent ignorance as is equivalent to actual knowledge. The proofs fail to show any such construction or continuance of a nuisance, or knowledge and concealment of a condition amounting to a nuisance, as is alleged in the declaration. It is therefore unnecessary to notice the other allegations of error.

The judgment is reversed, and a new trial ordered.

The other Justices concurred.

94 482
154 645

CHARLES ARMITAGE v. MARY H. SAUNDERS ET AL.

Account stated—Evidence—Statute of frauds—Promise to pay the debt of another—Application of payments.

1. It is not necessary, in order to a recovery upon an account stated, that the antecedent debt or demand between the parties be proved; citing *Stevens v. Tuller*, 4 Mich. 387; *Albrecht v. Gies*, 33 Id. 389.
2. Upon the transfer of the business of a copartnership, one of its creditors carried the balance due him into his account with the succeeding firm, and thereafter rendered monthly state-

ments, showing a varying balance in his favor, amounting, when the account was closed, to more than the original debit. The payments made largely exceeded the original debt, and some of them exceeded the balance due at the time on the new account. And it is held that it was competent for the new firm to pay the debt of the old firm in the manner stated, and that the creditor had the right to apply the payments upon said debt in the order in which they were made.

Error to Wayne. (Brevoort, J.) Argued January 5, 1893. Decided January 20, 1893.

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

George X. M. Collier, for appellants.

Sylvester Larned (*Ervin Palmer*, of counsel), for plaintiff.

MONTGOMERY, J. The plaintiff brought an action against the defendants to recover a balance due on account for services rendered as a blacksmith.

The defendants are keepers of a livery stable, the present firm having succeeded to the firm of Closs & Co., which firm was composed of one of the present members and one Closs, who retired in February, 1889, at which date the other two defendants were admitted to the firm. At this date the firm of Closs & Co. was owing plaintiff a balance of $72.95. This balance was carried into the account of the new firm, which was treated as the successor of the old, and bills were rendered monthly, upon which payments were made from time to time, the balance due plaintiff varying at different times from $27.75, on May 1, to $81.05, December 24, when the dealings between the parties closed. Considerably more than sufficient to satisfy the balance of February 23 had been paid at different dates, and some payments had been made when the payments by far exceeded the amount due on the new deal.

The only defense relied upon is the statute of frauds,

which exempts one from liability for the debt of another unless the obligation be evidenced by writing.[1] The facts of the case render the statute inapplicable. It was certainly competent for the defendants to pay the bill of plaintiff against Closs & Co., and this they have done, if the plaintiff is privileged to make application of the payments in the order received on an admitted bill. This he has done, and, we think, rightly.

We think, also, that there was an account stated. Under these circumstances, it is not necessary that the antecedent debt or demand between the parties be proved. *Stevens v. Tuller*, 4 Mich. 387; *Albrecht v. Gies*, 33 Id. 389.

The judgment will be affirmed, with costs.

The other Justices concurred.

MOSES A. BERRIDGE v. GEORGE R. SLAWSON AND ALBERT W. LOBDELL.

Partnership—Retirement of member—Continuation of business—Evidence.

In this case it is held that the question whether the defendants continued to do business as copartners under the old firm name after the retirement of plaintiff, and whether defendant Lobdell had knowledge of such retirement, and of the giving of a new note by the new firm to renew notes due at the time of such retirement, which the new firm were to pay, and which new note plaintiff indorsed and paid at maturity, was properly submitted to the jury, and that an affirmative finding by them warranted a verdict in favor of plaintiff for the amount so paid.

---

[1] See *Chappell v. Barkley*, 90 Mich. 35.

Error to Mecosta. (Palmer, J.) Argued January 5, 1893. Decided January 20, 1893.

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

D. E. Corbitt, for appellant, contended:

1. One partner cannot maintain an action at law to recover his share of the partnership funds received or appropriated by his copartners, nor for advances or loans made by him to the firm, nor to reimburse himself or for contribution for debts of the firm paid by him out of his private funds, and this rule is not affected by the fact that such payment was compulsory; citing 17 Amer. & Eng. Enc. Law, 1256.

M. Brown, for plaintiff, contended:

1. Defendants were held to be copartners in this same business; citing *Lobdell v. Slawson,* 90 Mich. 201; and, by continuing the business as they did after plaintiff sold his interest to Slawson, they are presumed to be partners; citing *Frederick v. Cooper,* 3 Iowa, 171, 183.
2. The court, assuming that the question of partnership was a question of fact, submitted the case to the jury, and this was proper if there was any conflict of evidence; citing *Chamberlain v. Jackson,* 44 Mich. 320; *Densmore v. Mathews,* 58 Id. 623; *Kingsbury v. Tharp,* 61 Id. 223; *McDuffie v. Bartlett,* 3 Penn. St. 317; and if plaintiff were a partner he could maintain this suit; citing *Carpenter v. Greenop,* 74 Mich. 664.

LONG, J. June 2, 1883, plaintiff and the two defendants entered into a partnership business under the firm name of A. W. Lobdell & Co., for the purpose of purchasing logs, lands, and timber, and of manufacturing lumber and shingles. Each partner was to put in one-third of the capital necessary to prosecute the business, each having a one-third interest in the profits therein. By the terms of the articles of copartnership, Lobdell agreed to sell, and did sell, an undivided two-thirds interest to Berridge and Slawson in a shingle mill and a large quantity of personal property, and also a two-thirds interest in a land contract

then held by him, Berridge and Slawson agreeing to pay two-thirds of the purchase price of the land under such contract. The partnership continued between the three parties from that date up to the fall of 1885, during which time the business was carried on as contemplated by the articles of copartnership, when Mr. Berridge, the plaintiff here, sold and transferred all his interest in the copartnership business and property to Mr. Slawson. At the time of this sale the partnership indebtedness amounted to about $12,000, a part of which consisted of notes in the bank, given by the copartnership. After the sale by plaintiff of his interest in the partnership to Slawson, the plaintiff gave notice of his retirement from the firm, by publishing the same in a newspaper at Greenville, where the principal business of the partnership was conducted. This notice came to the attention of Mr. Lobdell. Thereafter the business was carried on under the name of A. W. Lobdell & Co., the same as before, Mr. Lobdell himself having the principal charge, up to May, 1888, when the copartnership was dissolved.

Before Berridge sold out his interest to Slawson, a note of $4,000 was held by the bank, which had been given by A. W. Lobdell & Co. After the plaintiff retired from the firm, this note was renewed from time to time by A. W. Lobdell & Co. through Mr. Slawson, the plaintiff becoming an indorser upon it. Some other indebtedness was also owing to the bank by the company. A new note was given by the firm as a renewal, and indorsed by the plaintiff. It appears that this note was taken up by the plaintiff, and the present suit is brought to recover against the defendants, composing the firm of A. W. Lobdell & Co.

The defense interposed is that Mr. Lobdell never assented that the plaintiff might retire from the firm; that the money due upon the note should be paid by the old firm

of A. W. Lobdell & Co., of which the plaintiff was a member; and that, when the plaintiff retired from the firm, it worked a dissolution of the partnership, Lobdell never assenting to continue the partnership business with Slawson alone.

The court submitted the question to the jury whether Lobdell had notice of the sale by plaintiff to Slawson of his interest, and whether Lobdell had notice of the execution and delivery of this note, and whether at such time Lobdell and Slawson were partners, and still carrying on the business under the firm name of A. W. Lobdell & Co. These were the only questions in dispute between the parties.

We are satisfied that there was some testimony which had a tendency to show that Lobdell continued in the partnership and assisted in the conduct of the business under the firm name of A. W. Lobdell & Co., after he had been fully apprised that Slawson had purchased all of the plaintiff's interest in the firm business; and it appears that from that time the plaintiff never took any part in the affairs of the new firm of A. W. Lobdell & Co. The court charged the jury:

"The mere fact of Berridge having sold and transferred his interest in the firm to Slawson, one of his copartners, would not, of itself, have constituted the two remaining members partners, and neither could bind both without the knowledge or consent of the other. It would be competent, however, for the two remaining members to continue in business as before, under the name of A. W. Lobdell & Co. And if you believe from the evidence that Lobdell and Slawson, the remaining members, after the sale by Berridge to Slawson of his interest, continued the business as before under the name of A. W. Lobdell & Co., and Lobdell had knowledge of the fact of the giving of this note, and that he and Slawson were copartners, then this plaintiff is entitled to your verdict. Berridge is not the maker of this paper; he is only liable as the indorser; and, if the Greenville bank had neglected to protest it, they

could not have held him. He was simply subrogated to the rights of the bank, and whatever suit the bank might have brought against Lobdell & Co., Berridge can maintain."

The jury found a verdict in favor of the plaintiff for the amount claimed. Lobdell alone brings the case to this Court.

The testimony shows that, after Berridge retired from the firm, Lobdell and Slawson continued in the same line of business, and added the new business of manufacturing lumber. They understood, apparently, that Lobdell continued to own a one-third interest in the firm and Slawson two-thirds, and that Berridge had no interest whatever in the business. Lobdell had charge of the affairs, signed checks and notes in the name of A. W. Lobdell & Co. for the three years after Berridge withdrew from the firm, paid off much of the old indebtedness, and Berridge was never called upon during that time to contribute anything to the firm account, or to assume any of its liabilities. The notes out of which the note in suit grew, while originally a part of the indebtedness of the old firm, were renewed by a new note given by the new firm of A. W. Lobdell & Co., without any attempt to hold Berridge as one of the makers. When renewed, Berridge, at the request of Slawson, became an indorser upon it, and was never treated by Lobdell and Slawson as one of the makers, and evidently was not so regarded by the bank when it was discounted. During the period of two years before the final dissolution of the firm, Lobdell and Slawson cut about all the timber upon the partnership lands, manufactured it into lumber and shingles, sold it, and kept the proceeds. In 1886 or 1887 they examined the books of the firm, and Slawson was credited with two-thirds interest in the firm, and Lobdell with one-third, and the accounts of the firm were figured on that basis; and some testimony is given tending to show that Lobdell knew about

the renewals of these notes. We think the question was fairly submitted to the jury whether Lobdell and Slawson continued as partners after Berridge retired from the firm.

Judgment must be affirmed, with costs.

The other Justices concurred.

---

94 489
101 35

94 489
f118 180

94 489
854NW 173
129 46

94 489
136 554

94 489
153 137
153 138

In the Matter of the Estate of Anne Lambie, Deceased. Appeal of Neil McMillan.

Estates of deceased persons—Debts—Mortgage upon land of estate—Authority of administrator to borrow money.

A mortgage upon land belonging to the estate of a deceased person, not given by the decedent, and not therefore a personal debt, is a debt against the estate, within the meaning of 3 How. Stat. § 6105, which authorizes the probate court to license an executor or administrator to borrow money by way of mortgage on the estate of the decedent "for the purpose of paying the debts against the estate."

Error to Wayne. (Gartner, J) Argued January 6, 1893. Decided January 20, 1893.

Appeal by an heir and residuary legatee from an order of the circuit court, affirming the order of the probate court, allowing a special administrator with general powers to mortgage real estate to pay a mortgage thereon. Affirmed. The facts are stated in the opinion.

William J. Gray, for appellant, contended:

1. The language of the statute, "debts against the estate," is plain. Is a mortgage, securing no personal liability, a debt? A mortgage is simply a security,—a lien upon land; citing Jones, Mortg. § 953; and this doctrine is recognized in numerous cases holding a married woman's mortgage to be good, although

she could not be held personally upon the accompanying obligation. Whatever debt there had been (and it was not against Mrs. Lambie) was extinguished by the sale. It is plain, therefore, that the statute does not reach a case like that at bar, however wise it might have been for the Legislature to have made provision for it.

2. The administration of estates relates primarily and fundamentally to personal property alone; and the main objects proposed are that the personalty be collected, the debts and charges paid, and the surplus distributed to the persons entitled; citing Schouler, Ex'rs, §§ 1, 5; and if the personal estate be sufficient for the payment of debts and charges, the real estate should not be touched by the administrator, as the personal estate is primarily liable for the debts, and the real estate only after the personalty has been exhausted; citing How. Stat. § 5874; but the administrator has the right of possession of real estate until the estate is settled or turned over to the heirs, and when the personal estate is ample for the debts the real estate is to be at once turned over to the heirs; citing How. Stat. § 5875.

3. In this case there is no finding, even, that the administrator was, at the time of hearing, in possession of the land. But, at any rate, the administrator should not interfere with possession by the heirs unless necessary; citing *Rough v. Womer*, 76 Mich. 375; and it follows from this that the administrator takes possession of lands only to provide himself with funds for the payment of debts.

4. The administrator is authorized to sell lands when necessary for the payment of debts; citing How. Stat. § 6025; and the petition must contain a list of the debts; citing How. Stat. § 6026; as must the petition for leave to mortgage; citing 3 How. Stat. § 6106; and it is clear that real estate may be sold or incumbered only to provide funds for the payment of debts.

5. It is not the office or duty of the administrator to preserve the real estate for the heirs, but only the personalty. The heirs, as such, can ask him to take no step with reference to the real estate, not necessary for the payment of debts. So far as real estate is concerned, the obligation of the administrator is to the creditors, not to the heirs. The latter must look out for themselves.

6. If the Court construes this statute as did the circuit court, possibly it may be accomplishing a laudable object, but it is not one contemplated by the statute, and the innovation will be dangerous. To adopt this construction, it will be necessary to disregard the terms of the statute, and to engraft upon the probate system a policy utterly at variance with all pre-

conceived notions, and this Court will not do this; citing *Insurance Co. v. Aspinall*, 45 Mich. 330, where it was sought to uphold a probate mortgage as an equitable act.

Orla B. Taylor (*Edwin F. Conely*, of counsel), for the administrator.

Charles C. Stewart and *Bowen, Douglas & Whiting*, for the estate.

McGRATH, J. A special administrator has been appointed of the estate of Anne Lambie, deceased. He found no personal estate, and but one parcel of real estate, valued at $60,000, which was incumbered by two mortgages,—the first of $12,000, and the second of $5,000. The second had been foreclosed by advertisement, the sale having been made May 11, 1891. The equity of redemption would expire May 11, 1892. This mortgage was not given by decedent, and was not therefore a personal debt owed by her. In March, 1892, the special administrator petitioned the probate court for license to mortgage the real estate to pay said mortgage and protect the estate, and the probate court granted the authority.

The sole question is, therefore, whether the mortgage debt is a "debt against the estate," under section 6105, How. Stat., as amended by Act No. 67, Laws of 1889. It is insisted that a mortgage is simply a security,—a lien upon the land. In other words, it is not an absolute conveyance. But it is, nevertheless, security for a debt, —a lien securing an indebtedness. The property is charged with the payment of the debt. A mortgage has been defined as a debt by specialty. A debt is defined as any claim for money,—that which one is bound to pay. Coke says that "*debitum*" signifies not only a debt for which an action of debt lies, but generally any duty to be yielded or paid.

In *Elwood v. Deifendorf*, 5 Barb. 398, a testator charged

his debts upon certain lands devised, and it was held that the charge included a contingent liability which the testator was equitably bound to pay.

In *Lockhart v. Van Alstyne,* 31 Mich. 76, a debt is defined to be that which one person is bound to pay another, either presently or at some future period; something which may be the subject of suit as a debt.

In *Allen v. Dickson,* Minor (Ala.), 120, a debt is said to be a legal liability to pay a specific sum of money.

There is no question here but that this estate, consisting only of this one parcel of land, which has been pledged to pay this specific sum, is legally liable to pay this charge upon it, and it can make no difference that decedent was not personally liable, but took this property subject to the pledge.

In *Re Marden's Estate,* Myr. Prob. 184, deceased was the owner of real estate, her separate property. To secure the payment of her husband's note she joined her husband in a mortgage of her separate real estate. The executor asked the court for an order of sale of the mortgaged property, and that the proceeds, as far as required, be applied to the payment of the debt. The application was resisted on the ground that the debt was not a "debt outstanding against the decedent," under the code. The court granted the license, holding that the words "against the decedent" were the same as "against the property of the decedent." The court say:

"If it is not a debt outstanding against the decedent, the executor could not pay it, even if he had plenty of other resources."

In the present case the language of the statute is "debts against the estate." Is not this mortgage debt one against the estate,—against the property of the estate? Is not the estate—the property of the estate—charged with its payment? Is it not legally liable for its payment? The word

"debts" in the statute should be given its ordinary signification, rather than a technical construction which would be contrary to the practical construction which has been given it up to the present time.

The judgment is affirmed, with costs. Let it be certified to the probate court accordingly.

The other Justices concurred.

---

94 493
154 526

NANCY WELCH ET AL. v. JOHN N. HODGE, COMMISSIONER OF HIGHWAYS, AND LEROY E. NUMMER, CLERK, OF THE TOWNSHIP OF EASTON.

Highways—Establishment—Notice.

Failure to serve notice of an application to lay out a highway upon the occupant, who is a tenant of the owner of a life-estate in the land through which the highway is to run, is fatal to the proceedings; citing 3 How. Stat. § 1298; *Dixon v. Commissioner*, 75 Mich. 225.[1]

Certiorari to review proceedings for laying out a highway. Submitted on briefs January 6, 1893. Proceedings quashed January 20, 1893. The facts are sufficiently stated in the opinion.

Mitchel & Hawley, for petitioners.

F. D. M. Davis, for respondents.

MONTGOMERY, J. This is *certiorari* to review the proceedings of the defendant commissioner in laying out a highway in the township of Easton, Ionia county.

[1] See *Brazee v. Raymond*, 59 Mich. 548; *Goss v. Highway Commissioner*, 63 Id. 608; *Wilson v. Township Board*, 87 Id. 240; *Hall v. Pettit*, 88 Id. 158; *Sherman v. Peterson*, 91 Id. 480.

The petitioner Nancy Welch is the owner of a life-estate in certain premises through which the highway runs, the two other petitioners being, with others, owners of the fee. At the time of the proceedings Frank Welch was a tenant in the occupancy of the premises. The commissioner returns that notice of hearing upon the application for laying out the highway was not served upon the occupant.

This omission was fatal to the proceedings. 3 How. Stat. § 1298; *Dixon v. Commissioner of Highways*, 75 Mich. 225. The proceedings must be quashed, with costs.

The other Justices concurred.

94 494
135 531

GRACE GRIFFIN v. JAMES W. HELME, JR., CIRCUIT COURT COMMISSIONER OF LENAWEE COUNTY.

Execution against the person—Bond for jail limits—Poor debtors' act.

Chapter 309, How. Stat., which provides for the release of poor debtors from imprisonment, does not apply to a debtor who has given a bond for the jail limits; citing *Miller v. Strabbing*, 92 Mich. 300.

Certiorari to review the action of a circuit court commissioner in discharging a defendant from liability on his bond given for the jail limits, under the poor debtors' act. Argued January 12, 1893. Proceedings quashed January 20, 1893. The facts are stated in the opinion.

George W. Ayers and *Watts & Smith*, for petitioner.

James W. Helme, Jr., in pro per.

LONG, J. This is a proceeding by *certiorari* to review the action of the circuit court commissioner of Lenawee county in discharging one Phillip Henning from his bond given for the jail limits.

Henning was arrested on a *capias* issued out of the circuit court for that county upon a judgment, at the suit of the petitioner in this proceeding, in an action of seduction. The plaintiff, after the rendition of the judgment in her favor, caused an execution to be issued against the goods and chattels of defendant, Henning, which was returned unsatisfied. Thereafter she caused a *capias ad satisfaciendum* to be issued, upon which the defendant was arrested, and gave bonds for the jail limits of the county on July 1, 1890. On May 2, 1891, defendant, Henning, presented to the keeper of the jail of the county a notice that he was unable to pay the judgment, and was desirous of taking the benefit of the law for the relief of poor debtors, being chapter 309, How. Stat. The jailer took the notice to the circuit court commissioner, and made known to him the desire of Henning to take the benefit of the statute. Notice was thereupon given by the commissioner to the attorneys of the plaintiff in the action, and he appointed May 7, 1891, as the time of hearing Henning's claim. The attorneys for the plaintiff in the action appeared, and moved to quash the proceedings upon the ground that Henning was not entitled to the benefit of the statute, for the reason that he was not actually confined in the jail, and that the statute did not apply to one who was upon the limits under a bond. The commissioner overruled the objection, and discharged Henning from liability under his bond given for the jail limits.

At the time this proceeding was had, the case of *Miller v. Strabbing*, 92 Mich. 300, had not been decided by this Court. It was held in that case that this statute

does not apply to one who is upon the jail limits under a bond, but only applies to the case of one actually confined in or committed to the jail at the time the application for discharge is made under this statute.

The proceedings before the commissioner must be quashed. The plaintiff in the original suit will lose no rights by this proceeding which she had obtained by the arrest on *capias*.

At the time this proceeding was had before the commissioner, this statute had not been construed. Consequently, no costs will be awarded.

The other Justices concurred.

---

94 496
122 353

CARL F. A. KOEHLER v. WALTER BUHL ET AL.

94 496
d125 256

94 496
s54NW 157
131 c 61

Contract of employment—Discharge for incompetency—Evidence—Tender.

1. A contract by which an employer agreed to pay an employé, who entered his service on June 2, 1890, $35 per week, and in January, 1891, $100 as extra pay, and, furthermore, for the year 1891 said salary and 5 per cent. of the net profits of the department of the business in which he was employed, is held to have covered all of the year 1891.
2. Where an employé agrees that his work shall be done to the satisfaction of his employer, a letter received from a customer for whom the employé has done a piece of work is not admissible to show the employer's dissatisfaction, or that the work was not well done, in the absence of proof that a conversation occurred between the employer and employé about it.
3. Evidence that the same fur cutters were employed while a furrier was working for the common employer as before, and that before his employment the work had been good, has no tendency to show that the furrier was an incompetent workman.
4. A tender in bank notes is good, unless objected to on the ground that they are not legal tender; citing *Fosdick v. Van Husan*,

21 Mich. 576; *Lacy v. Wilson*, 24 Id. 479; *Beebe v. Knapp*, 28 Id. 70.

5. An impeaching question which fails to include the time and place of an alleged conversation, or the circumstances under which it took place, is insufficient, it not satisfactorily appearing that the witness identified the occasion.
6. Where a person contracts to do work to the satisfaction of his employer, the employer is the judge, and the question of the reasonableness of his judgment is not for the jury.
7. The employer is not obliged in such a case to take advantage of the first infraction of the contract.

Error to Wayne. (Gartner, J.) Argued January 13, 1893. Decided January 20, 1893.

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

Corliss, Andrus & Leete, for appellants.

M. P. McGregor, for plaintiff.

HOOKER, C. J. The plaintiff, a furrier, entered defendants' employ on June 2, 1890, under the following written contract, viz.:

"Agreement between Walter Buhl & Co. and Carl Koehler.

"Walter Buhl & Co. agree to pay Carl Koehler thirty-five dollars ($35.00) per week, and in January, 1891, the sum of one hundred dollars ($100) as extra pay; and, furthermore, for the year 1891 they agree to pay to him the above-mentioned salary and five per cent. of the net profits of the fur department of the business.

"In consideration of the above salary and bonus, Carl Koehler agrees to do the best work he can for the firm, and agrees that such work and business as may be intrusted to him shall be done to the satisfaction of said firm.

"WALTER BUHL & Co.
"CARL KOEHLER."

Koehler was discharged on February 28, 1891, and subsequently brought *assumpsit*, claiming the full amount that he was to receive according to the terms of the contract.

Upon the trial the plaintiff was asked:

"How much did your salary come to, at $35 a week, from the time you were discharged up to the 1st of January, 1892?"

This question was objected to, upon the ground that the employment was for one year only. The plain import of the language used is that the contract was intended to cover all of the year 1891, and the testimony was properly admitted. This disposes of the first and sixth assignments of error, the court having charged the jury that "the contract of employment provided for the entire year 1891."

Upon the trial the defendants claimed that the plaintiff was not a competent workman, and that they found fault with his work, and upon his cross-examination the plaintiff was asked concerning a piece of work that he did for one Henry Clothier. He admitted seeing the work in the factory after its return, and also saw the letter from Clothier to the house, but denied that anything was said to him about the work being unsatisfactory. The letter was then offered in evidence by defendants' counsel, but was excluded. The letter alone was not admissible to show defendants' dissatisfaction, nor was it competent evidence that the work was not well done. In the absence of proof that a conversation occurred about it, no error was committed in excluding it.

By way of defense, the defendants sought to show that they employed the same fur cutters while the plaintiff was with them as before, and that before his employment the work had been good. This evidence was properly excluded. It did not tend to show plaintiff's incompetency.

Evidence was offered on the part of the defendants to show that the sum of $100 was tendered to the plaintiff for the January bonus, mentioned in the contract. The witness said:

"I offered him $100. It was in currency,—paper money. We said, 'Here is $100, which we claim to be due you,' or words to that effect. He said he would not take it. I have no recollection of a receipt being demanded."

"*Question by Court:* Was this money in greenbacks or national bank notes?

"*A.* I could not state.

"*Court:* Then it is not necessary to pursue it any further. (Exception by defendants' counsel.)"

This evidence should have been admitted, and the question should have been left to the jury. It is well settled that a tender in bank notes is good, unless objected to on the ground that they are not legal tender. *Fosdick v. Van Husan,* 21 Mich. 576; *Beebe v. Knapp,* 28 Id. 70; *Lacy v. Wilson,* 24 Id. 479.

Edward Schneider, a witness for the plaintiff, was asked, on cross-examination, if he did not say to Mr. Deyo "that Mr. Koehler's system was not half learned." The following colloquy ensued:

"*A.* No, sir; I never said that.

"*Q.* Did you say that his system was defective?

"*A.* No, sir.

"*Q.* Did you not say that the system was not such as to make a perfect fitting garment?

"*A.* No, sir. I never said that. I once passed a remark to Mr. Deyo about one seal, but it had nothing to do with fitting, and it is simply a matter of—"

Later the witness Deyo was called, and asked the following question, viz.:

"Did Mr. Schneider state to you, shortly after Mr. Koehler was discharged, that Mr. Koehler's system was not half learned?"

The objection to this question was properly sustained, the foundation being insufficient. Neither time, place, nor circumstance was included in the original question, and it does not satisfactorily appear that the witness Schneider identified the occasion.

The 8th, 9th, and 10th assignments of error are based on the charge, which was as follows:

8. "Of course, when a contract states 'to the satisfaction of said firm,' the meaning of that is that they cannot act captiously or arbitrarily about it; and, if they did discharge him, it does not depend entirely upon what they may have thought, or what their judgment of the capacities of Mr. Koehler may have been, because they would have to act reasonably."

9. "The question of fact for you to determine will be as to whether Mr. Koehler was a competent and fit person for the employment of fitter and designer."

10. "If Koehler was a fit and competent person, he was then, under the terms of his contract, entitled to his full compensation during the year 1891, and until December 31, 1891."

The effect of these instructions was to give the jury to understand that, if the plaintiff was a competent workman, he had a right to recover, whether he did good work or not, and this in the face of his undertaking to do not only good work, but work that should be satisfactory to his employers. It is settled law that, where a person contracts to do work to the satisfaction of his employer, the employer is the judge, and the question of the reasonableness of his judgment is not a question for the jury.

The jury was called in by the judge for instructions twice, and, while the first interview shows nothing that necessarily injured the defendants' case, the instructions on the second occasion were erroneous. The following instructions were given:

"You want to remember the fact that in June, 1890, the plaintiff was employed by the defendants in this case. He remained in the employment of the defendants for June, for July, for August, for September, for October, for November, for December, for January, and for February, during all of which time there is no evidence in this case that any fault was found with the plaintiff in this case. He remained in the employment of the defendants in this case for nine months before any fault was found with him;

and in the latter part of February, according to the undisputed testimony in this case, he was peremptorily discharged by the defendants in this case."

The assumption that the defendants did not find fault is not supported by the record, the testimony of the plaintiff showing the contrary, to say nothing of the defendants' proofs.

Again, the court instructed the jury that—

"A person always has to act within a reasonable time. As to what constitutes a reasonable time is sometimes a question of fact and sometimes a question of law. Now, if you employ a man who enters your employment, and you are to decide upon certain questions, you are obliged, under the law, to act within a reasonable time, and if the defendants in this case recognized the fact, or were aware of the fact, that this man was an incompetent man at any time within the nine months, their business was to make it known to the plaintiff in the case."

The application of such a rule to this case would put a premium on hard dealing, by requiring an employer to take advantage of the first infraction of the contract. Anything forgiven might fasten the contract upon him, and make the incompetent workman secure in his employment.

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

The other Justices concurred.

94 502
96 540
94 502
s54NW 156
s34ASR 361
129 3120
94 502
148 3492
148 3494
148 495
94 502
149 3641

HERBERT H. GUSTIN v. THE UNION SCHOOL-DISTRICT OF BAY CITY ET AL.

Land contract—Option—Consideration—Descent of property—Specific performance.

1. Many of the adjudicated cases upon what are termed "options" for the purchase of land have arisen upon unilateral contracts, which do not vest any interest in the land in the vendee (*Richardson v. Hardwick*, 106 U. S. 252), and only become binding by acceptance or performance of their conditions before the offer is withdrawn.
2. The rent reserved in a lease signed by both parties is a sufficient consideration for the agreement of the lessor to convey the land to the lessee at the expiration of the lease upon the payment of the agreed purchase price.
3. A lease containing an agreement by the lessor to convey the leased premises to the lessee at the expiration of the term, upon payment of an agreed purchase price, vests in the lessee a right to purchase, which, with the lease, passes to his administrator, who may assign it, and, upon payment of the purchase price by the assignee within the time limited, the contract becomes a completed purchase, and is enforceable in equity.

Appeal from Bay. (Cobb, J.) Submitted on briefs January 13, 1893. Decided January 20, 1893.

Bill for specific performance of contract. Defendants appeal. Decree affirmed. The facts are stated in the opinion.

J. L. Stoddard, for complainant.

T. A. E. & J. C. Weadock, for defendants.

HOOKER, C. J. This is a bill for specific performance. The premises in question are two lots in Bay City. On January 16, 1886, the defendant school-district, through

its proper officers, executed and delivered to George W. Mann a lease of the premises for the term of five years. Among the provisions of the lease was the following, viz.:

"Said first party agrees to execute to said second party or his assigns a deed, with full covenants of warranty, of said described land, at the expiration of this lease, upon the payment to it of the sum of $2,500, provided said second party, or his assigns, shall ask for said deed, in writing, at any time during the three months immediately preceding the time of the expiration of this lease."

Both parties signed the lease. In February, 1886, this lease was assigned to R. P. Gustin & Co. by instrument in writing. The bill alleges that this assignment was to R. P. Gustin, and the briefs of both parties so state. It will therefore be assumed that the exhibit is incorrectly printed, or that the name R. P. Gustin & Co. was but another name for R. P. Gustin, which may be inferred from the proofs. Gustin took possession of the property, and made repairs to the amount of several hundred dollars, and used the building upon the premises for a store, until his death, on February 25, 1889. His widow, Rachel S. Gustin, was appointed administratrix, and administered the estate, and a corporation was organized, composed of herself and others, which purchased the stock, and continued the business upon the premises under some arrangement made with her.

On the 9th day of January, 1891, her attorney appeared before the defendant board of education, and represented that she was unable to sell the contract or buy the land, and asked a further lease for two years to the corporation. The negotiations resulted in an agreement to make the R. P. Gustin Company a new lease for two years, with the privilege of purchasing left out. Writings were to be drawn, and defendants caused this to be done, but they were never executed. Defendants claim that the right to

purchase was at that time surrendered. We do not think that the proofs show this.

On January 14, 1891, Rachel S. Gustin, as administratrix, assigned the old lease and contract to the complainant, receiving therefor one dollar. On the 15th day of January, 1891, complainant deposited $2,500 with the city treasurer, and demanded in writing, of the president and clerk of the board, a deed of the premises. This was refused, and his money was tendered back to him.

The defendants contend that under this lease all right of enforcement descended to the heirs, and that Mrs. Gustin had no right to assign it, so far, at least, as the right to purchase is concerned; and that complainant, taking nothing by the void assignment, and being shown not to be an heir of deceased, has no right to a deed.[1] On the other hand, complainant asserts that the lease and accompanying option amounted to no more than a chattel interest, and as such went to the representative, and might be sold by her without an order from the probate court, like any other personal property, and that therefore the assignment to the complainant was valid.

The test to be applied is this: Did the intestate acquire under the writing that which equity will treat as an interest in the land, to the extent of considering the vendor a trustee, holding the title for the vendee? Many, if not most, of the adjudicated cases upon what are termed "options" for the purchase of land, seem to have arisen upon unilateral contracts, which only become binding by acceptance or performance of their conditions before the offer is withdrawn. But this case is not such, for the rent was a sufficient consideration for the offer, which

[1] Counsel cited, in support of this contention, *Hunt v. Thorn*, 2 Mich. 213; *House v. Dexter*, 9 Id. 246; *Baxter v. Robinson*, 11 Id. 520; *Jenkins v. Bacon*, 30 Id. 154; *Compo v. Iron Co.*, 49 Id. 39.

was therefore irrevocable. The unilateral contract does not vest any interest in the land in the vendee. *Richardson v. Hardwick*, 106 U. S. 252 (1 Sup. Ct. Rep. 213). Neither does the writing in this case. The consideration only makes a right out of what, in the other case, is a privilege merely. In both cases the interest attaches only when the condition is performed. The deceased, then, had merely a right to acquire an interest, and at his death nothing descended to his heirs. The lease, however, with the accompanying right to purchase, did pass to his representative, and, through her, to the complainant, whose assignment the defendants are in no situation to assail. By the payment the contract became a completed purchase, and the complainant acquired an interest in the land.

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

The other Justices concurred.

---

94 505
97 575

94 505
99 540

94 505
140 535
140 536

94 505
e144 51

94 505
f154 285
j154 288

WILLIAM MAY v. THE BOARD OF CANVASSERS OF WAYNE COUNTY.

Elections—Recount of ballots—Authority of board of canvassers—Mandamus.

Act No. 208, Laws of 1887 (3 How. Stat. § 234*a*), which provides for the correction of frauds and mistakes in the canvass and returns made by inspectors of election, is construed as follows:

a—The statute gives an aggrieved party the *right* to a recount of the votes cast for and against him for the office for which he was a candidate, upon his complying with its provisions, enforceable by *mandamus;* citing *McKenzie v. Canvassers*, 70 Mich. 147.

b—The purpose of the provision of the act giving the board

of canvassers *power* to cause the ballot-boxes, used in the election districts in which the errors, mistakes, or frauds complained of are alleged to have occurred, to be brought before it, is not to enable the board to ascertain whether a recount shall be had, but whether there was fraud or mistake in the original count.

c—This provision is not mandatory, but was intended to confer a *right* which the board might exercise in case of necessity, and its non-exercise is not jurisdictional.

d—The statute gives to neither the board of canvassers nor to the committee appointed to make the recount power to enter upon an investigation of alleged frauds committed at the election; nor does it confer power upon the board to compare the registration lists with the poll-lists for the purpose of determining whether the votes of unregistered persons were received, and to exclude the entire vote of a precinct on that ground.

e—If the resolution of the board directs the committee to proceed to investigate the matters set forth in the petition, a further provision authorizing them to open *all* ballot-boxes containing votes cast for the office for which the petitioner was a candidate should be construed as having relation to the investigation thus directed, and as being limited to the ballot-boxes in the precincts named in the petition.

f—It was held in *Maynard v. Board of Canvassers*, 84 Mich. 228, that where the facts are not in dispute, and it appears that the relator is not entitled to the office, the Court will not compel the issue of a certificate by *mandamus;* but it does not follow that the Court will accept an unauthorized count as finally establishing such fact; citing *Keeler v. Robertson*, 27 Mich. 129.

g—Where upon the face of the returns of the inspectors of election, as corrected by the authorized recount, the petitioner is shown to have received a plurality of the votes cast for the office for which he was a candidate, and the board of canvassers assumes to change said result by correcting the returns from a precinct according to an unauthorized recount of the ballots cast therein for said office, and by the rejection of the vote of an entire precinct on the ground that votes were cast therein by persons who were not registered, *mandamus* will lie to compel the board to reconvene, and vacate a resolution directing the issuance of a certificate of election to the candidate thus shown to have been elected, and direct that a certificate be issued to the petitioner.

Mandamus. Argued January 3, 1893. Granted February 3, 1893.

Relator applied for *mandamus* to compel respondent to reconvene, and direct the issuance to him of a certificate of election. The facts are stated in the opinion.

William S. Sheeran (*Fred A. Baker, Edwin F. Conely,* and *Orla B. Taylor,* of counsel), for relator.

Otto Kirchner and *John B. Corliss,* for respondent.

PER CURIAM. The relator was a candidate at the election of 1892 for the office of county clerk of Wayne county. On the face of the returns he received 26,799 votes, and his competitor, Henry M. Reynolds, 26,821. The relator presented to the board of county canvassers a petition asking a recount in certain of the precincts of the county. The board thereupon entered an order reciting the filing of the petition, and concluding with the following resolution:

"*Resolved,* that a committee of three be appointed by this board to proceed to make investigation of the matters set forth in said petition, in accordance with the provisions of Act No. 208, Pub. Acts of 1887; that they be, and are hereby, authorized to open all ballot-boxes containing votes for the office of county clerk, and to make correct and full returns in writing under their hands to this board, as required by said act."

The committee appointed proceeded to recount the votes in *all* the precincts of the county. As a result of the recount, relator received 26,791 votes and Reynolds 26,697. On the report to the board of county canvassers, a resolution was passed declaring that Reynolds was entitled to the certificate of election. This result was reached by throwing out the entire vote of the fourth precinct of the Fifth ward of the city of Detroit, on the ground that 121 votes were cast in the precinct by persons who were not registered; and by ignoring the recount in the township of Ecorse, and in the first and third wards of Wyandotte, on

the ground that the ballot-boxes had been tampered with, the board for that reason accepting the original returns in the three last named precincts. This action showed a plurality for Reynolds of 565. The recount of the votes in the fourth precinct of the Fifth ward agreed with the original returns, and, if the votes of that precinct be counted as cast, the result would be a plurality for Reynolds of 12 votes, accepting as correct the report of the committee in all other respects; but it is alleged in the petition, and not denied in the answer, that in the township of Hamtramck Reynolds made a gain by the recount of 20 votes. There was no petition for a recount in the township of Hamtramck, so that, if the action of the board in excluding the vote of the fourth precinct of the Fifth ward of Detroit and in recounting the votes in Hamtramck be held unauthorized, the result is that on the face of the returns, as corrected by the authorized recount, and assuming the action of the board to have been legal in adopting the original returns in Ecorse and the two Wyandotte districts, the relator is shown to have a plurality of 8.

It should be stated that the relator disputes the claim that votes were cast by unregistered voters in the fourth precinct of the Fifth ward of Detroit, and alleges that the apparent discrepancies are due to mistakes made in recording the names of voters.

1. The statute, Act No. 208, Laws of 1887 (section 234*a*, 3 How. Stat.), reads:

"Upon filing such petition, making such deposit, and giving at least twelve hours' written notice thereof to the opposing candidate, by handing to such candidate a copy thereof, or, if such candidate cannot be found, by leaving such copy at the last place of residence, it shall be the duty of such board of canvassers to proceed to make an investigation of the facts set forth in said petition. For such purpose the said board shall have power to cause

the ballot-boxes used in such election districts to be brought before them. The said board shall thereupon appoint a committee of their own number, as follows: The said board shall designate a member, who shall be the chairman of said committee, the candidate presenting such petition and the candidate opposed thereto shall each choose a member; * * * and the three thus chosen shall constitute a committee to investigate the errors, mistakes, or frauds complained of. Said committee shall, in some public place, where such candidates and their counsel may be present, if they so desire, without unnecessary delay, proceed to open the ballot-boxes from such districts, townships, or wards, and to make a recount thereof as to such candidates."

Two questions relating to the construction of this statute are suggested:

First. Is the production of the ballot-boxes, which is authorized, for the purpose of a preliminary investigation as to whether there shall be a recount?

Second. If it is not for that purpose that the ballot-boxes are to be brought before the board, is the failure to have the boxes produced before the full board in the first instance jurisdictional, so that a recount, in the absence of such preliminary inspection of the boxes by the board, is extra-official?

The contention of the respondent's counsel is that the investigation which the board is to make of the facts stated in the petition is preliminary to a determination of whether the facts are such as to warrant a recount. As stated in the respondent's brief, their position is this:

"We submit that, in the first place, the board must be satisfied that there is reasonable ground for the claim of petitioner that he has been aggrieved by the official returns. It cannot be that any one, by the filing of a petition and the deposit of $100, can impose upon the board the duty of entering upon a recount of all the ballots cast in the county."

This contention of counsel is fully answered by the case of *McKenzie v. Board of Canvassers*, 70 Mich. 147. In that case a petition was filed for a recount, and the board

returned that the votes were counted twice by the inspectors of election of the ward, and each time the result was the same; that the number of votes cast corresponded with the poll-list kept at the time; that the relator was present at the time when the count was made by the inspectors of election, and made no objection to the count or result for either fraud or mistake; that, at the meeting of the board of canvassers held to consider the subject of relator's petition, he was asked by the board if he had any proof he wished to submit, tending to show error or fraud on the part of the inspectors of election in the Third ward; that relator said he did not think there was any fraud or intentional error, but that there might have been a mistake in the counting; that his attorney was present with him before the board, and claimed in behalf of the relator that it was the duty of the respondent, as the matter then stood, to proceed and make a recount of the ballots cast for the office of alderman in said ward, and that relator should offer no proofs; that, the board being satisfied the count made by the inspectors of election was correct, it declined to recount the votes, and proceeded with the canvass of the vote as returned by the inspectors of election, and declared the relator's opponent elected. The Court held that it was intended by the statute in question to give an aggrieved party the right to a recount of the votes cast for and against him for the office for which he was a candidate, and *mandamus* was granted.

The purpose for which the board shall have the power to cause the ballot-boxes to be brought before it is that of a recount of the ballots. It is not for the purpose of ascertaining whether a recount shall be had, but of ascertaining by a recount whether there was fraud or mistake in the original count. Is the failure to cause these ballot-boxes to be thus brought before the board jurisdictional?

or, on the other hand, was this provision intended to confer a right which the board may exercise in case of necessity? We think the latter construction is the only one of which the language is susceptible. In terms there is no mandatory requirement that the ballot-boxes shall be brought before the board, while the statute is mandatory that a recount shall be had.

It is to be borne in mind that there was no suggestion, so far as appears, made to the board as a board, that the ballot-boxes had been tampered with, prior to the opening of the boxes and the recount of the votes. In the absence of any such suggestion, the legal presumption, of course, is that the ballot-boxes had been preserved in their integrity, and that the sole duty of the committee would be performed by a recount of the ballots contained within the boxes. We have no doubt that, if it had been brought to the attention of the board that the ballot-boxes were claimed to have been tampered with, it would have become the duty of the board to cause the boxes to be brought before it and make an investigation. Such investigation would, by the terms of the statute, evidently be confined to an inspection of the boxes themselves, and the board would be authorized to exercise the *quasi* judicial function of determining whether a recount of the ballots as cast could be had. If an inspection of the boxes show that they have not been preserved in their integrity, we think it would be extravagant to claim that the law is so imperative in its requirements that the official return, presumably correct, could be overcome by any such experiment as a count of ballots which are not apparently the same as those cast at the election. *People v. Cicott,* 16 Mich. 283. But in the present case no attempt was made by the board itself to inspect these ballot-boxes, and the conclusion reached was based not upon the required inspection by the board, but upon testimony taken by the

committee without authority of law, and upon the report of the committee to the board. This, in our judgment, was unauthorized.

2. The board had no power to exclude the whole vote of the fourth precinct of the Fifth ward. The statute gives to neither the board nor the committee of the board power to enter upon an investigation of alleged frauds committed at the election. Nor is the power conferred upon the board to compare the registration lists with the poll-lists for the purpose of determining whether the votes of non-registered persons were received. The powers of the committee are ministerial, and not judicial. *Andrews v. Judge of Probate,* 74 Mich. 285; *Coll v. Board of Canvassers,* 83 Id. 371; *Roemer v. Board of Canvassers,* 90 Id 27; *Luce v. Mayhew,* 13 Gray, 83; *Clark v. Board,* 126 Mass. 284.

3. It is suggested that the relator, having participated in the recount under a resolution authorizing a count of all the ballot-boxes of the county, is bound to accept the action of the committee as a whole, and cannot now question the authority of the committee to count the ballots in the township of Hamtramck, a precinct not included in the petition. But we think this is not a correct view. When it is considered that the resolution itself is limited to a direction to the committee to proceed to investigate the matters set forth in the petition, the authority contained in the resolution expressed in the words, "that they be, and are hereby, authorized to open all ballot-boxes containing votes for the office of county clerk," should be construed as having relation to the investigation directed, and as being limited to the ballot-boxes in the precincts named in the petition; but, if any other construction were open, the petitioner certainly ought not to be held estopped because the board assumed to include in a grant of what he was legally entitled to a direction to proceed to an investigation of matters not within the jurisdiction of either the

board or the committee. It does not appear affirmatively that relator participated in the recount in Hamtramck.

4. It is suggested that, as *mandamus* is not a writ of right, the Court will not direct its issue if it appear that the correct result was reached by the board; and that, as the vote in Hamtramck has in fact been recounted, and as it appears by such recount that Reynolds gained 20 votes, sufficient to elect him if the original returns in Ecorse and the two wards in Wyandotte be accepted, it follows that the petitioner has not been injured by the action of the board. The committee exceeded its powers in counting the vote in Hamtramck. If the original returns in Wyandotte and Ecorse be accepted, still, in our judgment, the extra-official statement of the committee relating to the votes cast in the township of Hamtramck cannot be accepted in preference to the legal certificate of the inspectors of election. A similar question was presented in *Roemer v. Board of Canvassers, supra,* and the same conclusion reached. It that case it was claimed that the tally-sheets produced showed that the second statement of votes was correct, and impeached the first returns. It was stated in the opinion that there was nothing appearing which justified an inference that any but honorable motives actuated the canvassing board; but it was held that, as the board acted without authority, its unauthorized action could not be considered as overturning the original and only legal returns. So here it would be but reasoning in a circle to hold that the action of the board in relation to the fourth precinct of the Fifth ward of Detroit and the township of Hamtramck was unauthorized, and a nullity, and yet to hold that such action concludes either the parties or the Court. In so far as the case of *Sherburne v. Horn,* 45 Mich. 160, has been construed as in conflict with these views, it was overruled by *Coll v.*

Board of Canvassers and *Roemer v. Board of Canvassers.*

As the case of *Sherburne v. Horn* has been again cited as sustaining the contention of respondent's counsel, we have examined with care the original application, and find the facts to be that the board of county canvassers assumed to throw out the votes of two townships,—one upon the ground that the signatures to the certificate were not genuine, and the other upon the ground that but two of the inspectors of election signed the certificate. The case was determined upon the application for an order to show cause. We are constrained to say that the conclusion reached by the Court that *mandamus* would not lie to compel a reconvening of the board and the canvassing of the ballots is not in line with the great weight of authority either in this State or elsewhere, and certainly is not in harmony with the cases of *Coll v. Board of Canvassers* and *Roemer v. Board of Canvassers,* above cited. See, also, *State v. Hill,* 10 Neb. 58 (4 N. W. Rep. 514); *People v. Hilliard,* 29 Ill. 413; *State v. Canvassers,* 36 Wis. 498; *Strong, Petitioner,* 20 Pick. 484; *Kisler v. Cameron,* 39 Ind. 488.

In *Maynard v. Board of Canvassers,* 84 Mich. 228, it was held that where the facts are not in dispute, and it appears that the relator is not entitled to the office, the Court will not compel the issue of a certificate by *mandamus;* but it does not follow from this that the Court will accept an unauthorized count as finally establishing such fact. See *Keeler v. Robertson,* 27 Mich. 116, 129, in which case it was said:

"It would be contrary to public policy to allow any evidence whatever, based upon a counting made in direct violation of law, to be received at all. The object of the statute is to prevent tampering with the ballots; and, inasmuch as it would be impossible to determine with certainty whether any fraud had been committed in any

unauthorized counting, there can be no propriety in allowing any evidence resting on it."

In what has been said it is not intended to impugn the motives of the board or the committee, or to pass upon the question of whether the evidence before the board was sufficient to justify its action if it had been invested with the authority to act upon such evidence. On the contrary, enough does appear in the return to indicate that the case was one calling for a careful and conscientious judicial scrutiny, which we have no doubt it will receive in the proper tribunal. We rest our conclusions wholly upon the ground that the board exceeded its powers. The questions involved in the case are properly triable in *quo warranto* proceedings.

We deem it proper to add that the law in its present form is not well adapted to our present system of voting. The chief purpose of the act was to furnish a way for the correction of mistakes in the original count. At the time of its enactment candidates were voted for on separate tickets, and it could rarely occur that any ground of difference would exist as to what ballots should be counted for a particular candidate. Since its enactment the general election law of 1891 has provided for an official ballot, upon which the names of all the candidates are printed, and prohibiting distinguishing marks. It has come within the observation of this Court that this provision has resulted in bitter controversies, and has furnished ample opportunity for radical disagreements as to what constitutes distinguishing marks, and the power thus vested in partisan tribunals arbitrarily to determine this question is liable to result in future scandal, unless some means of direct judicial review be provided.

We think the *mandamus* in this case should issue as prayed.

HOOKER, C. J., did not sit.

94 516
95 156
95 463
96 44
94 516
112 502

CHARLES E. BELKNAP v. THE BOARD OF CANVASSERS OF IONIA COUNTY.

Elections—Recount of ballots—Congressman—Certificate of election—Mandamus.

1. Act No. 208, Laws of 1887 (3 How. Stat. § 234*a*), which provides for the correction of frauds and mistakes in the canvass and returns made by inspectors of election, does not apply to the office of Congressman.
2. Where the board of canvassers of a county have canvassed the votes cast therein for Congressman from the returns of the inspectors as corrected by a recount had under the statute cited, *mandamus* will lie to compel them to reconvene, and recanvass the votes according to the original returns, and report the result to the Secretary of State.

Mandamus. Argued January 3, 1893. Granted February 3, 1893.

Relator applied for *mandamus* to compel respondent to reconvene, and canvass the votes cast for the office of Representative in Congress from the Fifth district according to the original returns, respondent having assumed, upon the application of relator's opponent, George F. Richardson, to recount the ballots under the provisions of Act No. 208, Laws of 1887. The facts are stated in the opinion.

Dwight Goss and *Taggart, Wolcott & Ganson,* for relator.

Ellis, Nichols & Miller, for respondent.

PER CURIAM. This is an application for a *mandamus* to compel the board of canvassers of Ionia county to reconvene, and canvass the votes cast for petitioner according to the original returns made to the county clerk. The petition sets forth that, according to the original returns made to the several county clerks of the district,

he was elected Representative in the Federal Congress, and the answer does not deny that allegation.

The House of Representatives is made the judge of the election and qualifications of its own members, and it is now well settled that Act No. 208, Laws of 1887 (3 How. Stat. § 234*a*), under which the recount was had, has no application to such a case. *Weston v. Probate Judge,* 69 Mich. 600; *Naumann v. Board of Canvassers,* 73 Id. 252; *Newton v. Board of Canvassers,* 94 Id. 455; *Wheeler v. Board of Canvassers,* Id. 448; *State v. Canvassers,* 36 Wis. 498; *Keeler v. Robertson,* 27 Mich. 116. It follows that the board of canvassers of Ionia county was wholly without authority in the premises.

The answer sets up that relator filed a petition for a recount in the county of Kent, and that such recount was had, and that, while relator objected to the action of the Ionia county board on the ground that the petition was not filed in time, yet he did not question the power of the board. It is, however, alleged that by the original returns relator was elected. His right, therefore, to a certificate did not depend upon the recount in Kent, and the petition filed in Ionia county was not predicated upon nor rendered necessary by the recount in Kent. Mr. Richardson was in no sense misled or prejudiced by either the recount in Kent or the failure to object to the recount in Ionia, instituted by himself.

It is next urged that, the returns having been made, and the certificate having been issued, the relator's only remedy is a contest in the House of Representatives. The point is ruled by *Roemer v. Board of Canvassers,* 90 Mich. 27.

It is further insisted that, inasmuch as the answer alleges that the recount in Ionia county was fair and impartial, and resulted in such an increase of the vote for Mr. Richardson as to entitle him to the certificate of elec-

tion, it would be unjust to set aside such recount. In *Maynard v. Board of Canvassers*, 84 Mich. 228, it was held that where the facts are not in dispute, and it appears that the relator is not entitled to the office, the Court will not compel the issue of a certificate by *mandamus*. In the present case the petition alleges unfairness and partiality in the recount, and a large number of copies of ballots, certain of which were counted for Mr. Richardson, and others of which were evidently cast for relator, and rejected by the committee, are attached to the petition.

A comparison of these copies negatives any presumption of fairness and impartiality that might otherwise exist. While the answer of a majority of the board contains a general denial of the allegations of unfairness and partiality, and contains a general allegation that the alleged copies of the ballots are not true copies, yet said answer does not attempt to indicate in what respect such copies differ from the originals. Two answers are presented; one signed and sworn to by twelve members of the board, and another signed and sworn to by eight members. The latter admits the allegations of fraud, unfairness, and partiality, and that the copies of the ballots are true copies, while the former denies the allegations of fraud, unfairness, and partiality, and alleges that the copies are not true copies. A determination of the essential facts in this controversy must depend upon a re-examination by the proper tribunal of the original ballots. It cannot be said, upon the papers before us, that the fairness and impartiality of this recount are undisputed, and therefore the case does not come within the rule laid down in the Maynard case above cited.

The respondent must be held to have acted without authority. It will be the duty of the board to reconvene, and recanvass the votes of Ionia county according to the original returns, and to report the result to the Secretary

of State. It will then be the duty of the State Board of Canvassers to reconvene, and recanvass the vote for Congressman in the Fifth district, and issue a certificate accordingly. In the mean time, Mr. Richardson has his remedy, should he desire a recanvass of the Kent county vote according to the original returns in that county.

The *mandamus* will therefore issue as indicated, without costs.

HOOKER, C. J., took no part in the decision.

---

94 519
s109 193
109 195

94 519
117 21

94 519
f151 1113

JOHN P. SANBORN v. WILLIAM T. MITCHELL, CIRCUIT JUDGE OF ST. CLAIR COUNTY.

Probate courts—Special appeal—Discretion of circuit court—Mandamus.

1. *Mandamus* will not lie to compel a circuit judge to vacate an order allowing an appeal to the circuit from an order of the probate court under How. Stat. § 6784, where the petition for leave to appeal sets forth facts sufficient to call for the exercise of the discretion of the circuit court, and such discretion has been exercised.
2. The appeal is not to be refused upon the denial of an interested party of the facts alleged in the petition for leave to appeal.
3. It is within the power and the duty of the circuit court to consider both the petition and the answer, and determine whether the petitioner is without default, and whether it appears that justice requires a revision of the case.
4. Where it appears from the petition that the account of an executor has been improvidently allowed, and that the property rights of wards have been injuriously affected, it would be a very exceptional case in which the court should not grant the leave to appeal.
5. The petition in this case (see opinion) is held sufficient to call for the exercise of the judgment of the circuit court upon the

questions whether the petitioners were without default, and whether justice required a revision of the case, and it will not be disturbed by *mandamus;* citing *Smith v. Circuit Judge,* 82 Mich. 93.

Mandamus. Argued January 4, 1893. Denied February 3, 1893.

Relator applied for *mandamus* to compel respondent to vacate an order allowing an appeal from probate court after the expiration of the statutory time therefor. The facts are stated in the opinion.

N. E. Thomas, O'Brien J. Atkinson, Henry M. Duffield, and *A. R. Avery,* for relator.

Stevens & Merriam (C. A. Kent, of counsel), for respondent.

GRANT, J. One James W. Sanborn died in 1870, testate. By his last will his brother, the relator, John P. Sanborn, and Newell Avery were appointed executors and trustees. They jointly executed the trust until Avery's death, in March, 1877. After that time the relator continued to act as the sole trustee until his resignation, in 1891.

James W. Sanborn left surviving him his widow, Mehitable D., and three children,—Nancy, Frederick D., and William H.; the latter being an incompetent person. William H. became of age in April, 1889, and by the terms of the will the estate was then to be divided among the legatees. Nancy married William F. Botsford. She died before William H. became of age, leaving two infant children. Annual accounts were filed up to and including the year 1882. After that date the relator filed no account until 1891. When the time arrived for the distribution of the estate, the question arose whether, under the terms of the will, the children of Mrs. Botsford were entitled

to their mother's share of the estate. A bill in chancery was filed to obtain a construction of the will. Pending this bill, and in November, 1890, the legatees, being desirous to obtain possession of the property, and being willing to concede that the Botsford children were entitled to their mother's share, opened negotiations with the relator with a view of settlement with him, and the turning over of the property to the parties interested. Meanwhile Mehitable D. Sanborn had been appointed guardian of her incompetent son, William, and William F. Botsford guardian of the infant children of Nancy. These negotiations were consummated, and resulted in the execution of an agreement and bond. The agreement was executed November 10, 1890, by Mehitable D. Sanborn, W. F. Botsford, and Frederick D. Sanborn, of the one part, and relator, John P. Sanborn, of the other part. Mehitable and Mr. Botsford executed it as guardians of their respective wards. The material parts of this agreement are as follows:

"*Whereas,* the said John P. Sanborn has acted as executor and trustee under the will of James W. Sanborn, deceased, late of St. Clair county, Michigan, for many years past, during which period he has at all times kept all of the parties interested fully advised of the details of the estate, and of the current management thereof, and now desires to resign the trusteeship, and be discharged and relieved of all liability as executor and trustee under said will, and to have his bond canceled; and

"*Whereas,* the said parties of the first part are willing to take charge of the estate of said deceased, and to relieve said second party from all responsibility on account thereof:

"*First.* The said John P. Sanborn, in consideration of the premises, and of the undertaking of the parties of the first part herein mentioned, agrees to file in the probate court, as soon as practicable, a general statement of his account as executor and trustee of said estate, and also a true statement of the assets of said estate now remaining in his hands.

"*Second.* The parties of the first part jointly and severally agree that they will accept the said statement of

said account, and the said statement of assets, as true and correct, and will consent to, and assist in obtaining, the allowance of the said account by the probate court for the county of St. Clair, and, when said account has been allowed, will procure the appointment by said probate court of a successor to John P. Sanborn, as trustee of said estate, who will receipt to said Sanborn for the assets of said estate in Sanborn's hands; and thereupon the said first parties will consent to and insist upon the delivering of and cancellation of said Sanborn's bond as executor, and discharge of his sureties from all liability under said bond, and will release the said Sanborn from all liability and responsibility whatsoever on account of his said trusteeship and executorship; and said parties further agree that they will deliver, as hereinafter provided, a bond, a true copy whereof is hereto annexed, all of the stipulations and agreements of the obligors in said bond being made a part of this agreement, the same in all respects as though written out at length herein.

"*Third.* It is also mutually agreed that the said account and statement of assets shall be placed by said Sanborn in the hands of Fred L. Wells, of Port Huron, Michigan, in escrow, to be filed by him in the probate court, as hereinafter provided, as soon as examined by the first parties, and that the said bond shall be executed by the parties of the first part hereto, without date, and placed in the hands of C. F. Harrington, of Port Huron, in escrow, with authority to him to insert the proper date of the delivery thereof; and upon the filing by said Wells, in the probate court of St. Clair county, of the said account and statement of assets, said Harrington is immediately to deliver to said Wells, for said John P. Sanborn, the said bond, having first inserted the proper date therein, to wit, the day of the date of its delivery; the said party of the second part hereby agreeing that said account shall be prepared and placed in the hands of the said Wells within the next 60 days.

"*Fourth.* It is also mutually understood and agreed that, out of the assets now remaining in the hands of said executor and trustee, he is authorized to take out (1) all the legal expenses to which he has been subjected, and for which he has become liable, including counsel fees; and (2) the sum of $2,000, as and for his salary and compensation as such executor and trustee, still due him, in addition to the sum of $1,500 per annum."

In pursuance of this agreement the relator filed his account as executor and trustee February 9, 1891. The bond mentioned in the above agreement was duly executed, and bears date March 6, 1891. It was in accordance with the agreement, and recited that the relator—

"Has filed in the probate court for the county of St. Clair a general statement of his accounts as executor and trustee under said will, and a true statement of all assets of said estate now remaining in his possession, or in his control; and the said above obligors have examined the same, and are satisfied of the correctness thereof."

This account was allowed April 7, 1891, by the consent of the parties, and, as appears by the petition in this case, at the request of Frederick D. Sanborn, acting on his own behalf and on the behalf of the other parties interested, while the relator was absent from the State. June 9, 1891, the relator resigned his trust, and subsequently Frederick D. Sanborn was appointed executor and trustee in his stead. In August, 1891, relator turned over to his successor, Frederick D. Sanborn, certain assets in his hands, and claims that they constituted all the property of the estate. On October 7, 1891, Frederick D. Sanborn filed a petition in the probate court, setting forth, in substance, that the account rendered by John P. Sanborn was not correct, and that he had not filed a true account of the assets in his hands, and praying that he be cited to appear and render a full and complete account of said assets, and to furnish a detailed statement of his doings as executor, and that he surrender and deliver up all the personal property in his possession, and that he (Frederick) be authorized and empowered to bring suit upon the bond for such sums as should be found due from him to the estate, if he should fail to pay them over. No further action appears to have been taken upon this petition, and it is still pending.

Before relator's account was allowed, another agreement was made between the parties, in regard to an error which relator claimed to have been made in the account rendered in 1882. This item was for $11,623.96, claimed to have been erroneously entered on said account for interest. By this subsequent agreement, Mehitable, Frederick, and Mr. Botsford agreed to allow this item of interest, and the relator agreed to waive a claim of $4,273.54 shown by said account to be due him, and also the $2,000 mentioned in the first agreement. It was expressly stipulated in this agreement that it should in no manner interfere with or prejudice any of the rights of the parties under the original contract, dated November 10, 1890.

On January 25, 1892, Frederick D. and Mehitable D. Sanborn filed a petition in the circuit court for the county of St. Clair, on behalf of themselves and the wards, praying to be allowed to appeal from the allowance of relator's account, allowed April 7, 1891. After a hearing upon the petition, and answer thereto, the court allowed an appeal. The relator now prays for the writ of *mandamus* to compel the respondent to vacate the order allowing said appeal. The relator insists:

1. That the petition for an appeal makes no such showing as the statute requires in order to justify an appeal after the expiration of the time allowed by the statute.
2. That the agreement above given is conclusive upon the parties, and bars the right of appeal.

The statute provides that—

"If any person aggrieved by any act of the judge of probate shall, from any cause, without default on his part, have omitted to claim or prosecute his appeal according to law, the circuit court, if it shall appear that justice requires a revision of the case, may, on the petition of the party aggrieved, and upon such terms as it shall deem reasonable, allow an appeal to be taken and prosecuted with the same effect as if it had been done seasonably." How. Stat. § 6784.

If the petition for leave to appeal sets forth facts sufficient to call for the exercise of the discretion of the circuit court, and such discretion has been exercised, this Court will not interfere.

The petition in this case, for leave to appeal, is very lengthy, gives a detailed statement of the dealings of the executor and trustee, and makes certain charges, which it is unnecessary to state here. The truth of such charges should not be determined upon *ex parte* showing, but only upon evidence produced in open court, where the truth can be elicited by examination and cross-examination. We are, therefore, only concerned to determine whether the petition sets forth sufficient facts to give the court jurisdiction.

In order to show that the petitioners acted without default upon their part in not taking an appeal within the statutory time, they allege that the executor notified Frederick D. Sanborn that if he would appear at his office August 8, 1891, he would turn over to him the assets and papers of the estate; that Frederick D. Sanborn and William F. Botsford went to said office at the time specified, but that the executor did not appear, but that his attorney appeared and delivered to Frederick certain notes and mortgages, and stated that that was all of the assets which said Sanborn had to deliver at that time; that some days thereafter his said attorney sent to Frederick a mortgage, and a certificate issued in the year 1875 by W. L. Bancroft, as receiver of the Chicago & Lake Huron Railroad, payable to Henry Howard and John E. Miller for $5,500; that said certificate was worthless, and that there was nothing upon it to indicate that it belonged to, or was the property of, the estate; that petitioners did not know until August 8, 1891, that it was claimed by the executor that said certificate belonged to said estate, and that they had never before that date heard of the existence

of said certificate; that in the year 1880 said executor purchased for said estate $20,000 of bonds of a certain railway company; that in 1881 or 1882 he also purchased for said estate $20,000 of certain railroad car bonds; that he has failed to account for said bonds, or to turn them over to his successor; and that they—

"Were not aware, nor did they learn of the fact, that said railroad bonds and said railroad car bonds were not embraced in said statement of assets claimed to be in the hands of said Sanborn until the 60 days in which they might have appealed from the allowance of said account had expired."

It is unnecessary to mention any other items referred to in the petition. It is true that these allegations are denied by the executor in his answer to the petition for an appeal, and that he states therein that the petitioners were fully informed in regard to the assets of the estate and his doings as executor, and that the settlement was made with the full knowledge of all the facts. But the truth of these statements cannot be determined in this proceeding. The appeal is not to be denied upon the denial of an interested party of the facts alleged in the petition. If this were so, an appeal could very rarely be granted. It is within the power and duty of the court to whom the petition is addressed to consider both the petition and answer, and determine (1) whether the petitioner is without default; and (2) whether it appears that justice requires a revision of the case. The petition in this case sets forth sufficient to call for the exercise of this judgment on the part of the court, and therefore we cannot disturb it. *Smith v. Circuit Judge,* 82 Mich. 93.

The second question is more difficult of determination, in so far as it relates to the rights of the interested parties who were of age and competent. Were they the sole parties interested, a more careful examination of the

record and the rights of the parties would be required than we now feel called upon to give. So far as such parties are concerned, there is much force in the position advocated by the learned counsel for the relator, that their voluntary agreement is binding upon them. If they fully understood the situation, and the circumstances and facts as set forth by the relator, there is no good reason why they should not be bound by their agreement. If, however, the true situation was concealed from them, and they acted, in making such agreement, upon the representations of the executor that the account and statement of assets were true, while in fact they were false, such agreement, both by authority and in reason, would not be binding. Inasmuch as, under the view we take of the case, the writ of *mandamus* must be denied, we think it unnecessary to express a further opinion upon this branch of the case, but leave it to be determined upon the merits, as they shall appear at the trial.

But the rights of infants and an incompetent are involved in this controversy. They are wards of the courts, and it is the duty of courts to see that their rights are protected. Guardians cannot stipulate away the rights or property of their wards, without good and sufficient consideration; and, whenever it appears to the court that this has been done, any agreement accomplishing that result will be promptly set aside. As to these infants and the incompetent, it was the duty of the executor and trustee to file in the probate court an itemized account of his receipts and disbursements, and an accurate statement of the property in his hands, in which they were interested. The guardians of these wards were not justified in settling with the executor without such true account, and without obtaining for their wards, if possible, the entire property due them. We are not to be understood as holding that the account filed by the executor in this case is not suffi-

ciently specific. That must be determined, in the first instance, by the court which hears the case; and it must determine whether a more specific account shall be filed before proceeding with the case. Where the property of wards is interested, it is the duty of probate courts to examine the account very carefully, and to see that their rights are protected. Such courts should not accept the stipulations of parties without examination. Whenever it appears upon petition to the circuit court that such account has been improvidently allowed, and that the property rights of wards have been injuriously affected, it would be a very exceptional case in which the court should not grant the leave to appeal. The law does not, under those circumstances, visit the fault of the guardian upon them. They are without default, and are not left to pursue their remedy against the guardian who may be in default.

It follows that the writ must be denied, with costs.

The other Justices concurred.

JOHN MCLELLAND v. THE A. P. COOK COMPANY (LIMITED).

Deed—Covenants—Right of action—Mortgage foreclosure—Bill to restrain.

The right of action, if any, of a grantee of part-paid swamp land, who secures the payment of a portion of the purchase price by mortgage, and remains in undisturbed possession for five years before the grantor secures his patent, and for ten years after its issuance, without being threatened with litigation growing out of the state of the title, or the non-payment of taxes assessed against the land before the patent was issued,

which patent contained a reservation of liens which the State might have therefor, is upon the covenants of warranty in his deed; citing Jones, Mortg. §§ 1500–1508.

Appeal from Kent. (Grove, J.) Submitted on briefs January 6, 1893. Decided February 3, 1893.

Bill to set aside a mortgage foreclosure, and for the discharge of the mortgage lien. Complainant appeals. Decree affirmed. The facts are stated in the opinion.

Westerman & Westerman, for complainant.

Weaver & Weaver and *Stuart & Knappen*, for defendant.

LONG, J. This bill is filed to set aside a mortgage foreclosure, and for a discharge of the mortgage lien, on the claim that a tender had been made of the amount due, and for other causes stated in the bill.

The premises were purchased by complainant of Addison P. Cook (now deceased), on August 12, 1875, on a contract, the complainant paying $100 down, the purchase price being $2,000. At that time, Cook held the land under a part-paid certificate from the State, it being swamp land, the patent not having been issued, though the certificate was issued December 15, 1853. After the certificate was issued, taxes were assessed from year to year, down to 1875, but were not returned, or were rejected by reason of the land being swamp land, and part paid. Up to this time the Commissioner's books showed about $600 delinquent taxes. January 15, 1876, complainant paid Mr. Cook $700 more, and took a deed containing the general covenants of warranty, the deed being dated to correspond with the date of the contract. Complainant, on obtaining the deed, executed to Cook a mortgage upon the land for the remaining $1,200; payable, $100, January 15, 1878,

and $100 annually thereafter, with interest at 7 per cent., with right to pay the whole amount at any time. Complainant entered into possession of the premises, and is still in possession. Later, Mr. Cook assigned the mortgage as collateral to a loan to the People's Bank of Manchester, but never disposed of the mortgage.

February 23, 1877, complainant filed a bill in the Lenawee county circuit court, in chancery, against Mr. Cook and his wife and the Manchester bank, alleging that at the time of the contract of purchase he did not know that Mr. Cook had not a title in fee; that he had since learned that Cook's only title was under the swamp-land certificate, and that a large amount of taxes had accumulated against the land; that the deed given should have contained covenants of seisin and against incumbrances, and that he accepted the deed of general warranty under misapprehension of the effect of such deed; that he feared that Cook would dispose of his interest in the land, and that he had disposed of the mortgage. Mr. Cook answered this bill, setting up the true state of the title; denying that anything was done to mislead complainant; alleging that the latter was fully advised of the state of the title when he purchased, and that defendant could and would make good the title to the land, and was amply responsible, both legally and pecuniarily, upon the covenants contained in his deed; and denying that complainant was in any way jeopardized. This case was put at issue, and the cause referred to the commissioner to take proofs. Some testimony was taken, but the cause was never ready for hearing until after Mr. Cook died.

For the purpose of settling his rights under the swamp-land certificate, Mr. Cook caused suit to be begun against the Commissioner of the State Land Office, the result being that the Court held that the Commissioner must

issue patents on the payment of purchase price and interest, without payment of taxes. *Robertson v. Commissioner*, 44 Mich. 274. Patents were issued in accordance with this decision, containing reservation of liens which the State might hold for taxes assessed and remaining unpaid. Mr. Cook thereafter paid, as it is claimed, all legal taxes assessed against the land so far as they were incumbrances upon these lands.

On December 28, 1888, Mr. Cook assigned this mortgage to the A. P. Cook Company, Limited. Mr. Cook died, intestate, in April, 1889, and the chancery suit thereafter was revived in its name. The case was brought on for hearing on pleadings and proofs to be taken in open court. The complainant declined to proceed, and the bill was dismissed, with costs, February 10, 1891.

Defendant then began statutory foreclosure of the mortgage, when the present bill was filed by the complainant, setting up to some extent the former suit and the proceedings therein, and alleging as grounds of relief the same grounds embraced in the first bill as to title when contract of sale was made, and incumbrances then existing upon the land, but alleging no present failure of title, and no present incumbrances, and making no claim of Mr. Cook's insolvency, or any threatened injury to complainant's rights; but alleging, however, for the first time, what is claimed to have been an absolute, unconditional tender of the full amount due on the mortgage. On filing the bill, an injunction was issued restraining the foreclosure proceedings, which were thereafter discontinued. Issue was joined, and the case removed to the Kent circuit, by reason of the disqualification of Judge Lane to hear the case. The answer filed fully meets all the equities of the bill, sets up in bar of the present suit the adjudication in the former suit, and asks the benefit of a demurrer. Proofs were taken before the commissioner, and, on the

hearing in the court below, the court found that no legal tender had ever been made, fixed the amount due on the mortgage, and awarded foreclosure and order of sale for the amount so found due in default of payment. From this decree complainant appeals.

We think the court below was not in error in its conclusions. No showing was made that Mr. Cook made any misrepresentations in regard to his title at the time the contract of sale was executed, or when the deed was given; and no effort was made to show that Mr. Cook did not have a good and perfect title to the land as early as 1881. No showing was made by the complainant that he had suffered any damage or loss whatever by reason of the defect in the title prior to that time, or that he was in any way injured by the fact that Mr. Cook did not have a patent to the land at the time of his conveyance to the complainant, or by reason of the unpaid taxes. He has paid no more interest on his mortgage than he would otherwise have paid. When the title was perfected by the taking of the patent by Mr. Cook from the State, and on the payment of all the valid taxes, complainant still refused to pay his mortgage and the interest thereon. He has been in possession of the premises continuously, and has never been disturbed by any one, or even threatened with litigation growing out of the state of the title or the incumbrances. If he had any right of action, it could only have been upon the covenants of warranty in his deed. Jones, Mortg. §§ 1500–1508.

In fact, about the only defense of which there is any pretense or claim is the alleged tender. It would profit no one to set out the testimony which complainant claims shows a tender. We have examined it with great care, and are led to the conclusion that no unconditional tender of the amount due on the mortgage is shown. It is evident that many talks were had about the matter, but the

complainant always insisted that the lands were incumbered by these taxes, which Mr. Cook must remove, as the complainant wanted his title made perfect; and it is not satisfactorily shown that he was willing to pay the amount of the mortgage until this was done. His tender, if made at all, was in 1877, and while the question was being agitated about these taxes, and before the first bill was filed; yet no claim was made of a tender by that bill. All the circumstances surrounding the case, as well as defendant's testimony, contradict the complainant's claim that a tender was made sufficient to discharge the lien of the mortgage.

We think the court below reached the right conclusion, and the decree will be affirmed, with costs.

We call attention to the fact that no index is furnished with this record, and, had the case been reversed, no costs would have been granted to the party appealing.

The other Justices concurred.

SUSAN M. CRAWFORD v. WILLIAM H. OSMUN.

[See 70 Mich. 561; 90 Id. 77, 82.]

Tender—Interest.

Upon the facts stated in the opinion, the Court find that the tender made by complainant to defendant's son was sufficient to relieve her from the payment of interest on the amount due the defendant after such tender was made.

Appeal from Shiawassee. (Newton, J.) Argued January 12, 1893. Decided February 3, 1893.

Complainant appeals from an order of the court below, denying her application for leave to record the decree herein upon the ground of a tender having been made of the amount due defendant thereunder. Reversed, and order entered in this Court for complainant. The facts are stated in the opinion.

E. S. Crawford, for complainant.

Aug. C. Baldwin, for defendant.

McGRATH, J. This cause is before this Court for the fourth time. 70 Mich. 561; 90 Id. 77, 82.

Complainant asks for an order authorizing the recording of the decree made and entered in this Court, claiming that the sum of $530.37, named in the order of this Court entered May 13, 1892, has been paid to defendant; that the balance payable to defendant, under the decree of this Court to which the aforesaid order was amendatory, was, on the 22d day of March, 1892, the sum of $7,467.79; and that the said sum was, on said last-named date, tendered to the defendant A controversy has arisen concerning this alleged tender.

It is sufficient to say that, while we find that no tender was actually made to the defendant in person, we also find that a deed for execution by defendant had been forwarded to defendant's solicitor, with the expectation that it would be executed, and that notice of such execution would be given by such solicitor; that after waiting three weeks, and hearing nothing, complainant went to Pontiac, where both defendant and his solicitor resided, and, first calling upon the solicitor, there learned that the deed had not been executed; that the said solicitor informed complainant that he would notify defendant to be at his office in the afternoon, and try to have him there at that time; that, in the afternoon, complainant again went to the

office of said solicitor, and was then and there prepared to pay over to defendant the amount due under the decree; that defendant did not appear, but in his stead came William H. Osmun, Jr., a son of the defendant, and a man of mature years, who informed complainant, in the presence of said solicitor, that his father was not well, and would not come out in the storm, and, at the same time and place, stated that his father would not sign the deed unless receipts were passed releasing him from all liability; that said William H. Osmun, Jr., then and there further stated that he had the matters pertaining to the property in question in his hands to settle and do with as he chose, and was ready and willing to pass receipts in full at any time, and that, if receipts were passed in full, he would have his father sign the deed without delay; that at said interview the defendant's solicitor was present, and, in the presence of said solicitor, the said William H. Osmun, Jr., handed back to complainant the deed which had been by complainant forwarded to defendant's solicitor for execution; that, at the conclusion of said interview, complainant went to the local banks, and exchanged the drafts then in her possession for legal-tender notes, and went to the defendant's house for the purpose of making a tender, and there found the said William H. Osmun, Jr., who informed complainant that his father was not at home, but was at his daughter's, a short distance away; that complainant went to the daughter's house, and was informed there that defendant was not there; that complainant then returned to defendant's house, and, not finding defendant, made a tender of the amount due to said William H. Osmun, Jr., which said William H. Osmun, Jr., refused to accept.

The defendant denies that his son was authorized to accept any money due defendant. We find, however, that the son was authorized to state that his father would not execute the deed until he received a receipt in full of all

demands from complainant, and that this statement was made in the presence of defendant's solicitor. We think, therefore, that complainant should be excused from the payment of interest upon the amount due after the date upon which the transactions aforesaid occurred.

It is high time that the courts were relieved of this controversy, and therefore it is ordered that the complainant pay to the register of the circuit court for the county of Shiawassee, in chancery, the sum of $7,467.79, in full of the decree herein, within 30 days from this date, and thereupon the complainant will be entitled to a final order of the said circuit court, authorizing the recording in the office of the register of deeds for the county of Shiawassee of the decree or decrees in this cause. No costs will be awarded to either party in this proceeding in either court.

The other Justices concurred.

94 536
99 532

94 536
s 106 128

94 536
109 395

94 536
137 396

94 536
f 157 1314
157 3606

Henry C. Sterling v. Robert C. Callahan.

Intoxicating liquors—Sale to minor—Action by parent—Damages—Evidence—Remarks of court—Instructions.

1. Proof of the furnishing of intoxicating liquors to a minor is sufficient to warrant a recovery by the father of at least $50 damages, under section 20 of Act No. 313, Laws of 1887, which makes any person who sells or furnishes intoxicating liquors to a minor liable for both actual and exemplary damages therefor, to the father or mother, in such sum, *not less than $50 in each case*, as the court or jury shall determine.[1]

[1] In *Theisen v. Johns*, 72 Mich. 285, it was held that the phrase, "not less than $50 in each case," refers to the cause tried, and that where the claim for damages alleged in the declaration brings the case within the jurisdiction of a court of record, if the plaintiff is entitled to recover at all, he shall at least recover $50 and

2. It is error to instruct the jury that, if they discredit one of the plaintiff's witnesses, their verdict must be for the defendant, where there is other competent testimony before them to support the averments of the declaration.
3. Counsel can be usually safely trusted to pass such criticisms upon witnesses as the occasion demands, and the circuit judge should avoid anything calculated to impress the jury with his own views as to the facts; citing *Railroad Co. v. Kirkwood*, 45 Mich. 51; *Wright v. Towle*, 67 Id. 255; *Lovejoy v. Michels*, 88 Id. 15.
4. Where the jury have apparently accepted and acted upon an erroneous instruction of the circuit judge given on his own motion, the error is none the less damaging because the instruction was accompanied by an opposing one, given on the request of one of the parties.

Error to Wayne. (Brevoort, J.) Submitted on briefs January 12, 1893. Decided February 3, 1893.

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

Henry M. Cheever, for appellant.

Ralph Phelps, Jr., and *William B. Jackson*, for defendant.

MONTGOMERY, J. The plaintiff sued to recover damages caused by a sale of liquors to his minor son, and produced, as witnesses to prove the sales and intoxication of the son, Robert Millard and Fred White and the son himself. The testimony need not be set out at length. Suffice it to say that each of the three witnesses gave evidence tending to support the allegations contained in the declaration.

The circuit judge charged the jury, in part, as follows:

"Now, gentlemen, without referring to any part of the evidence, I leave the matter wholly to you. It is for you to say under all circumstances, has this plaintiff made a case by a preponderance of evidence? That is to say, if

the costs of suit; and in *People v. Neumann*, 85 Mich. 98, it was held that furnishing liquor to a minor is "letting him have it," and that it is not necessary to hand the liquor to the minor in order to furnish it to him.

you do not believe the evidence of this boy, your verdict will be for the defendant. And right here let me tell you that, if the witness falsifies his testimony, you have the right to disregard all of it. You have seen him; you have heard the manner in which he has spoken to you, and seen the manner in which he has acted. He told us here that he wanted to be one of the boys. Does that mean he wanted to be a loafer, a rounder, a blackguard, and a thief, or what does it mean? I leave it for you to say. The manner in which he has given his testimony, and the manner in which he has acted, that you have a right to pass upon and the right to criticise."

Another portion of the charge is as follows.

"Now, as I said before, do you believe his testimony? Did he buy this liquor from Callahan, that his mother said started him on his career downward? Because, gentlemen, if he did not buy any liquor there, or if he did not buy liquor enough that it might be so connected with and effective in causing actual loss to plaintiff, he cannot recover. It is not sufficient for plaintiff to show the mere furnishing of intoxicating liquor to his minor son to entitle him to recover, but such furnishing must be in such quantities, and under such circumstances, that the jury can fairly infer that plaintiff was actually damaged thereby."

In another part of the charge a request of plaintiff was given, as follows:

"If you find that the boy drank liquor, beer, or whisky in defendant's saloon (that is what I have already said to you), and that the same was there furnished by him or his barkeeper, the plaintiff is entitled to recover the sum of at least $50."

It is apparent from the reading of this charge that it cannot be sustained as law.

1. There was ample testimony, aside from that of the son, to support the averments of the declaration. It was therefore error to charge that, if the jury discredited the son, the verdict must be for the defendant.

2. It was also eminently unfair to the plaintiff for the

circuit judge to refer to this young man's testimony in such scathing terms as he saw fit to employ. Counsel representing parties can be usually safely trusted to pass such criticisms upon witnesses as the occasion demands, and the circuit judge should avoid anything calculated to impress the jury with his own views as to the facts. *Wright v. Towle,* 67 Mich. 255; *Marquette, etc., R. R. Co. v. Kirkwood,* 45 Id. 51; *Lovejoy v. Michels,* 88 Id. 15.

3. The court was also in error in charging that it is not sufficient for plaintiff to show the mere furnishing of intoxicating liquors to his minor son to entitle him to recover, but that such furnishing must be in such quantities, and under such circumstances, that the jury can fairly infer that the plaintiff was actually damaged. This instruction is directly in the face of the statute. 3 How. Stat. § 2283*e*3. See, also, *Theisen v. Johns,* 72 Mich. 285. As the jury apparently accepted and acted upon this instruction of the circuit judge, given on his own motion, it was none the less damaging error that such instruction was accompanied by an opposing instruction, given on request of one of the parties.

The other questions presented on the record are not likely to arise again.

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

The other Justices concurred.

AUSTIN LANE v. MERRILL JONES.

Justices' courts—Return of officer—Impeachment—Costs.

1. A defendant in justice's court may show by affidavit, in support of a motion to dismiss the suit, that the summons was served more than 12 days before the return-day.
2. How. Stat. § 6940, which provides that "whenever a judgment shall be rendered by any justice of the peace against any party, unless otherwise herein provided, it shall be with costs of suit," applies to a judgment dismissing a suit upon motion of the defendant, supported by affidavit showing that the summons was served more than 12 days before the return-day.

Error to St. Clair. (Vance, J.) Submitted on briefs January 13, 1893. Decided February 3, 1893.

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

W. E. Leonard (*William M. Cline*, of counsel), for appellant.

Avery Bros. & Walsh, for defendant.

MONTGOMERY, J. This case originated in justice's court. The suit was commenced by summons. On the return-day the defendant appeared, and showed by affidavit that the summons was served upon him more than 12 days before the return-day. Thereupon the justice dismissed the cause, and entered judgment for the defendant for his costs.

Two questions are presented which require discussion:

1. Whether it was competent for the defendant to dispute the return of the officer by affidavit.

2. Whether, after determining to dismiss the cause, the justice was authorized to enter a judgment for the defendant for costs.

The circuit judge held the affirmative of both propositions. We think he was right. In *Michels v. Stork*, 52 Mich., at page 263, it is said:

"Had the suit been brought against the officer for a false return, it is conceded that the plaintiff would have been at liberty to show the falsity of the return by any evidence fairly tending to show it. He might do this, also, by affidavit, on a motion in the same suit to set aside the return; and this is not an uncommon proceeding, when the truth of the return is disputed;" citing *Chapman v. Cumming*, 17 N. J. Law, 11; *Carr v. Bank*, 16 Wis. 50. See, also, *Allen v. Mills*, 26 Mich. 124.

The statute authorizing judgment for costs in justice's court is section 6940, How. Stat., and reads:

"Whenever a judgment shall be rendered by any justice of the peace against any party, unless otherwise herein provided, it shall be with costs of suit."

Where, as in the present case, the want of jurisdiction does not appear upon the face of the proceedings, and it is necessary that the defendant should appear, or have a judgment passed against him which is good upon its face, we think it would be manifestly unjust to hold that he should be put to the expense of appearing, and not be entitled to judgment in his favor for costs of suit. *Cary v. Daniels*, 5 Metc. 240; *Jordan v. Dennis*, 7 Id. 591; *Reynolds v. Plummer*, 19 Me. 22; *Davis v. Hastings*, 8 Cush. 314; *Dixon v. Hill*, 8 Ind. 147.

Judgment will be affirmed, with costs.

The other Justices concurred.

94 542
d125 195

HENRY HENKEL AND JACOB KRAFT v. GEORGE SCHAUB.

Libel and slander—Words injurious to a person in his business—Pleading—Damages.

1. Words, spoken or written, injurious to a person in his business, which are false and malicious, are actionable *per se*, and special damages need not be alleged or proved; citing *Manufacturing Co. v. Perkins*, 78 Mich. 1; *Oliver v. Perkins*, 92 Id. 304.
2. Plaintiffs' declaration is held to state a cause of action for slander upon their business of keeping the stallion named therein for breeding purposes, for gain and reward.

Error to Montcalm. (Smith, J.) Submitted on briefs January 13, 1893. Decided February 3, 1893.

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

Ellsworth v. Barden, for appellants.

Mitchel & Hawley and *C. W. Perry*, for defendant.

LONG, J. Plaintiffs filed a declaration in the circuit court for Montcalm county, in an action on the case, for slander, to recover damages against the defendant growing out of his claimed false and malicious statements and representations of and concerning a certain stallion, called "Butor," and of and concerning the said plaintiffs in their business as owners of said horse, and in keeping and using the same as a breeding horse, for public and general use, for hire, gain, and reward. Defendant pleaded the general issue.

After a jury had been impaneled to try the cause, and counsel for plaintiffs had stated what they expected to prove,—stating the case substantially as set out in the

declaration,—they called a witness to prove and substantiate the claims thus made. This was objected to by defendant's counsel on the ground that the declaration did not state a cause of action, and that no cause of action was stated by plaintiffs' counsel; that there could be no recovery in such an action unless special damages were alleged, or offered to be proved. The trial court thereupon stated to plaintiffs' counsel that, in order to entitle plaintiffs to recover, it was incumbent upon them to allege and prove the persons by whom the mares were owned or controlled, and by whom they would have been employed to permit or allow said horse to serve said mares for fee or reward, had not the defendant published the slanderous words. The court then offered plaintiffs the opportunity to amend their declaration in this respect, which plaintiffs declined to do. The court therefore directed a verdict for defendant. Plaintiffs bring error. The declaration is as follows:

"*In the Circuit Court for the County of Montcalm.*

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

"Henry Henkel and Jacob Kraft, of said county, plaintiffs herein, by Ellsworth & Barden, their attorneys, complain of George Schaub, defendant herein, in a plea of trespass on the case:

"*For that, whereas,* the said plaintiffs are now, and have been for more than three years last past, the owners of a certain imported and registered Percheron stallion, called 'Butor,' now about seven years old, and of the value of two thousand dollars, which said horse was imported from France in the year 1887, and in the same year entered for registry, and recorded as number 6,763, in the Percheron Studbook of America, compiled and published by the American Percheron Horse-Breeders' Association, and was and is a full, pure-blooded Percheron stallion, and which said Henkel and Kraft now keep, and for the whole of said time have kept, exclusively for breeding purposes, not only on their own farms, for use upon their own mares,

but also for public use, for hire and gain, in the said county of Montcalm, and in the counties of Kent and Newaygo, in said State; and that, during the time they have so owned said horse, it has begotten many colts from their own mares, and from the mares of many persons in the said counties of Montcalm, Kent, and Newaygo; and that said horse, 'Butor,' is not only an imported, registered Percheron stallion, as above stated, but he is a good colt getter, and a valuable horse for breeding purposes, and is and has been especially valuable to said owners by reason of the moneys realized by them from the public for the services of said horse as a breeding horse; and that the said Henkel and Kraft have, for the whole of said time, advertised and represented to the public said horse to be an imported, registered stallion, as above set forth and described, and that said horse is what they so advertised and represented him to be; and that they have each year, during the whole of said time, realized and received large sums of money for the services of said horse as a breeding horse, by reason of the fact that said horse was and is an imported, registered Percheron stallion, as above set forth and described, as the said Henkel and Kraft have ever represented and held him out to be; and that the said Henkel and Kraft are, and ever have been, honest, upright, and truthful and faithful citizens of this State, and of good repute and standing as business men in the community where they reside.

"That in the month of May, A. D. 1891, one George Schaub, of the township of Pierson, in said county of Montcalm, who was then and there, and for a long time prior thereto had been, the owner of a stallion which he kept for breeding purposes, for hire and gain, well knowing the premises, but greatly envying the good standing and repute of the said Henkel and Kraft, and their possession and ownership of a horse of so much value for breeding purposes as said horse, Butor, and contriving, and wickedly and maliciously intending, to injure the said Henkel and Kraft in their good name, fame, and credit, as honorable business men, and to bring them into disrepute, scandal, and disgrace with and among all their neighbors, and to injure them in their property, by bringing said horse, Butor, into bad repute, and lessening his value as a breeding horse, did designedly, falsely, and maliciously pretend, represent, and state to one John Field, at Pierson, in said county of Montcalm, that said

horse, Butor, so owned by said Henkel and Kraft, was nothing but a grade horse (meaning thereby that said horse was not a full, pure-blooded Percheron stallion, and that he was crossed with some other breed of horses), and was therefore worthless as a breeder, and that said horse, Butor, was not an imported horse (meaning thereby that said horse had not been bred in France, and had not been imported from France), and that he was not registered (meaning thereby that said horse was not enrolled or registered in the studbook above mentioned); and that in the same month, and within the said county of Montcalm, the said George Schaub, with like motive, and actuated by the same purpose, as aforesaid, designedly, falsely, and maliciously and wickedly intending to injure said Henkel and Kraft as aforesaid, did represent and state and say, at various times and places, during the said month, to Johnson Reed, Nicholas Ferguson, Fred Fahner, August Beduhn, John Brunner, William Rader, and many others, that said horse was not an imported horse (meaning thereby that said horse was not a full, pure-blooded Percheron stallion of French breeding, and was not imported from France), and that said horse was not a registered horse (meaning thereby that said horse was not entered or registered in said studbook), and that he was only a grade horse (meaning thereby that he was not a full, pure-blooded Percheron stallion), and that he, said horse, was a 'dunghill' (meaning thereby that the pedigree of said horse could not be traced, and that he was a mixture of various breeds of horses, and was not a full, pure-blooded Percheron stallion), and that they ought not to pay so much for the services of such a horse as they would for an imported, registered horse (meaning by the words 'imported, registered horse,' a horse which was a full, pure-blooded Percheron stallion, imported from France, and registered in said studbook).

"That by reason of the premises, and the said false and malicious statements and representations so made as aforesaid by said George Schaub, of and concerning said horse, Butor, so owned by said Henkel and Kraft as aforesaid, the said Henkel and Kraft have been greatly damaged, by the loss of serving fifty mares, and more, by said horse, in the season of 1891, in consequence of such false and malicious statements, to wit, in the sum of six hundred dollars; that said Henkel and Kraft have been greatly

damaged by said false representations and statements so made as aforesaid, in the lessening of the value of said horse, and by reason of the decrease in value of colts begotten by said horse, Butor, and the bad reputation thus given said horse; and that said Henkel and Kraft have also been greatly injured and damaged by reason of such false and malicious representations and statements so made as aforesaid by said Schaub, of and concerning said horse, in their character and standing as honest and upright business men in the community where they reside,—to the plaintiffs' damage, in all, of two thousand dollars.

"ELLSWORTH & RARDEN,
"Attorneys for plaintiffs."

The first question suggested by defendant's counsel is whether the action is for slandering the plaintiffs in their business, occupation, or calling, or for slandering the plaintiffs' horse. It is admitted that, if it be the former, then the words may be actionable *per se*, and the action might be maintained without alleging or proving special damages. On the other hand, it is insisted that, if the action is upon the words spoken of and concerning plaintiffs' horse, then the words spoken are not actionable *per se*, and no recovery can be had without alleging and proving special damages.

The claim is made that the occupation or calling of the plaintiffs is not stated in the declaration, and nothing set out therein showing that the defendant said anything of and concerning the plaintiffs in that respect, but that the claim is made for recovery of damages solely upon the ground of the false statements made by defendant of and concerning the said horse, and, as no special damages are alleged, no recovery can be had.[1]

This contention cannot be sustained. The declaration plainly sets out the business and calling of the plaintiffs.

[1] Counsel cited, in support of this claim: *Wilson v. Dubois*, 35 Minn. 471; *Boynton v. Shaw Stocking Co.*, 146 Mass. 219; *Dooling v. Publishing Co.*, 144 Id. 258; *Tobias v. Harland*, 4 Wend. 537.

As appears by the declaration, they are the owners of this horse, which it is alleged is of the value of $2,000; that he was imported from France, and recorded in the stud-book as a full, pure-blood Percheron stallion, and which they had kept for breeding purposes from the year 1887, for hire and gain, and that he had begotten many colts; that he was a good colt getter, and especially valuable to his owners. It is further alleged that the plaintiffs have represented and held out the horse as such, and that they are upright and truthful citizens, and of good standing in the country; that the defendant is also the owner of a stallion, and, greatly envying the good standing and repute of plaintiffs, and wickedly and maliciously intending to injure them in their good name, fame, and credit, he made the false and malicious statements set out in the declaration, and by means of which they have been greatly damaged, etc., in their character and standing as honest and upright business men, etc. It is apparent from the plain terms of the declaration that the action is based, not only upon the slander of the horse, but also upon the character, fame, and credit of the plaintiffs, who are the owners thereof, and engaged in the business and calling of keeping the horse for hire, gain, and reward. The court was therefore in error in holding that the declaration did not state a cause of action.

The rule is well stated in Newell on Defamation, Slander, and Libel (at page 181), as follows:

"When language is used concerning a person, or his affairs, which, from its nature, necessarily must, or presumbably will, as its natural and proximate consequence, occasion him pecuniary loss, its publication *prima facie* constitutes a cause of action, and *prima facie* constitutes a wrong, without any allegation or evidence of damage, other than that which is implied or presumed from the fact of publication; and this is all that is meant by the terms 'actionable *per se*,' etc. Therefore the real, practical

test by which to determine whether special damage must be alleged and proven in order to make out a cause of action for defamation is whether the language is such as necessarily must, or naturally and presumably will, occasion pecuniary damage to the person of whom it is spoken."

The declaration was not demurred to, and the substance of a good declaration is certainly contained in these allegations.

Words, spoken or written, injurious to a person in his business, which are false and malicious, are actionable *per se*, and special damages need not be alleged or proved. *Haney Manfg. Co. v. Perkins*, 78 Mich. 1; *Oliver v. Perkins*, 92 Id. 304.

What proofs the plaintiffs may be permitted to put in, if any, under the claim of slander to the horse, we need not now determine; but the declaration is sufficient to admit proof of the slander upon plaintiffs' business, as it is framed.

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

The other Justices concurred.

94 548
96 346

ADDISON B. MORELAND AND FRANK MORELAND v. GEORGE N. HOUGHTON, ANNA H. GARDNER, AND CHARLES H. VAN WAGONER.

Mortgage—Validity of assignment—Foreclosure.

1. Where, pursuant to the verbal instructions of the mortgagee, an agent executes an assignment of the mortgage, and delivers both instruments to the assignee, a sufficient title to the mortgage is transferred to the assignee to entitle him to foreclose it in equity.

2. Where, in such a case, it appears that the purpose of the transfer of the mortgage was to secure the assignee as surety, the fact that the assignment does not in terms purport to convey any right or title in the mortgage notes or debt will not prevent the vesting in the assignee of a beneficial interest in the mortgage.
3. The only question open to contest by the mortgagee in such foreclosure suit, in which he is made a defendant, is the superiority of complainant's title to his, and he cannot complain because of the non-production of the original mortgage notes, or a failure to account for their absence by satisfactory proof.

Appeal from Tuscola. (Beach, J.) Submitted on briefs January 18, 1893. Decided February 3, 1893.

Bill to foreclose a mortgage. Defendant Van Wagoner appeals. Affirmed. The facts are stated in the opinion.

Atwood & Caskey (E. F. Bacon, of counsel), for complainant.

Charles R. Mains, for appellant.

MONTGOMERY, J. Complainants filed a bill to foreclose a mortgage given by Houghton to Perkins & Co., dated January 14, 1882, for $311, on land situated in the township of Novesta, in the county of Tuscola. On the 7th day of February, 1884, Perkins & Co. assigned this mortgage, and indorsed the notes secured by it, to the defendant Van Wagoner, for a consideration, as stated in the assignment, of $155.

Complainants, in their bill of complaint, allege that said defendant Van Wagoner has assigned to them his interest in the mortgage as security for their indorsement upon a note in bank, which they claim to have paid, and to secure them also for the sum of $26.50, advanced to pay a livery bill owing by Van Wagoner. The defendant Van Wagoner answered, and denied the assignment of the mortgage by him to complainants. The defendant Gardner

answered, and the defendant Houghton permitted the bill to be taken as confessed. Testimony was taken in open court, and a decree rendered in favor of complainants for $125, from which decree defendant Van Wagoner alone appeals.

It appears by the testimony that the complainants indorsed a note for $160 for Van Wagoner at the Caro Exchange Bank in 1883, and that this note was renewed, from time to time, for about a year, when Van Wagoner made default, and failed to attend to the renewals; that at that time Van Wagoner was the owner of the mortgage in question, and all the notes secured by it; that these notes and the mortgage were in the possession of a Mr. Getty, an agent of Van Wagoner. Complainant Addison B. Moreland testified that, about the time the note became due, he saw defendant Van Wagoner, and spoke to him about the note; that Van Wagoner told him that he held this mortgage on real estate in Novesta, and would authorize Mr. Getty, who was present, to assign the mortgage as collateral security upon the note, and for the payment of the livery bill of $26.50. Getty afterwards delivered the mortgage, with an assignment, to complainants, which he executed as the attorney of Van Wagoner.

Various objections were urged in this Court, and such as we think deserving of notice will be referred to.

It is claimed that authority of the agent to make the assignment of the mortgage in question was not shown to have been in writing. We think this was not essential. Whether at law or not the written assignment be sufficient to authorize a foreclosure, the delivery by the agent in pursuance of instructions of the owner would be sufficient to have transferred a title to this mortgage, entitling complainant to maintain a bill of foreclosure in equity. See *Pease v. Warren*, 29 Mich. 9.

It is claimed that, as the assignment does not in terms

purport to convey any right or title in the debt or notes, it does not carry any beneficial interest to the assignees. But it is shown by the undisputed testimony that the purpose of the transfer of this mortgage was to furnish security to the complainants for their indorsement, upon which they were liable. It would be directly contrary to the intent of the parties to hold that the complainants have no beneficial interest in the mortgage.

Complaint is also made that the complainants did not produce the original notes secured by the mortgage, nor account for their non-production by satisfactory proof. If it be assumed that the defendant is correct in this contention, it is not a fact of which he can complain. The mortgagors and the owners of the equity of redemption might be entitled to raise this question, but it cannot affect the appealing defendant, as the only question which he is in this Court entitled to contest on the record is the superiority of complainants' right to his.

We have examined the record, and think the conclusions of the circuit judge upon the facts were fully sustained by the testimony.

The decree will be affirmed, with costs.

The other Justices concurred.

94 551
100 579

94 551
122 310

EMMA ERICKSON v. JOHN DRAZKOWSKI AND JOHN JOHNSON.

Evidence—Value of household goods—Exemptions—Removal of debtor from State.

1. Householders must be presumed to have such knowledge on the subject so as to render them competent to testify as to the

value of articles of household furniture owned by them, such as housekeepers are accustomed to buy; citing *Printz v. People*, 42 Mich. 144; *Ritter v. Daniels*, 47 Id. 617; *Bowers v. Horen*, 93 Id. 420; *Tubbs v. Garrison*, 68 Iowa, 44; *Storage Co. v. Rogers*, 52 N. W. Rep. 826.

2. Temporary residence in another state, caused by the unlawful seizure of household goods, will not subject the goods to attachment at the suit of the party guilty of the original trespass, on the ground that the owner is a non-resident of this State, and not a householder therein.

Error to Gogebic. (Haire, J.) Argued January 19, 1893. Decided February 3, 1893.

Trespass to personal property. Defendant Drazkowski brings error. Affirmed, with $25 for vexatious appeal. The facts are stated in the opinion.

M. H. Crocker, for appellant.

Charles E. Miller, for plaintiff.

McGRATH, J. This action is brought to recover the value of certain household goods, exempt from execution, taken upon a writ of attachment.

Plaintiff and her husband resided at Ironwood. On the 11th of August, 1891, John Drazkowski, plaintiff in the attachment suit, together with one Eddy, a constable, went to plaintiff's residence, and seized all of the household effects therein, consisting of furniture, beds, bedding, tableware, and kitchen utensils, the aggregate value of which was given at $100. Plaintiff and her husband had no friends in Ironwood, and few acquaintances. The result was that they were practically driven from their home, and forced to seek shelter at plaintiff's mother's, about five miles distant, but in the state of Wisconsin.

On the next day, August 12, another writ was issued, at Drazkowski's instance, for the same debt, and placed in

the hands of another constable, the defendant Johnson, who testified "that he took the goods mentioned in the list from Erickson's place under a writ of attachment, and that he did it under instruction from the defendant Drazkowski." A defense is now set up under the second writ, claiming that, at the time of the seizure under that writ, the plaintiff was not a resident of the State of Michigan.

The evidence clearly showed that the plaintiff was in Wisconsin temporarily, because of defendant's unlawful seizure of their household effects, and the trial court very properly directed a verdict for plaintiff.

Plaintiff and her husband testified to the value of the property taken, but it is insisted that their competency to testify upon the question of value did not appear. The articles seized were such as housekeepers are accustomed to buy, and householders must be presumed to have such knowledge upon the subject as to render them competent to testify as to the value of such articles. *Tubbs v. Garrison,* 68 Iowa, 44 (25 N. W. Rep. 921); *Ritter v. Daniels,* 47 Mich. 617; *Printz v. People,* 42 Id. 144; *Bowers v. Horen,* 93 Id. 420; *Storage Co. v. Rogers,* 52 N. W. Rep. 826.

The judgment is affirmed, and, for vexatious appeal, plaintiff will be entitled to the sum of $25.

The other Justices concurred.

PATRICK C. MURPHY v. EDWARD D. NELSON.

Libel and slander—Judicial proceedings—Affidavit for appeal from justice's court.

1. A judgment may in fact be a fraud upon the rights of the party against whom it is rendered, while the judicial officer rendering it may have acted in entire good faith.
2. It would lead to strange results if a litigant could not allege, in the pleadings and papers necessary to obtain a review of a judgment rendered against him, that it was in fact a fraud upon his rights, without charging corruption and fraud upon the judicial officer who rendered the judgment.
3. An affidavit filed in support of an application for leave to appeal from a justice's judgment, which alleges that the testimony was concluded after dark on the day of the trial; that thereupon the justice announced an adjournment, but for no definite time; that all of the parties left the justice's office; that the attorney for the defendant was sick for several days after the trial, and unable to attend to business; that judgment was rendered on the day the case was tried; that the affiant was thereby deceived; and that by reason thereof, and of the sickness of the attorney, the defendant was prevented from taking an appeal within the statutory time,—does not charge fraud and dishonesty upon the justice, and is not libelous *per se*.

Error to Gogebic. (Haire, J.) Argued January 20, 1893. Decided February 3, 1893.

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

M. H. Crocker, for appellant, contended:

1. The *ex parte* application to the judge at chambers for leave to appeal was not a regular or legal proceeding, it being required to be made to the court, on notice; citing Circuit Court Rule No. 103; *McCaslin v. Camp*, 26 Mich. 390.
2. But if the petition had been properly presented to the court, the charges made in it against the magistrate were improper.

Broad charges of fraud and dishonesty against a magistrate, without giving particulars, are not grounds for granting leave to appeal from a justice's judgment; and if the libelous statements were unnecessary or irrelevant, or improper statements to be put into the petition, they were not privileged, and an action of libel will lie for the publication; citing *Hart v. Baxter*, 47 Mich. 198; *Marsh v. Ellsworth*, 50 N. Y. 311; *McLaughlin v. Cowley*, 127 Mass. 316; Newell, Defam. p. 423, §§ 26, 27; Id. p. 460, § 51; and the statements "that said justice rendered judgment against said bank in said cause," and "that this affiant was deceived thereby," and "that said judgment is a fraud upon the rights of said bank," are imputations against said justice as a magistrate, and charges against his honesty and integrity as such; citing Newell, Defam. p. 176, § 11.

Charles E. Miller, for defendant.

GRANT, J. The alleged libel in this case consists in making, presenting to the circuit judge, and filing in the office of the clerk of the circuit court, an affidavit by defendant, praying for leave to appeal from a judgment rendered by the plaintiff, as a justice of the peace, against the First National Bank of Ironwood, of which defendant was cashier. Defendant objected to the introduction of any evidence under the declaration, for the reason that it did not set forth a cause of action. The court sustained the objection, but gave the plaintiff leave to amend, which he refused to do, and thereupon judgment was rendered for the defendant.

The affidavit alleges that the cause was tried November 24; that the testimony was not concluded until after dark, and the court announced an adjournment, but fixed no time, whereupon all the parties left the office; that the attorney for the bank was sick for several days thereafter, and unable to attend to business; that judgment was rendered on said 24th day of November against the bank; that the affiant was deceived thereby; that by reason thereof, and of the sickness of its attorney, the bank was prevented from taking an appeal within the time limited

by the statute; that the bank has a full and perfect defense to said action, as the affiant has been advised by its attorney; and that said judgment is a fraud upon the rights of the bank.

1. The declaration contains no *innuendo* to explain the language of the alleged libelous article. Plaintiff claims that it is libelous *per se*, and that it charges fraud and dishonesty upon him. We do not think this construction can be placed upon the language. We find nothing in the affidavit which can fairly be construed as making such a charge against the plaintiff. The fact that plaintiff announced an adjournment, and the sickness of the attorney, are the two facts upon which defendant based his right to appeal. The fact that the plaintiff announced an adjournment, and afterwards entered judgment on the same day, does not charge an intent to deceive the defendant. The case had been submitted, and the justice had four days within which to enter judgment. No announcement of an adjournment was necessary, but, having announced it, the natural inference is that he desired time for deliberation, and would enter judgment within the next four days. The rendition of the judgment on the same day was entirely proper, but the defendant might well think, on account of the lateness of the hour, that judgment would be rendered on a subsequent day, and might very naturally be deceived by such announcement, and might so state without any reflection on the conduct of the justice.

2. A judgment may in fact be a fraud upon the rights of the party against whom it is rendered, while the judicial officer rendering it may have acted in entire good faith. It would certainly lead to strange results if litigants could not allege, in the pleadings and papers necessary to obtain review of judgments, that such judgments were in fact a fraud upon their rights, without charging

corruption and fraud upon the judicial officers rendering them.

Judgment affirmed.

The other Justices concurred

JAMES T. BOND AND JOHN W. CLANCY v. CORNELIUS W. MCMAHON.

Promise to pay the debt of another—Evidence—Acceptance of order—Payment—Bill of exceptions—Instructions.

1. Where, in a suit upon the alleged promise of the defendant to pay the plaintiffs a debt due them from a third party, it appears that an order was given to the plaintiffs by the defendant upon a fourth party, at the time the promise was made, for the amount of the debt, the order is admissible as a part of the *res gestæ*.
2. The question whether the order was received in payment of the debt is one of fact for the jury.
3. Where the record fails to show that the bill of exceptions contains all of the evidence, the Court are bound to presume that there was sufficient evidence to justify the instructions given by the trial court; citing *People v. McKinney*, 10 Mich. 54; *Cook v. Hopper*, 23 Id. 511; *Greenlee v. Lowing*, 35 Id. 63.

Error to Gogebic. (Daboll, J., presiding.) Argued January 20, 1893. Decided February 3, 1893.

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

M. H. Crocker, for appellant.

Charles E. Miller, for plaintiffs.

MONTGOMERY, J. The plaintiffs recovered a judgment

on a declaration alleging a promise on the part of defendant to pay plaintiffs a debt owing to them by one Toohey. Defendant brings error.

1. The declaration averred a promise by defendant in consideration of the release of Toohey by plaintiffs. Defendant's testimony tended to show that on the occasion when the alleged promise of defendant, and the simultaneous release of Toohey, occurred, defendant gave to plaintiffs an order on the Northwestern Water & Gas Supply Company covering the amount, upon which order only a portion was paid, leaving a balance unpaid, for which defendant was still claimed to be liable. Objection was made to the introduction of this order in evidence. We think it was admissible as a part of the *res gestæ*. It did not, it is true, tend to prove a promise to pay anything other than through the water-works company, unless supplemented by oral testimony; but the giving of the order was a part of the very transaction, which would not be understood without its introduction.

2. The claim of defendant was that there was no promise on his part to pay Toohey's debt; that the order in question was given for Toohey's accommodation, and was accepted as payment. The circuit judge properly left the question as to whether the order was received in payment as a question of fact to the jury.

3. The principal grounds relied on for a reversal relate to the charge of the court. The force of the objections depends upon the correctness of the contention made by the defendant's counsel, that there was no evidence in the case which justified the submission to the jury of the two questions which appear to have been left to them, namely, whether Toohey was released from his indebtedness upon the promise by defendant to pay the debt, and whether a receipt given by plaintiffs to the defendant after the date of this transaction was given by mistake or obtained by

fraud. No question appears to have been made but that the instructions on this point were abstractly correct, and unfortunately the record does not show that all the evidence is included in the bill of exceptions. Under these circumstances we cannot presume error, but, on the contrary, are bound to presume that there was sufficient evidence to justify the instructions given by the circuit judge. *Cook v. Hopper*, 23 Mich. 511; *Greenlee v. Lowing*, 35 Id. 63; *People v. McKinney*, 10 Id. 54.

Judgment will be affirmed, with costs.

The other Justices concurred.

94 559
100 423
94 559
105 656

MINNIE HARRISON v. SAMUEL I. HARRISON.

Divorce—Pleading—Cross-bill—Pregnancy before marriage.

1. An answer in a divorce suit in the nature of a cross-bill, filed under Chancery Rule No. 123, must be verified in order to authorize a decree for the defendant, but, if not, it may be amended, where the proof shows an absence of collusion.
2. Pregnancy before marriage, concealed from the husband, who has not, previous to the marriage, sustained improper relations with the wife, is a fraud which is a sufficient ground for annulling the marriage, if the discovery of the fact is followed by a cessation of cohabitation, and abandonment; citing *Baker v. Baker*, 13 Cal. 87; *Reynolds v. Reynolds*, 3 Allen, 605; *Morris v. Morris*, Wright, 630; *Ritter v. Ritter*, 5 Blackf. 81; *Carris v. Carris*, 24 N. J. Eq. 516; *Sissung v. Sissung*, 65 Mich. 180.

Appeal from Gratiot. (Daboll, J.) Argued January 5 and 6, 1893. Decided February 10, 1893.

Bill for divorce. Defendant appeals. Affirmed, and case remanded, with directions to permit the defendant to

verify his answer, and for a decree in his favor annulling the marriage. The facts are stated in the opinion.

L. B. Sawyer, for complainant.

O. W. Giddings (N. Leonard, of counsel), for defendant.

HOOKER, C. J. Complainant filed her bill for divorce on the grounds of desertion, cruelty, and failure to provide. Defendant answered, denying the allegations of the bill, and asking that the marriage be annulled for fraud. The court below dismissed complainant's bill, making no mention of defendant's claim to relief.

A discussion of the facts relied upon by complainant would subserve no useful purpose. It is sufficient to say that we think the circuit court did right in dismissing her bill. We think, however, that defendant was entitled to relief.

The question raised by the record never having been decided in Michigan, a short statement of the facts upon which the decision is based may be advisable: The defendant, a young Russian, residing here, became engaged to complainant, then living in Russia, through correspondence induced by mutual acquaintances. On August 8, 1889, he first met her, in New York, and on the 11th of the same month they were married, cohabiting then for the first time. In February he went east on business, and while gone she was delivered of a child. The evidence is conflicting, but we are satisfied that this was a mature child, carried the ordinary period. The defendant returned about two weeks after the birth. Complainant succeeded in convincing the defendant that it was a premature birth, telling him that—

"She had a miscarriage, and that the baby was undeveloped at birth; that she was glad he did not come home right away, when the baby was born, for he would not

have liked it, it was so small; that it weighed about four pounds, and did not have any shape to its eyes, nose, or feet; and that it was wonderful how it got developed in two weeks' time."

They lived together in apparent harmony until August 14 following, when defendant again went to New York; and the next day she (complainant) left, after making an arrangement with defendant's brother, through whom she obtained some money. On defendant's return he first ascertained the truth about the child, and upon her return, some days later, he refused to live with her.

The proof convinces us that complainant was *enceinte* at the time of her marriage, and that she succeeded in making him believe that the child, born something over six months after the marriage, was premature and legitimate; and we see no evidence of condonation or of cohabitation after discovery of the truth.

Pregnancy before marriage, concealed from the husband, who has not, previous to marriage, sustained improper relations with the wife, is a fraud which is a sufficient ground for annulling the marriage, if the discovery of the fact is followed by a cessation of cohabitation, and abandonment. *Baker v. Baker,* 13 Cal. 87; *Reynolds v. Reynolds,* 3 Allen, 605; *Morris v. Morris,* Wright, 630; *Ritter v. Ritter,* 5 Blackf. 81; *Carris v. Carris,* 24 N. J. Eq. 516. This rule seems to be recognized in the case of *Sissung v. Sissung,* 65 Mich. 180.

The answer lacks the verification required by the statute to be appended to bills for divorce. Answers in the nature of cross-bills require this, and no decree can be granted without it. But it may be amended. The proof shows an absence of collusion, and we will therefore remand the case, with direction that such amendment be permitted, and that thereupon a decree be entered by the circuit

court, in chancery, dismissing complainant's bill, and annulling the marriage, as prayed by defendant.

The complainant will recover costs of this Court.

The other Justices concurred.

WILLIAM S. ATLEE v. THE BOARD OF SUPERVISORS OF WEXFORD COUNTY.

Certiorari—Organization of new township.

Certiorari will not lie to review the proceedings of the board of supervisors organizing a township, after officers have been elected and property assessed for taxation therein; citing *School-dist. v. School Inspectors*, 27 Mich. 3.[1]

Certiorari to review proceedings organizing a township. Submitted on briefs January 6, 1893. Writ dismissed February 10, 1893. The facts are stated in the opinion.

Chittenden & Lamb, for petitioner.

HOOKER, C. J. This cause comes to this Court by *certiorari* to the board of supervisors of Wexford county to review the proceedings of said board in relation to the attempted organization of the township of Slagle from certain territory taken wholly from the township of Springville.

The action complained of was taken by the board in June, 1891, and no steps were taken to review it for about 14 months. Meantime, we infer, officers had been elected and property assessed for taxation, as counsel ask that the

[1] See *Perrizo v. Kesler*, 93 Mich. 280.

tax rolls may be ordered into the hands of the officers of the township of Springville for collection. The case is within the principle laid down in the case of *Fractional School-dist. v. School Inspectors,* 27 Mich. 3.

Certiorari dismissed.

The other Justices concurred.

---

94 563
101 444

JOHN HENSEL v. MARGARET MAAS.

Principal and agent—Extent of authority—Evidence—Instructions to jury.

1. The authority of an agent to make a sale of specific property, given six months prior to the sale, will be presumed to have continued until the time of the sale, in the absence of contrary proof.
2. It is error to admit testimony of the statements of an agent, well calculated to induce the belief that his authority is unlimited, and at the same time exclude testimony offered by the principal to show its real extent.
3. If the authority of an agent to make a sale of property is not continuous, it is error for the court to refer to a conversation had with the principal six months before the sale, in which, as claimed, such authority was admitted, and instruct the jury that the right to recover depends upon the existence of authority at that time.

Error to Wayne. (Gartner, J.) Argued January 6, 1893. Decided February 10, 1893.

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

Charles C. Stewart, for appellant, contended:

1. Where one is to be held for the acts of another as his agent,

the agency must be clearly shown; and there is no inference to be drawn that a special agent once employed has been employed again; citing *Campbell v. Sherman*, 49 Mich. 534, 536.

Charles Flowers, for plaintiff.

MONTGOMERY, J. The plaintiff brought this action to recover compensation alleged to be due him as a real-estate agent for making the sale of a piece of land in the city of Detroit, belonging to defendant. The defendant is a widow lady, a German, and does not speak English. She was living on the land in question in April, 1891, when the plaintiff and one Maedje called upon her for the purpose of ascertaining if the property was for sale, and, as is claimed by the plaintiff, for the purpose of obtaining the agency for selling it.

Maedje testified in relation to the conversation which occurred as follows:

"Mr. Hensel introduced himself to her, and asked her whether she wanted to sell the property; that he was looking for some property; he had some buyers for some. She said, well, they concluded to sell, but she could not attend to the selling, and the making out of papers, and so forth. She did not understand that, and she put everything in the hands of her son, Joseph P. Maas, on Gratiot avenue, and anything we would do with him would be satisfactory in every sense. She referred right direct to him, and told us to go there to him, and anything that he did would be satisfactory to her."

Plaintiff testified to this same conversation as follows:

"I told her that I heard she wanted to sell her land, and I had just two men on hand looking for a piece of property.

"*Q.* What was said?

"*A.* I went with Maedje to her, and asked her if she wanted to sell the property. She said she wanted to sell the property, but she had given it to Joseph Maas, and had nothing further to do with it."

Defendant's testimony was as follows:

"They came in and asked me whether the land was for sale,

and I answered that the land was for sale, and then they asked me the price, and I told them $20,000. They told me it was a good deal too much; that I could never get that much for the land. They told me if they bought the land they would plat it, and lay it out in lots; and I told them I did not understand anything about that business, and they should go to Joe, and speak to him about it."

The witness Maedje also went with the plaintiff to see Joseph Maas, and testified as follows:

"We explained that we had been to see his mother, and that she had referred us to him. He said: 'Well, that is all right; but for the present I hardly think that I will sell. I have concluded to wait a little while, but whenever I do conclude to sell, why, you folks will have the first chance to sell it. I will let you know.'"

The plaintiff gave substantially the same testimony as to the interview with Mr. Joseph Maas, and testified further that the following November he met Joseph Maas, and that the following occurred:

"Mr. Maas told me that he was going to Mr. Potter; that he wanted to sell his land; and he told us, 'All right, if you have a man that wants the land, it is going to be sold,' and in that case he would not go to Mr. Potter. I then said, 'Let us go in here, and make a kind of writing of this;' and he said, 'That is not necessary,' because his word was as good as his writing.

"*Q.* What was said about the price?

"*A.* $16,000; anything above that should go to us."

Joseph Maas denies this conversation, and testifies that he told the plaintiff that no commission could be allowed him on the sale.

The plaintiff called John W. Fox as a witness, for the purpose of showing that plaintiff had made a bargain with him to sell the land, and, against the objection of defendant's counsel, he was permitted to testify to a conversation with Joseph Maas, as follows:

"I spoke of going up to see Mrs. Maas, and Mr. Maas

said, 'It is no use to go up to see my mother; she would simply refer you back to me;' that whatever he did in the matter was right."

The defendant offered to show by her own testimony, and the testimony of her son, Joseph Maas, the extent of the authority in fact conferred by her upon Joseph Maas. This was excluded, and the refusal to admit this testimony is one of the grounds of error relied on.

The circuit judge charged the jury, in response to request by defendant's counsel:

"An agent's authority cannot be presumed to last indefinitely, and evidence that he had power to make a contract relative to selling property is not proof that he had such authority six months later."

And, on his own motion, the judge charged the jury as follows:

"The first question you will have to determine is as to whether Joseph Maas, the defendant's son, had authority to make this contract. Upon that question you are to take into consideration all the testimony in this case. You will remember the testimony of the plaintiff, and also of Mr. Maedje, as to what took place when they first called upon the old lady in reference to securing this property for sale. It will be for you to say as to whether their version is correct, and, if correct, as to whether she held out at that time that her son had authority to make the contract, and the property was placed in his hands for sale, and that she had made him her agent for dealing with reference to this property, and it will be for you to say whether he did have authority, under those circumstances, to make the contract in question."

We are not able to see how these two propositions can stand together. If the authority which the agent in fact had was not continuous, certainly it was error to refer to a conversation which occurred six months prior to the alleged service, and make the right to recover depend upon the existence of authority at that time.

Next, it was stated in response to the request by the defendant:

"No contract made by plaintiff with defendant's son would bind defendant unless defendant's son actually had authority to make such contract."

This request was given with the following modification:

"If, by reason of any conversation which happened between the plaintiff and defendant, she held out that her son had authority to make a contract of this kind, why, then whether any express authority would be shown or not would not change the matter. In other words, if she held out that he had authority to make a contract of this nature, no matter whether he had any express authority from her or not, it would not change it; she would be liable in both instances."

And, in another place in the charge, the judge says:

"So the real questions for you to determine will be as to whether Joseph Maas had authority to make this contract, first; in the second place, as to whether a contract was made; and, in the third place, as to whether that contract was carried out and executed."

These instructions, when taken in connection with the admission of the testimony as to statements of Joseph Maas bearing upon the question of his authority, above quoted, were well calculated to mislead the jury. The court had refused to permit testimony of defendant as to the nature of the authority which defendant had conferred upon her son. The admission of the alleged statement, which was calculated to induce belief that authority was unlimited, could not have failed to have its effect upon the jury, as the charge clearly left the question of whether authority in fact existed with the jury. Even if this testimony had been admissible as a part of the *res gestae*, under the ruling in *Haughton v. Maurer*, 55 Mich. 323, as bearing upon the question of whether there was in fact authority, it was certainly not conclusive, and it was

damaging error to admit it, and at the same time to exclude testimony as to what was in fact the authority of Joseph Maas. It is evident that the circuit judge started out with the purpose of keeping the parties to the question of whether there was a holding out to the plaintiff of Joseph Maas as an agent having authority to make the contract alleged. This course was proper if it had been adhered to, but it made it necessary that extreme care should be exercised in excluding testimony which the jury might construe as tending to show authority in fact, and in excluding, by the charge, any such theory from the consideration of the jury.

As the case must go back for a retrial, we think it proper to add that the learned circuit judge, in our opinion, gave an instruction too favorable to defendant, in stating that the evidence that Joseph Maas had power to make a contract relative to the selling of the property is not proof that he had such authority six months later. We think that the authority, relating, as it did, to the sale of specific property, might be presumed to continue, in the absence of any proof to the contrary. It was, of course, competent for the defendant to show a revocation of authority by her, and testimony, if offered for this purpose, should have been received.

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

The other Justices concurred.

94 569
152 430

ANDREW J. NICHOLS v. FRANK S. NICHOLS, LOTTIE E. KEENEY, SYLVESTER R. NICHOLS, AND LULU A. NICHOLS.

Deed—Fraud—Delivery—Life-lease.

1. Deeds executed by a father to his children, and a lease of a life-estate in the land executed by them to him as a part of the same transaction, will be construed as one instrument, and the estate conveyed to the children held to be subject to the life-estate reserved to the father.
2. The complainant is held not to have made out his case by a preponderance of the proofs, namely, that he was induced by fraud to sign the deeds sought to be set aside, and that they were never delivered with intent to have them take effect, but were left in the hands of his attorney, to be recorded in case judgment should pass against him in one or both of certain pending suits.

Appeal from Monroe. (Kinne, J.) Argued January 10 and 11, 1893. Decided February 10, 1893.

Bill to set aside certain deeds. Complainant appeals. Decree affirmed. The facts are stated in the opinion.

O. A. Critchett and *Landon & Lockwood,* for complainant.

E. R. Gilday (*I. R. Grosvenor,* of counsel), for defendants.

MONTGOMERY, J. The bill in this case is filed to set aside certain deeds made by complainant to his children.

It appears that two suits had been brought against complainant by a Mrs. Vincent,—one for breach of promise to marry, and the other for slander. On the day before that on which the trial of the first-mentioned case was expected to occur, complainant and his two daughters appeared at the office of Col. Grosvenor, who was acting as attorney

for complainant in the two suits referred to. They came to consult with Col. Grosvenor with reference to their testimony to be given on the trial, which was expected to occur the following day. It was on the occasion of this visit that the deeds in question were prepared, and at the same time a life-lease of the same property to complainant was prepared, and signed by the two daughters, who were present, and prepared for the signatures of the two sons, which were thereafter affixed.

Two grounds for equitable relief are urged:

1. That the complainant was induced to sign the deeds by fraud.

2. That the deeds were never delivered with intent to have them take effect, but that the delivery was conditional only, and that the deeds were left in the hands of Col. Grosvenor, to be placed of record in case judgment should be obtained against complainant in one or both of the suits then pending.

1. The alleged fraud is supported only by the testimony of complainant, which is contradicted by two of the defendants, who were present, and by Col. Grosvenor and Mr. E. R. Gilday, who was called in to do the writing. The complainant's version of what took place is as follows:

"He [referring to Col. Grosvenor] said to the girls, 'That woman is after the farm; she has her eye on that farm, and she is going to have it; that is what she is after.' My daughter spoke and said, 'Colonel, isn't there any way that father can fix his property so as to keep it out of Julia's hands?'

"*Q.* Which girl said that?

"*A.* Mrs. Keeney. 'Why, certainly there is,' he says. She says, 'How?' 'Why, he can deed it to you children.' Mrs. Keeney spoke up and said, 'Pa, what do you say to that?' I thought a minute, and said, 'I do not think that is necessary.' 'Well, you don't want her to have the farm, do you?' 'Why, no; and I don't see how she is going to get it. I have done nothing that she is going to get it for.' 'Well, that is the best way.' 'Well, if it must be done,' says I, 'I will deed it to my sister.' Mrs.

Keeney said, 'Are not Aunt Mary's affairs in bad shape?' Says I, 'I don't know that they are, but, if you think they are, I will deed it to Frank, my oldest son.' The colonel says, 'Now, you just deed that over to your children; divide the property up, and deed it over to them, and I will hold the papers; and if the case is settled, or no judgment is obtained, I will pass the papers back to you.' I consented; thought there was no trouble about the settlement, and of course the papers would be passed back to me."

He further said that he did not hear the deeds read, and, when asked why he did not, he answered:

"Well, the first reason was I was a little hard of hearing, and I was sitting on the back side of the room, and I was thinking I had got into the lion's mouth, and I felt just as though I did not care much what went on, and I did not pay any attention. I could hear once in a while what they were reading. I knew they were reading the deeds, but I could not tell what, and after they got them made out they asked me to sign them. I went up and signed them."

The testimony of the two daughters and of Col. Grosvenor and Mr. Gilday shows that, after some discussion about deeding the property to his sister or to his son Frank, it was decided to deed it to his children in certain proportions; that complainant said that he had for some time contemplated making such a disposition of his property; that the deeds were prepared under his direction; that he then, in form, delivered the ones running to his daughters; that they executed a life-lease to him in return; and that, after some discussion, it was decided to withhold the deeds from record for the time being, for the reason that it was thought, if the deeds were recorded, the fact of their execution might be taken as evidence against complainant in the two suits referred to. Subsequently the two sons came to Monroe with their father, and their testimony shows the delivery of the two deeds to them, and that they at the same time executed the lease to the com-

plainant; and this testimony is corroborated by the testimony of Grosvenor and Gilday. We are fully convinced that there was no fraud practiced upon the complainant; that whatever he did he did with his eyes open, and, whatever may be thought of the attempt to place the property beyond the reach of Mrs. Vincent, the complainant is not in a position to assert the invalidity of the deed upon this ground.

2. The question of whether the deeds were delivered with intent that they should have present effect is not left free from doubt by the proofs, but a careful examination of the testimony leads us to the conclusion that the complainant must have understood that the deeds would take effect from their date. The fact that the deeds were formally delivered, two of them on the day of their signing, and the other two at a later day; the fact that complainant was at pains to figure out the proportions in which he desired to have his property given to his children; the fact that he stated that he had before contemplated making such a disposition of his property; the fact that complainant was told by Mr. Gilday that the disposition which he was then making was final,—all support the contention of the defendants, and lead to the conclusion that the complainant, while understanding the import and effect of the transaction at the time, seeks now to avoid his contract because of the changed relations between himself and Mrs. Vincent. The case is one in which the conclusion of the learned circuit judge, who saw the witnesses and heard their testimony, is entitled to weight; and while, as stated, the case is not free from doubt, yet we feel well satisfied from our independent examination of the testimony that the complainant has not made out the case stated in his bill by a preponderance of the proofs.

It is contended that the lease which was prepared, and

signed by one of the daughters, who is a minor, is for this reason subject to revocation by her; and that the instrument, as a whole, is of doubtful validity, in view of article 18, § 12, of the State Constitution, which provides that "no lease or grant hereafter of agricultural land for a longer period than 12 years, reserving any rent or service of any kind, shall be valid." We think it is clear, however, that the deeds and the lease must be taken and construed as one instrument, and that the estate which was conveyed by the deeds is subject to the reservation contained in the instrument. If desired, the decree may embody this as a determination of the Court in this proceeding. In other respects the decree will stand affirmed, with costs.

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

94 573
115 508

WILLIAM A. WOLF v. THE ESTATE OF REUBEN F. TROXELL, DECEASED.

Bills and notes—Evidence—Consideration—Forbearance to prosecute—Threats—Duress.

1. Where a suit upon notes is defended upon the ground that they were given to prevent the prosecution of the maker's son for felony, the will of the father, made some years before he gave the notes, by which he disinherited the son, is inadmissible in evidence.
2. A note given to settle the embezzlement of an agent is valid, if there is no agreement to stifle a prosecution for the embezzlement.
3. The charge in this case is open to the objection that the jury would be likely to infer from it that, if the father was induced

to give his notes by a threat to prosecute his son for a felony, the notes were necessarily void, unless plaintiff was shown to be a *bona fide* holder, whereas the crucial question in the case was the illegality of the consideration, as based upon the alleged promise not to prosecute, which the threats only tended to prove.

4. The following propositions are summarized from the opinion of Chief Justice HOOKER.

a—A note given upon a promise to compound a felony is void, whether made at the solicitation of the maker, or by reason of the threats of the payee or his agent.

b—A note given to settle a just debt is valid, although its making was induced by threats to prosecute, in the absence of duress or fraud, and of a promise not to prosecute if the note is given.

c—Duress implies a constraint which overcomes the will of the person constrained, and it may be the result of imprisonment, or threats of immediate imprisonment; citing *Hackley v. Headley*, 45 Mich. 569; *Lester v. Manufacturing Co.*, 1 Hun, 288; *Plant v. Gunn*, 2 Woods, 372; *Landa v. Obert*, 45 Tex. 539; *Baldwin v. Murphy*, 82 Ill. 485.

d—The weight of authority is to the effect that imprisonment of one cannot be treated as duress or constraint of another, except in the case of husband and wife, who are treated as one in law; citing *Eadie v. Slimmon*, 26 N. Y. 9; *Green v. Scranage*, 19 Iowa, 461, *Brooks v. Berryhill*, 20 Ind. 97.[1]

Error to St. Joseph. (Loveridge, J.) Argued January 11, 1893. Decided February 10, 1893.

Appeal from the disallowance of a claim by commissioners on claims. Claimant brings error. Reversed. The facts are stated in the opinion.

William E. Walsh (*Harry F. Chipman* and *Henry C. Loveridge*, of counsel), for appellant.

Hugh P. Stewart and *Charles A. Sturges*, for defendant.

HOOKER, C. J. The claimant was owner of four promissory notes executed by decedent. Appealing from

[1] See *Meech v. Lee*, 82 Mich. 274.

their disallowance by commissioners, he met with defeat in the circuit court, and brings the case here on bill of exceptions. The defense made below was that the notes were given to prevent a prosecution of decedent's son for embezzlement.

The will of the decedent was introduced in evidence on behalf of the defendant, against objection. The only apparent object of the introduction was to get before the jury the fact that decedent gave his son no share of his estate. This will was executed several years before the transaction in controversy, and might lead to the inference that the son was wayward, and troublesome to his parent. It should not have been admitted.

Plaintiff's sixth request was as follows:

"A note given to settle an embezzlement or a shortage of an agent is valid and good, if it was given to settle the indebtedness or shortage, and if there is no agreement to stifle the prosecution for the embezzlement."

Under the facts of this case, no question of deceit being involved, this was a proper request, and should have been given.

In the charge undue prominence seems to have been given to the alleged threats to prosecute if decedent did not give these notes. Such threats were properly admitted as tending to show the giving of the notes upon a promise not to prosecute. But although the court instructed the jury that, "from all the evidence, you must determine whether the notes were given to settle a criminal prosecution threatened against the son, or whether they were given in settlement of a just claim owing by the son," etc., the further instruction was given that, "in order to defeat the notes, you must find that they were procured from the defendant by threats or intimidations that, if not given, his son would be prosecuted upon a criminal charge." And again:

"If he gave the notes voluntarily, or relying upon such an arrangement [*i. e.* that the son should pay them], it would be immaterial whether threats of prosecution were or were not in fact made. To make the threats material, you must believe that the notes were given because of them."

And again:

"If you believe that the notes were obtained by such threats of criminal prosecution, then the burden of proof would be shifted to the plaintiff, and it would lie with him to show, by a fair preponderance of evidence, that he was a *bona fide* purchaser of the notes."

It is plain that a note given upon a promise to compound a felony is void, whether it is made upon the solicitation of the maker of the note, or by reason of the threats of the payee or his agent. On the other hand, the note may be valid if no such promise to forego prosecution is involved, although threats to prosecute are made, and induce the making of the note, to settle a just debt, unless the circumstances show duress or fraud.

Duress implies a constraint which overcomes the will of the person constrained, and this constraint may be the result of imprisonment, or threats of immediate imprisonment. *Hackley v. Headley*, 45 Mich. 569; *Lester v. Manufacturing Co.*, 1 Hun, 288; S. C., 3 Thomp. & C. 657; *Plant v. Gunn*, 2 Woods, 372; *Landa v. Obert*, 45 Tex. 539; *Baldwin v. Murphy*, 82 Ill. 425.

The weight of authority is to the effect that imprisonment of one cannot be treated as duress or constraint of another. The case of husband and wife is exceptional, they being treated as one in law. *Eadie v. Slimmon*, 26 N. Y. 9; *Green v. Scranage*, 19 Iowa, 461; *Brooks v. Berryhill*, 20 Ind. 97. And in one case it was held that a father may avoid his deed given by the duress of imprisonment of a son. *Bayly v. Clare*, 2 Brownl. 276. But see, *contra*, *Fulton v. Hood*, 34 Penn. St. 365; *Martin v.*

Broadus, 1 Freem. Ch. (Miss.) 35; *Steinbaker v. Wilson,* 1 Leg. Gaz. R. 76; *Simms v. Barefoot's Ex'rs,* 2 Hayw. (N. C.) 402; *Smith v. Rowley,* 66 Barb. 502; *State v. Davis,* 79 N. C. 603.

We think that a jury would be likely to infer from the charge that, if the father was induced to give his notes by a threat to prosecute the son, the notes were *necessarily void,* unless the plaintiff should establish a *bona fide* holding, whereas the crucial question in the case was the illegality of the consideration, as based upon the alleged promise not to prosecute, which the threats only tended to prove.

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

The other Justices concurred.

94 577
95 273

94 577
104 559

94 577
123 701

94 577
125 356

94 577
158 74

HENRY T. TOLIVER v. CHARLES R. BROWNELL.

Justices' courts—Docket entry—Jurisdiction—Return to certiorari.

The docket entry of a justice of the peace of the date when a judgment was rendered cannot be changed by his return to a writ of *certiorari,* so as to show that he was out of the State on the day named, and that the judgment was actually rendered the day previous, when he was within his jurisdiction, and erroneously entered on his docket as of the following date; citing *Weaver v. Lammon,* 62 Mich. 366.[1]

Certiorari to review a justice's judgment. Argued January 11, 1893. Judgment reversed and proceedings quashed February 10, 1893. The facts are stated in the opinion.

[1] See *King v. Bates,* 80 Mich. 367.

Robert Young, for defendant, and petitioner in *certiorari*.

George X. M. Collier, for plaintiff, and respondent in *certiorari*.

GRANT, J. Plaintiff brought suit in justice's court against the defendant. The suit was tried upon June 17, and judgment reserved. Subsequently the justice rendered judgment, which appears upon his docket of date June 21. In his return to the writ the justice says that he was absent, in Chicago, the entire of June 21; that said judgment was in fact rendered June 20, but was erroneously entered upon his docket as rendered the 21st.

Upon its face the judgment was valid. This is a direct proceeding in the case to question the jurisdiction of the justice, and is a proper proceeding for that purpose. The docket entry must control, and a justice of the peace cannot change his docket for the purpose of taking away or conferring jurisdiction. *Weaver v. Lammon*, 62 Mich. 366. The justice, in this case, could not have rendered judgment on the 21st, because he was beyond his jurisdiction. Under the decision above cited, he cannot now be heard to say that his docket is erroneous, and that he rendered judgment on another day, when he was within his jurisdiction.

It follows that the judgment must be reversed, and the proceedings quashed.

The other Justices concurred.

94 579
103 53

94 579
d125 15

94 579
142 2381

94 579
157 2166

WILLIAM GRAF, ADMINISTRATOR, ETC., v. THE CHICAGO & NORTHWESTERN RAILWAY COMPANY.

Injury at railroad crossing—Contributory negligence.

1. A brakeman who sees a man approaching a railroad track at a street crossing, who can stop with perfect safety when within three or four feet of the track, has a right to presume that he will do so, and is under no obligation to attempt to stop the cars until he sees that the man intends to step in front of them, regardless of the danger.
2. Plaintiff's decedent is held to have been guilty of such negligence, in walking for 30 feet in plain view of an approaching train, and in attempting to cross defendant's track at a street crossing in front of the train, as to bar a recovery.

Error to Menominee. (Stone, J.) Argued January 10, 1893. Decided February 10, 1893.

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

Hayden & Young, for appellant, contended:

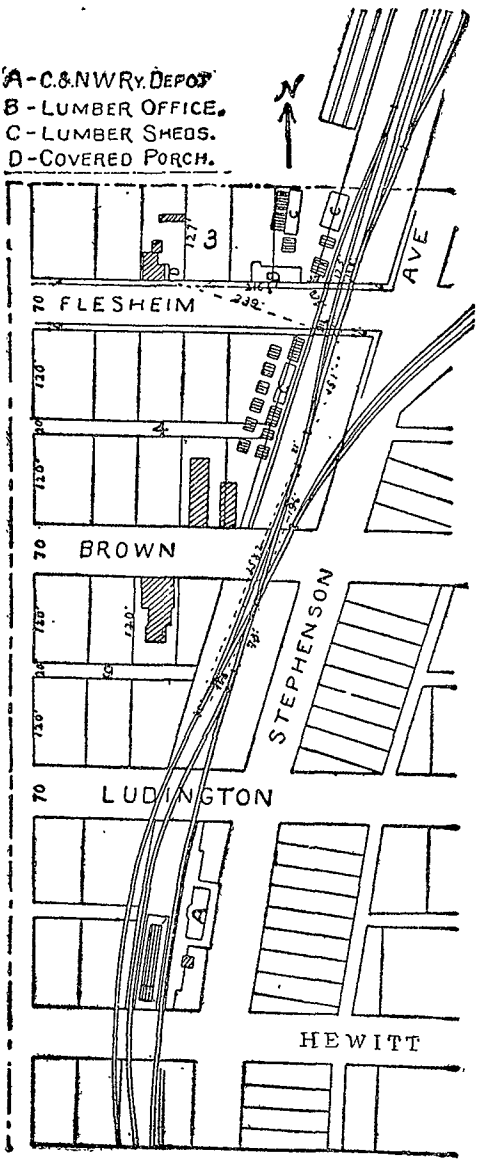
1. A "flying switch," or the "kicking" of detached cars, at a speed of even three or four miles an hour, over street crossings in a populous city, has been often held negligence *per se;* citing *French v. Railroad*, 116 Mass. 537; *Brown v. Railroad Co.*, 32 N. Y. 597; *Butler v. Railway Co.*, 28 Wis. 487, 494, 497; *Railroad Co. v. Baches*, 55 Ill. 379; *Railroad Co. v. Troutman*, 6 Amer. & Eng. R. R. Cas. 117; *Kay v. Railroad Co.*, 65 Penn. St. 269; *Howard v. Railway Co.*, 32 Minn. 214; *Railroad Co. v. Coon*, 111 Penn. St. 430; *Loucks v. Railway Co.*, 31 Minn. 526; *Duame v. Railway Co.*, 72 Wis. 523; *Frick v. Railway Co.*, 5 Mo. App. 435; *McWilliams v. Mills Co.*, 31 Mich. 274; *Battishill v. Humphreys*, 64 Id. 520; *Guggenheim v. Railway Co.*, 66 Id. 159; *Cooper v. Railway Co.*, Id. 262, 264; *Breckenfelder v. Railway Co.*, 79 Id. 560; *Schindler v. Railway Co.*, 87 Id. 400.

E. E. Osborn, for defendant.

GRANT, J. The accident which caused the death of plaintiff's decedent occurred upon defendant's right of way, and upon a public street crossing said right of way nearly at right angles. Iron Mountain, where the accident occurred, is strictly a mining town, of about 10,000 inhabitants. The railroad was early constructed to the mines first discovered and opened. Other mines were afterwards discovered, and, in the course of time, the town was built on each side of the track, which now divides the population about equally. The situation will be best seen from the map on following page.

The accident occurred upon Flesheim street, which is 70 feet wide, with a sidewalk on the south side 6 feet wide, which extends across the right of way. This street crosses the defendant's yard, where trains loaded with iron ore are made up for transportation, northward, to the lake port of Escanaba. The track which diverges eastward at Brown street leads to the Millie mine. The distance between Flesheim and Brown streets is 260 feet. Some six or seven cars loaded with ore had been drawn from the Millie mine past the switch between Brown and Ludington streets, and were shunted or backed by the engine into the yard. The east track is the main one. Eleven feet west of the main track is a side track, leading to the coal sheds of the Chapin mine, 200 feet north of the crossing. Twenty-one and a half feet west of this side track is another track, leading to a lumber yard. The tracks are level. At or near the Brown-street crossing, the engine was detached from the cars, having imparted sufficient momentum to propel them to the required place in the yard.

The deceased worked at the Chapin mine, on the east side of the track and north of the crossing, and lived on the west side, about three blocks from the crossing. He was 25 years of age, and in the full possession of all his


A - C.&N.W.Ry. Depot
B - Lumber Office.
C - Lumber Sheds.
D - Covered Porch.
N
AVE
3
FLESHEIM
BROWN
STEPHENSON
LUDINGTON
HEWITT

faculties. He was proceeding to his work on the sidewalk on the south side of Flesheim street, and, just as he stepped upon the middle or main track, was struck by the first car, and injured so that he died shortly after. Plaintiff claims that the deceased was struck upon the middle track, while defendant claims that he was struck upon the main track. This is the main fact in dispute in the case, but, in the view we take of the case, it is immaterial upon which track the accident occurred.

These cars were shunted or backed in the usual manner. The deceased was familiar with the situation, and with the manner in which the work was done. He had crossed these tracks daily for about two months. He approached and crossed the track at a rapid walk. It was broad daylight, about 6:30 P. M., in June, and the sun was shining at his back. His view of the tracks to the south was more or less obstructed by the lumber piled along and near defendant's right of way, but as he reached the right of way he had a clear and unobstructed view for 1,000 feet to the south. There is evidence that as he reached that point he looked to the south, but did not stop or slacken his speed, and was not seen to look again before he was struck. At this point he was fully 30 feet from the middle track. No other cars were upon the track, and there was nothing to obstruct his view of the approaching train. One disinterested witness, Henry Remy, stood in the office of the city lumber yard, on the north side of the street, saw him walk across, saw the train coming, and testified that he never thought deceased would walk across in his position. Witness immediately went over on seeing the accident, and testified that the deceased said, "Why did I try to cross the track? I thought the cars were on the other track."

It is charged in the declaration that the defendant was guilty of gross negligence in running said cars over this

street crossing at a great and reckless speed, and faster than six miles per hour, detached from the locomotive, and unaccompanied by any brakeman or switchman upon the moving cars, at or near the forward end thereof, to give warning of their approach in case of emergency, and without giving any signal or warning from the locomotive of their approach.

Upon the conclusion of the evidence the learned circuit judge directed a verdict for the defendant.

All the witnesses who testified to the accident say that they saw the train approaching, and heard the noise made by the puffs of the engine and the cars, and that the cars were shunted back in the usual manner. There is no evidence of any reckless speed, and it conclusively appears that there was a brakeman upon the cars. The brakeman himself was called as a witness by the plaintiff, and testified that he was standing upon the platform between the second and third cars as they were advancing. Two other witnesses also testify that they saw a man running along the tops of the cars as they were advancing. Had the brakeman seen the deceased as he was approaching, he certainly would have had the right to presume that he would stop. He might have stopped with perfect safety when within three or four feet of the track. No obligation rested upon the brakeman to attempt to stop the cars until he saw that the deceased intended to step in front of them, regardless of the danger. It would then have been impossible for him to stop the train in time to avoid the accident. We think the direction of the circuit judge is clearly within the following authorities: *Grostick v. Railroad Co.*, 90 Mich. 594; *Apsey v. Railroad Co.*, 83 Id. 439; *Mynning v. Railroad Co.*, 64 Id. 93; *Freeman v. Railway Co.*, 74 Id. 86; *French v. Railway Co.*, 89 Id. 537; *Pzolla v. Railroad Co.*, 54 Id. 273; *Kwiotkowski v. Railway Co.*, 70 Id. 549.

Many other authorities might be cited, but we deem it unnecessary. To hold that the plaintiff might recover under the undisputed facts of this case would be to reverse the previous decisions of this Court. The deceased walked for 30 feet in plain view of the approaching train, which could be seen by him at a glance. If the negligence of the defendant was gross and reckless, the negligence of the deceased was equally so.

The position of the learned counsel for the plaintiff that if the deceased looked to the south, and saw the approaching train, he had the right to assume that he could cross before the train would reach him, cannot be maintained. There was nothing in the situation to throw him off his guard or create confusion. Granting, as the plaintiff's counsel argued, that deceased, as he reached the first track, looked and saw the approaching train, and that it was then 100 feet distant from the sidewalk, still it was his duty to watch the train, and control his own movements in relation to it, and this duty would be more imperative upon him if he saw no one in charge of the train. Even if the train were then at a greater distance, it was all the time within his view, and his duty remained the same.

The facts in the case of *Detroit & Milwaukee R. R. Co. v. Van Steinburg*, 17 Mich. 99, are very different from the facts in the present case, as will appear from the majority opinion, on page 124, and the majority opinion is not an authority applicable to this case; but even the point to which the case is now cited was sustained by only two of the Justices, one not sitting, and the other dissenting.

Judgment affirmed.

The other Justices concurred.

J. Reid Crowell v. Jerome Truax.

94 585
s54NW 384
129 323

Attorney and client—Action for services—Evidence—Bill of exceptions—Instructions to jury.

1. It is error to permit an attorney, in a suit brought by him to recover for professional services rendered the defendant in a particular suit, to testify to a conversation had with the defendant before the suit in which the services were rendered was commenced, in which the plaintiff objected to being retained to defend a pending criminal suit against the defendant because defendant had had trouble with all the lawyers he came in contact with.
2. Evidence that, two years before the services sued for were rendered, some negotiations had been had by letter, resulting in plaintiff's agreement to accept $10 per day for services, has no bearing upon the value of the services sued for, and is inadmissible.
3. Where the record fails to show that all of the testimony is included in the bill of exceptions, it will not be assumed that no foundation was laid for hypothetical questions.
4. Where, in a suit by an attorney to recover for professional services rendered in a specified suit, the bill of particulars includes charges for making trips to two certain cities, without fixing a price, and the making of the trips is not disputed, nor the claim that no price was agreed upon, plaintiff's testimony that he "made no charges for the trips" cannot be taken as meaning that he did not expect pay for making them, and the jury are correctly instructed that he is entitled to what they were reasonably worth.
5. Where a payment by a defendant on the account sued on is admitted, and, for aught that appears in the record, was considered by the jury, error cannot be assigned upon the failure of the court to mention the subject in his charge, his attention not having been called to it by appellant's counsel.

Error to Lenawee. (Lane, J.) Argued January 12, 1893. Decided February 10, 1893.

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

H. C. Smith, for appellant.

Wood & Bird, for plaintiff.

HOOKER, C. J. Appellant was sued in *assumpsit* for services rendered by plaintiff in the trial of a case in circuit court. The declaration was upon the common counts, and the bill of particulars was as follows:

"1890, Feb. 26 and 27. To trying cause in the circuit court (*Millard v. Truax*); to two trips to Hillsdale (before trial); to two trips to Toledo (before trial),—$150.
"Dated October 8, 1890."

Plaintiff, in testifying upon his own behalf, stated that his first employment by defendant was to defend him upon the charge of assault and battery, out of which the case subsequently tried at circuit grew. He stated the conversation between them, the fact of the trial, and its result, and some conversation immediately following defendant's conviction. Objection was made to the testimony, as immaterial. The particular statements complained of seem to be the following:

"I told Mr. Truax this: 'I just came from the courtroom, and was with other lawyers there, who were condemning your action, in strong terms, in striking the old man Millard, and I condemned it.' I said: 'It would be in rather poor keeping for me now to make your defense, after I had already said that.' He urged me so hard that I finally told him that I would; at least, until something further occurred, I would take his defense. I went away from him, and was gone an hour and a half or two hours I came back, and told him that I did not believe I would, and he wanted to know the reason why. I told him that he had had trouble with all the lawyers he came in contact with; that the attorneys upon the street had told me that a lawyer at Lansing, and all the lawyers he had had any business with, had always resulted in difficulty; and, furthermore, I was rather timid about taking the case, anyhow. He urged me so hard that I finally took the case. I also announced to him at that time that my wife

had urgently requested me not to have anything to do with the case. But I came down on the adjourn day of the criminal case, and it is my impression that he was arrested with a *capias* for damages. Upon the day of trial of the justice's court criminal case Mr. Truax said he was not ready for trial; that his mother was an important witness. I told him, if I ever tried that case in the justice's court, I was going to try it that day. That case was completed. And I had so many talks with Mr. Truax, of course I cannot remember all of them; but upon the *capias* case I said that I thought I could get the case dismissed, and out of court, by some points that I had in view. Nothing further was said. In a subsequent talk, he said: 'Now, I want that case in circuit court to be tried immediately, and I do not want it delayed one moment.'"

The error complained of in this is that plaintiff testified to what the lawyers about town said about defendant's having trouble in settling with all the lawyers he ever had, etc. The testimony complained of related only to the employment to try the justice's court case. It had no connection with the *capias* case, which had not been commenced. The conversation was therefore immaterial, and should not have been admitted. Its character was such as would be likely to prejudice the jury against defendant.

After the trial at circuit, the parties to the present suit went to the office of Watts & Smith, and from there went up street together. Defendant asked plaintiff what he thought about the case. He answered:

"Mr. Truax, I think just as Mr. Smith does,—that the best duty you owe to yourself is to go and pay the amount they have recovered against you."

Defendant claims that what Mr. Smith said was immaterial. This is perhaps true, but the conversation between the parties was admissible. Plaintiff was advising the defendant professionally about the case. It was a part of the business of his employment, and the fact that Mr. Smith's advice was alluded to does not make it inadmissible.

The questions raised by the 3d, 4th, and 5th assignments of error relate to the hypothetical questions asked several witnesses, as to the value of the plaintiff's services. The record does not show that all the evidence is included in the bill of exceptions, and we cannot assume that there was not a foundation for the questions.

There was no error in the instruction to the jury that the plaintiff was entitled to what the trips to Toledo and Hillsdale were reasonably worth. There was no dispute about his making them, or the claim that no price was agreed upon them; and the evidence that plaintiff made no charges for them could not be taken as meaning that he did not expect pay for them. His bill of particulars included them, and he was claiming compensation for them at the hands of the court.

The evidence that two years before some negotiations had been had by letter, wherein plaintiff had agreed to take $10 per day for work, cannot be said to have had any bearing upon the question of the fixing of a price for plaintiff's compensation for these services. Hence the seventh assignment is without merit.

The court instructed the jury that plaintiff should be permitted to recover for the time necessarily spent in attendance upon court, while awaiting trial, before the case was reached. The bill of particulars does not limit the time spent upon the occasion of the trial, unless it be by stating two dates, February 26 and 27. It charges for three items, all under these two dates, although it is clear from the bill that all the services could not have been then rendered. The defendant ought not to have been misled, but should have understood that plaintiff claimed for all the services rendered in the case. Had the question been raised upon the trial, the court would doubtless have permitted an amendment, if it had been thought necessary, to cover the proof.

The last assignment of error relates to the failure of the court to mention the subject of payment in his charge. The payment was admitted, and, for aught that appears, was considered by the jury. The court's attention was not called to it, and counsel for defendant did not think enough about it to make a request. We think that error could not be predicated upon this, as the jury could hardly overlook so plain a proposition as that payments should be deducted, when it was conceded upon the trial.

For the error committed in receiving plaintiff's testimony, the case must be reversed, and a new trial ordered.

The other Justices concurred.

OSCAR WEBBER AND CLARENCE W. CHAPIN v. HARRIET N. TURNER ET AL.

Bills and notes—Payment—Collateral security.

This case involves the question whether stock was taken as collateral security to, or in payment of, the notes sued upon. And it is held that the circuit judge erred in submitting the question to the jury, the evidence showing conclusively that the stock was taken as security, and not as payment.

Error to Montcalm. (Smith, J.) Argued January 13, 1893. Decided February 10, 1893.

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

F. A. Miller and *Ellis, Nichols & Miller,* for appellants.

M. C. Palmer (*Morse, McGarry & McKnight,* of counsel), for defendants.

LONG, J. The main question in this case is whether there was any testimony tending to show that the stock in question was transferred in payment of the notes in suit.

It appears without contradiction that the defendants, who were operating a large flouring-mill at Stanton, Montcalm county, Mich., some time in May, 1887, became insolvent. Thereupon they called their creditors together for the purpose of making some satisfactory arrangement with them by which the property they then owned should pay the debts. At this time some of the indebtedness was evidenced by notes indorsed by different parties, some by notes of the firm indorsed by one of its members, and some obligations existed for which no notes were issued. Upon consultation with the principal creditors, among whom were the plaintiffs, who participated in the negotiations, it was decided to put the entire property of the defendants into a stock company, and issue stock to the different creditors, in proportion to the debts held by them, in payment and satisfaction of such debts. The arrangement was consummated, the corporation organized, the assets of the firm transferred to it, and stock issued to each creditor in the amount of the indebtedness in payment thereof. There were certain small debts which were not provided for in this way, but some personal property and book accounts were retained by the defendants, converted into money, and those small debts paid.

It is contended by defendants that the agreement between them and their creditors was that this stock should be taken in full payment, discharge, and satisfaction of their debts. At this time the plaintiffs held the firm notes for nearly $6,500, and stock was issued to them for $6,500. The firm notes representing this indebtedness were retained by the plaintiffs, and not delivered to defendants until

about six months afterwards. When stock came to be issued for the indebtedness that was represented by the indorsed notes, it was issued directly to a Mr. Weatherwax, who was an indorser on one of the notes, and to William F. Turner, who was an indorser on notes to the amount of $11,000, he receiving $11,000 of the stock under this arrangement, as it was originally contemplated should be done. No demand was ever made upon the defendants for payment of principal or interest until the suit in question was brought.

The testimony was taken before the court and jury, and, under the charge of the court, submitted to the jury, who found the issue in favor of the defendants, and rendered judgment for them for the difference between the amount of stock turned over to the plaintiffs and the amount of indebtedness due from the defendants to the plaintiffs, which, upon motion for new trial was remitted, and is not now before the Court. All the errors assigned relate to the charge of the court as given, as there were no requests proposed, no testimony offered which was excluded, and no exception to testimony introduced. The plaintiffs introduced the notes declared upon, amounting, with interest, to $15,828.89, and rested.

M. A. Reynolds, one of the defendants, was then called to testify in behalf of the defendants. From his testimony it appears that in May, 1887, the firm of Turner & Reynolds became insolvent, and called their creditors together to make an arrangement with them by which the property was to pay the debts. A stock company was formed. The plaintiffs held notes amounting to nearly $6,500, and stock was issued to them for that amount. These notes had the indorsement of the witness Reynolds only. They were the company's own notes. William F. Turner was an indorser at the time upon $11,000 of notes given to the plaintiffs by the firm of Turner & Reynolds,

and stock was issued to William F. Turner to secure him as an indorser. Some time the last of August or first of September, Mr. Turner, being interested in some lumber operations, became embarrassed, and transferred his stock to the plaintiffs, the witness making the transfer. Neither of the plaintiffs was present at the time. A day or two after the transfer was made, Chapin, one of the plaintiffs, inquired of Reynolds what there was about Turner's condition. He was told what the difficulty was, and the witness says that Mr. Chapin said, "He has transferred his stock to us." Witness said, yes, but that it should be transferred on the books of the company, to be notice to the general public. Chapin went and got the stock, and gave it to witness, who was secretary of the company, and he transferred it on the books. Two shares were left in Turner's name, at the suggestion of the witness, so that he could continue a director, and the balance was transferred to the plaintiffs. Witness was then asked:

"What was said at that time by you to Mr. Chapin about the transfer of this stock, regarding these notes?

"*A.* There was nothing said about it between us."

Witness further testified that he told Chapin that he had said to Turner not to put the stock in his general assets in his assignment, because the stock was issued to him to pay the notes, and the stock should go to whoever held the notes. Witness also testified, in relation to the indorsements appearing upon the notes, that the notes held by plaintiffs, when they were figured up, were less in amount by $272.22 than the $6,500 of stock held by them, and that amount was due the witness; that Chapin then delivered the notes for which he held the stock, and the $272.22 was indorsed on the notes in suit, Chapin saying that would pay the interest on those notes to date. Witness himself made the indorsements on the notes as so much paid.

Mr. Chapin was called on behalf of the plaintiffs, and testified that the plaintiffs never claimed to be the owners of the stock transferred by Turner to them, but held it as collateral security to the notes in suit; that the purpose of the transfer of the Turner stock was to secure them on the Turner indorsements, whatever might happen to him; that there was a surplus on the stock held by them—that is, the $6,500—over the notes they held, and that Mr. Reynolds indorsed it on the notes indorsed by Turner, to pay as far as it would go; that Mr. Reynolds made the indorsement with this understanding. Defendant William F. Turner was not sworn as a witness in the case.

The claim of the plaintiffs is that the stock was taken by them as security merely; while the defendants claim that it was issued by William F. Turner in payment of these notes, so far as Turner & Reynolds are concerned; and that, by the arrangement made in August or September following, the stock was taken by the plaintiffs in full payment of the notes. Substantially all the testimony bearing upon these questions has been set out, and upon which the court below left the question as one of fact for the determination of the jury.

The only question discussed by counsel in this Court was whether there was testimony warranting the court in submitting the question to the jury, plaintiffs claiming that there was not a *scintilla* of testimony showing or tending to show that the plaintiffs took the $11,000 in stock in payment of the notes.

The court below, as we think, was in error in submitting the question to the jury. The plaintiffs had possession of the notes, which showed the indorsement of the surplus over their stock of $6,500. Mr. Turner was an indorser upon these notes. At the time of the first arrangement, plaintiffs took stock for the amount of notes

held by them, and not indorsed by Turner, and Turner took the stock for the purpose of securing himself upon his indorsements on the $11,000 of the notes. There is nothing in the arrangement made in August or September following, showing or tending to show that the plaintiffs agreed or intended to surrender these notes in suit to the defendants or Turner, or to relieve them thereon. On the other hand, the proofs show conclusively that no such agreement was made, but that the plaintiffs treated the stock assigned to them by Turner as collateral to the notes, and as further security, which they desired on account of Turner's embarrassed condition, so that the stock might not pass under the assignment to the general creditors of Turner.

Under the facts stated, the court should have directed the verdict in favor of the plaintiffs.

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

The other Justices concurred.

ORION W. DAMON v. SIM DEBAR AND OTTO FRELITZ.

[See 83 Mich. 262.]

Former decision—Res judicata.

A rule of law, as laid down by the Court in the decision of a cause, is to be applied, upon the same state of facts, in all subsequent proceedings in that cause.

Error to Saginaw. (Gage, J.) Submitted on briefs January 13, 1893. Decided February 10, 1893.

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

Trask & Smith, for appellants.

Holden & Bradt, for plaintiff.

MCGRATH, J. In this case plaintiff recovered a judgment of $11.40.

The case was before this Court in 83 Mich. 262, and it was there held that the circuit judge should have instructed the jury to render a verdict for the plaintiff. Upon the second trial, upon substantially the same record, the circuit judge did direct a verdict, and defendants appeal.

It is insisted that the Court was misled upon the former hearing as to the points in dispute, and counsel for defendants close their brief with the following:

"We respectfully insist that the charge of the court on the other trial was correct."

If counsel entertained the impression that the Court was misled upon the former hearing, it was their duty, both to their client and this Court, to ask for a rehearing. It is well settled that a rule of law, as laid down by this Court in the decision of a cause, is to be applied, upon the same state of facts, in all subsequent proceedings in that cause. *Newberry v. Trowbridge,* 13 Mich. 278; *Mynning v. Railroad Co.,* 67 Id. 677.

The judgment must therefore be affirmed.

The other Justices concurred.

94 596
116 605
94 596
123 616

MARCELINE MUNRO v. POLLIE F. MEECH ET AL.

Deed—Construction—Res judicata—Parol testimony—Assignment for benefit of creditors—Bona fide purchaser.

1. The fact that the permanent and exclusive use of the land is essential to the enjoyment of a right granted therein will not operate to convey the fee.
2. A deed by which the grantor, after reciting his ownership in fee of a certain parcel of land, grants, bargains, sells, and quitclaims to the grantee, his heirs and assigns. forever, "the right to build and use a dock upon the front of" a certain portion of the land, only conveys the right to *use* the portion designated for the purpose mentioned in the granting clause.
3. Parol testimony is admissible to show that the merits of the case were not decided in a former suit, pleaded in bar; citing *Lyman v. Becannon*, 29 Mich. 466; *Franks v. Fecheimer*, 44 Id. 177.
4. A *bona fide* purchaser for value from the grantee of the assignee of an insolvent debtor, who executed his trust without filing the required statutory bond, and without objection from the assignor and the creditors on that ground, will be protected as against a deed executed by the assignor before the assignment, but not recorded until after the execution of the deed to the purchaser; citing *Fuller v. Hasbrouck*, 46 Mich. 78; *Butler v. Wendell*, 57 Id. 62; *Abbott v. Chaffee*, 83 Id. 256.

Error to Charlevoix. (Ramsdell, J.) Argued January 13, 1893. Decided February 10, 1893.

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

Fred W. Mayne (*Chamberlain & Guise*, of counsel), for appellants.

R. L. Corbett, for plaintiff.

GRANT, J. One Cole, being the owner in fee of a piece of land bordering on a lake in the village of South

Arm, Charlevoix county, executed to one John Munro an instrument of conveyance, the material parts of which read as follows:

"*Whereas*, the said party of the first part, at the time of the sealing and delivery of these presents, is seized in fee of certain premises, described as follows, to wit: A piece of land whose superficial area is to be not less than 120 feet by 120 feet, and to have a frontage upon the south arm of Pine lake of not less than 120 feet, and a frontage of not less than 120 feet upon a street to be laid out on fraction six of section 23, township 32 north, of range 7 west, in a nearly parallel line to the shore boundary of said fraction; said land to be bounded northwardly by a piece of land formerly owned by W. F. Empey; the division line between said two pieces of land being at an ash tree, which stands nearly equidistant from a warehouse upon the above-described premises, and a blacksmith shop on the said Empey land. Said land is hereafter to form two village lots of a village to be laid out on said fraction six, of which the land above described forms a part.

"Now, therefore, this indenture witnesseth, that the party of the first part, for and in consideration of the sum of ten dollars to them in hand paid by the party of the second part, the receipt whereof is hereby confessed and acknowledged, do by these presents grant, bargain, sell, remise, release, and forever quitclaim unto the said party of the second part, and to his heirs and assigns, forever, the right to build and use a dock upon the front of the above-described land, beyond a line commencing at the most south-eastern pile now driven in the water in front of the above-described land, and extending due north until it intersects a line extending from the above-mentioned street to the lake, and thence to the center of the channel of said lake; said line being a parallel line to the southerly line of said land, and 60 feet distant therefrom. The above right to include all the rights of the said party of the first part south and east of said lines.

"Together with, all and singular, the hereditaments and appurtenances thereunto belonging, or in anywise appertaining; to have and to hold the said right to the said party of the second part, and to his heirs and assigns, to the sole and only proper use, benefit, and behoof of the

said party of the second part, his heirs and assigns, forever."

Subsequently the land described in the recital was platted as lots 1 and 2 of block A of the village of South Arm.

Plaintiff claims title by mesne conveyances from John Munro, and in her declaration alleges that she is the owner in fee of the land described in the recital of the deed from Cole to Munro.

The defendants are in possession, and claim title under a deed from the assignee of John Munro, an insolvent debtor.

1. The principal question in the case arises upon the construction to be given to the deed from Cole to Munro; plaintiff contending that it conveyed the fee of the land, and defendants contending that it conveyed only an easement or corporeal hereditament. The intent to be gathered from "the four corners" of the instrument must control, and every word given effect, and harmonized with the rest of the instrument, if possible. *Moran v. Lezotte,* 54 Mich. 83. The enjoyment of the particular right granted may require the permanent and exclusive use of the land out of which it is granted, but this will not operate to convey the fee. Chief Justice Shaw, speaking for the supreme court of Massachusetts, said:

"The general rule is that the right of the public or of individuals to the use of the land of others, for a precise and definite purpose, not inconsistent with a general right of property in the owner of the soil, is, in contemplation of law, an easement or franchise, and not a right of property in the soil, even though it deprive the owner for the time being of all useful or beneficial interest in the land." *Harback v. Boston,* 10 Cush. 295; *Smith v. Wiggin,* 48 N. H. 105.

The deed in this case recites that the grantor is the owner of the fee, and he expressly conveys only the right to build and use a dock. The right so conveyed is

entirely consistent with the retention of the ownership of the soil. It is no more permanent or exclusive than the use of property acquired by grant for a railroad right of way, or for other railroad purposes.

In *Ryan v. Wilson*, 9 Mich. 262, the grantor conveyed to his son one-half of his farm, reserving to himself the other half, "for and during his natural life, and after his decease to revert to the party of the second part, and his heirs, forever."

It was held that no title to the land reserved passed by the deed to the grantee; Justice CAMPBELL holding that "no estate can pass by deed that is not embraced plainly within the words of grant."

In the present case no more apt words could be chosen to indicate the intention of the grantor to retain the fee, and convey only the right to use the land for the purpose mentioned. In view of this plain language, the words "the above right to include all the rights of the said party of the first part," etc., must be held to refer to the right conveyed, so that no doubt might exist as to the right of the grantee to use all the land south and east of said lines for the purpose indicated in the conveyance.

The plaintiff failed to prove the title set forth in the declaration, and the court erred in admitting the deed in evidence and in refusing to direct a verdict for the defendants.

2. In view of possible further litigation, it is proper to dispose of two other points raised in the case. Defendants pleaded a former suit in bar between this plaintiff and the two defendants Meech and Rathbone. After the introduction of the record of the judgment, plaintiff showed, by the minutes of a stenographer, that the court directed a verdict for the defendants for want of proper parties defendant. The ruling was correct. It is competent to show by parol that the merits of the case were

not decided in a former suit, pleaded in bar. *Franks v. Fecheimer*, 44 Mich. 177; *Lyman v. Becannon*, 29 Id. 466.

3. Defendants, in support of their title, offered in evidence a record of the general assignment for the benefit of creditors by John Munro to Henry A. Harmon, dated December 4, 1883, coupled with an offer to show a mesne conveyance from Harmon to the defendants. It appears that the deed from Munro to plaintiff's grantor, though made before the deed of assignment, was not recorded until after the deed of assignment, and after the alleged deed from the assignee to the defendants' grantor. Defendants further offered to show that the grantee of the assignee was a *bona fide* purchaser for value, without notice. This evidence was rejected on the ground that it was not accompanied with proof that the assignee had duly executed and filed his bond as such assignee. We think this was error. The purpose of this bond is to protect the assignor and his creditors. If they make no objection for failure to file the bond, and the assignee proceeds and executes the trust, other parties cannot complain, and *bona fide* purchasers for value will be protected. *Fuller v. Hasbrouck*, 46 Mich. 78; *Abbott v. Chaffee*, 83 Id. 256; *Butler v. Wendell*, 57 Id. 62.

Judgment reversed, and new trial ordered.

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

ADOLPHUS BARRON v. THE CITY OF DETROIT.

94 601
97 127
94 601
111 79
111 695
94 601
s54NW 273
s34ASR 366
129 256
94 601
j136 188

Municipal corporations—Negligence—Construction of market building.

Where a city erects a market building under a provision of its charter authorizing, but not requiring, it to erect and maintain market houses, it will be held to the same degree of care, not only in the construction, but in the plan of the construction itself, as a private corporation or an individual.

Error to Wayne. (Reilly, J.) Argued January 19, 1893. Decided February 10, 1893.

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

John J. Speed, for appellant.

Ira G. Humphrey and *Orla B. Taylor* (*Edwin F. Conely*, of counsel), for plaintiff.

LONG, J. The facts in this case are not in dispute. It appears that in January, 1890, by resolution of the common council, the city engineer was instructed to prepare plans for the construction of a market building. The plans were prepared and submitted, in response to the resolution, and the board of public works was directed to advertise for proposals for constructing the building in accordance therewith. Proposals were advertised for, and the board of public works reported that Patrick Dee was the lowest bidder; and by instruction of the common council the board entered into a contract for the construction of the building with him, which contract was confirmed by the council. The plans were prepared by a

draughtsman in the office of, and under the supervision of, the city engineer.

The building was an open structure, built on iron columns about 15 feet apart, surmounted by a roof composed of wood and iron. It was built in the form of a cross; being about 300 feet one way, and 400 feet the other. The columns rested upon stone piers, but were not anchored. At the time the plans were prepared, the propriety of anchoring the columns was discussed by the draughtsman and engineer. The draughtsman thought they ought to be anchored, but the engineer thought the construction strong enough, and his opinion was followed. He claims, however, to have looked the plans over hurriedly, and that he did not examine them carefully, for the reason that a competent superintendent was to be employed, and that the building would be properly constructed under him, and if any defect existed the omission would be supplied as the work progressed. The superintendent was appointed, and the work carried on under the contractor. Before it was completed some members of the board of public works expressed the opinion that the structure was dangerous, and would go down in a wind; and on the advice of the city engineer it was examined by architects, and upon their recommendation several braces were added, to strengthen it. One of the architects thus called says that he advised the inserting of some strips, and putting bolts through them, and anchoring them down; that it should be anchored in some way. These suggestions were referred by the board of public works to the contractor, and he placed extra braces in the roof, but did not anchor the columns. It was testified by some of the architects that in such buildings, in this part of the country, 40 pounds to the square foot, wind pressure, is usually allowed; and it was further shown that the velocity of the wind, to exert 40 pounds pressure, is 90 to 100 miles an hour.

On December 23, 1890, in a wind blowing about 50 miles an hour, this market building fell, no other buildings in the vicinity being affected; so that it is apparent that the fault was in the failure to anchor the columns. The plaintiff was injured by the falling of the building. It is conceded that at the time he was lawfully upon the premises, having paid the usual license fee required and collected by the city. His claim for damages having been refused by the common council, this suit was brought, and he was awarded damages in the sum of $1,000.

By the charter of the city of Detroit the common council is authorized to erect and maintain market houses, establish markets and market places, etc.

It is contended by counsel for the city that when the common council of the city authorized the making of plans and specifications for the market building, and directed the making of the contracts for its construction, it performed a purely legislative function; that the fault which occasioned the collapse of the building was in the plan, which failed to provide for anchoring it so that it could not be lifted from its foundation by the wind; that there was evident miscalculation as to the weight being sufficient to keep it in place. Counsel insists that the fault is with legislative action, and therefore a suit grounded upon it is grounded upon a wrong attributable to the legislative body itself, as the determination to construct the public work and the prescribing of the plans, are matters of legislation on behalf of the city, under the direction of its legislative body; that in carrying out the plans there may be negligence attributable to ministerial officers, but negligence in the plans themselves must be attributable to the body that devised, ordered, or adopted them,—and therefore the action cannot be maintained, under the principle applied in *Larkin v. County of Saginaw*, 11 Mich. 88; *City of Detroit v.*

Beckman, 34 Id. 125; *City of Lansing v. Toolan*, 37 Id. 152; *Davis v. City of Jackson*, 61 Id. 530.

This contention would undoubtedly be correct if the city had been acting purely in a matter of public concern, in its governmental capacity or character, and the cases cited would then be applicable. In *Larkin v. County of Saginaw* the plaintiff sought to recover for damages caused by a defective bridge, and it was held that the county was not liable for the acts of the board of supervisors in the exercise of its legislative power. In *Detroit v. Beckman*, *City of Lansing v. Toolan*, and *Davis v. City of Jackson*, the actions were for injuries caused by defects in public highways. In each of these cases it was held that, when complaint is made that the original plan of a public work is so defective as to render the work dangerous when completed, the fault is with legislative action, for which no action can be maintained. *Ashley v. City of Port Huron*, 35 Mich. 296, is to the same effect.

Judge Dillon, in his work on Municipal Corporations (4th ed., § 66), states the rule as follows: A municipal corporation—

"Possesses a double character: The one, governmental, legislative, or public; the other, in a sense, proprietary or private. The distinction between these, though sometimes difficult to trace, is highly important, and is frequently referred to, particularly in the cases relating to the implied or common-law liability of municipal corporations for the negligence of their servants, agents, or officers, in the execution of corporate duties and powers. On this distinction, indeed, rests the doctrine of such implied liability. In its governmental or public character, the corporation is made, by the state, one of its instruments, or the local depositary of certain limited and prescribed political powers, to be exercised for the public good on behalf of the state, rather than for itself. In this respect it is assimilated, in its nature and functions, to a county corporation, which, as we have seen, is purely part of the

governmental machinery of the sovereignty which creates it. Over all its civil, political, or governmental powers the authority of the legislature is, in the nature of things, supreme and without limitation, unless the limitation is found in the constitution of the particular state. But, in its proprietary or private character, the theory is that the powers are supposed not to be conferred, primarily or chiefly, from considerations connected with the government of the state at large, but for the private advantage of the compact community, which is incorporated as a distinct legal personality or corporate individual; and as to such powers, and to property acquired thereunder, and contracts made with reference thereto, the corporation is to be regarded, *quo ad hoc*, as a private corporation, or at least not public in the sense that the power of the legislature over it, or the rights represented by it, is omnipotent."

This rule is supported by a great number of authorities from the several states, and from the decisions of the Supreme Court of the United States, in the note to the section above quoted. It is, however, challenged by Denio, C. J., in *Darlington v. Mayor*, 31 N. Y. 164. He asserts the unlimited power of the legislature over municipal corporations and their property, and maintains that such corporations are altogether public, and all their rights and powers public in their nature, and that their property, though held for income or sale, and unconnected with any use for the purposes of municipal government, is under the control of the legislature, and not within the provisions of the constitution protecting private property. He denies the distinction between the public and private functions of city governments, and maintains that, as respects the state, all their powers and functions are public. This doctrine, however, has not obtained in this State; but it is held that cities are mentioned in our Constitution, in connection with local corporations, which are put upon a popular basis entirely beyond legislative interference, so far as local independence of action is concerned. Opinion of CAMPBELL, C. J., in *People v. Hurlbut*, 24 Mich. 86.

In *Board of Park Commissioners v. Common Council,* 28 Mich. 228, it was said by Mr. Justice COOLEY:

"We also referred, in *People v. Hurlbut,* to several decisions in the Federal Supreme Court, and elsewhere, to show that municipal corporations, considered as communities endowed with peculiar functions for the benefit of their own citizens, have always been recognized as possessing powers and capacities, and as being entitled to exemptions, distinct from those which they possess or can claim as conveniences in state government. If the authorities are examined it will be found that these powers and capacities, and the interests which are acquired under them, are usually spoken of as *private,* in contradiction to those in which the state is concerned, and which are called *public*; thus putting these corporations, as regards all such powers, capacities, and interests, substantially on the footing of private corporations."

This same distinction was also made in *City of Detroit v. Corey,* 9 Mich. 165; *Mayor v. Park Commissioners,* 44 Id. 602; *Niles Water Works v. City of Niles,* 59 Id. 324; *Cooper v. Detroit,* 42 Id. 584.

Under the facts in this case, the city must be held to the same degree of care, not only in the construction, but in the plan of the construction itself, as would a private corporation or an individual. Under the provisions of the charter granting the power to erect it, there was no imperative duty cast upon the city to provide for a market building. It could build it or not, as the council might determine. It is not like the case of a public highway, or the building of a bridge, where the duty is cast upon the municipality, by general law, to build and maintain them. Had this building been owned by an individual or a private corporation, the liability of either for this accident would not have been questioned, under the facts stated.

The judgment must be affirmed, with costs.

The other Justices concurred.

94 607
103 212
94 607
105 188
94 607
106 613
94 607
107 595
109 322
94 607
d128 568
94 607
s54NW 492
132 4379
94 607
136 4332

NOE ROUX v. THE BLODGETT & DAVIS LUMBER COMPANY.

[See 85 Mich. 519.]

Evidence—Order of proof—Principal and agent—Negligence—Instructions to jury—Fellow-servants.

1. The error, if any, in admitting testimony of the statements of an agent as binding upon the principal, is cured, if the principal seeks to impeach such testimony by that of the agent, who denies that such statements were made.
2. A charge from which the jury must have understood that, inasmuch as men of equal candor might differ on the subject as to whether the plaintiff was in the exercise of due care, the question being one where different views might reasonably be taken, it was the special province of the jury to determine it as a question of fact, is not open to objection.
3. Where a negligence case is tried upon the theory that the machinery by which plaintiff was injured was dangerous if uncovered, which fact the undisputed evidence tends to prove, the defendant cannot assign as error that the court in his charge assumed the existence of such fact, it being disputed for the first time by such assignment, except as questioned by a general request to direct a verdict for the defendant.
4. A foreman in a mill, whose duty it is to see that certain machinery, which is dangerous to employés working around it if uncovered, is covered, is not a fellow-servant of such employés in that regard, but represents the master, who is liable to an employé who is injured by reason of the non-performance of said duty; citing *Sadowski v. Car Co.*, 84 Mich. 100.

Error to Menominee. (Stone, J.) Argued January 4 and 5, 1893. Decided February 17, 1893.

Negligence case. Defendant brings error. Affirmed. The facts are stated in the opinion, and in 85 Mich 519.

Sawyer & Waite, for appellant.

Uhl & Crane, of counsel for appellant, contended:

1. The evidence of the declarations of the defendant's foreman,

made after the accident, was incompetent; citing *Lane v. Bryant*, 9 Gray, 245; *Luby v. Railroad Co.*, 17 N. Y. 131; *Whitaker v. Railroad Co.*, 51 Id. 295; *Railroad Co. v. Books*, 57 Penn. St. 339; *Railway Co. v. Hunter*, 33 Ind. 335; *Railway Co. v. Fillmore*, 57 Ill. 265; *Railroad Co. v. Gougar*, 55 Id. 503; *Railroad Co. v. Riddle*, 60 Id. 534; *Railroad Co. v. Coleman*, 28 Mich. 440; *Adams v. Railroad Co.*, 74 Mo. 553; *Railroad Co. v. Hawk*, 72 Ala. 112; *Dietrich v. Railway Co.*, 58 Md. 347; *Patterson v. Railway Co.*, 54 Mich. 91; *Railroad Co. v. O'Brien*, 119 U. S. 99; *Durkee v. Railroad Co.*, 69 Cal. 533; *Williamson v. Railroad Co.*, 144 Mass. 148; *Railroad Co. v. Womack*, 84 Ala. 149; *Railway Co. v. Barger*, 52 Ark. 78; *Wormsdorf v. Railway Co.*, 75 Mich. 472.

2. The evidence of such declarations cannot be considered competent upon the theory that the plaintiff merely anticipated the testimony of the foreman, and therefore the question relates simply to the order of proof; citing *Sherman v. Railroad Co.*, 106 N. Y. 542.

B. J. Brown (H. O. Fairchild, of counsel), for plaintiff.

LONG, J. This case was in this Court at the April term, 1891, and is reported in 85 Mich. 519. On the former trial in the court below the court took the case from the jury on the ground that the plaintiff was guilty of contributory negligence. The case has again been tried, and the plaintiff recovered judgment in the sum of $6,000. Defendant brings the case to this Court by writ of error. The facts appearing in the present case are substantially as they appeared in the former record, and are so fully stated in the former opinion that a restatement of them is unnecessary.

It is claimed by defendant's counsel that the court was in error in permitting plaintiff, upon the trial, to prove statements made by Mr. McDougal after the accident occurred. It appears that while a witness for plaintiff was upon the stand, under examination by plaintiff's counsel, he testified that he saw Mr. McDougal standing at the foot of the stairs while they were bringing the plaintiff down, after he was injured. He was asked to state

what, if anything, he heard Mr. McDougal say to plaintiff, and responded that he heard Mr. McDougal say, "It is too bad, Noe," speaking to the plaintiff, who said: "I know, Mr. McDougal, but it is your fault. I told you to fix it last night." And Mr. McDougal said: "I know, but I had too much to do. I could not fix it." This conversation took place about five minutes after the accident occurred by which the plaintiff was injured, and while the mill hands were removing him from the mill to the carriage, ready to take him home. Defendant's counsel cite many cases to the point that this testimony was incompetent for the reason that the statements were made after the accident occurred, and were therefore mere hearsay.

The rule is that declarations of an agent or servant do not, in general, bind the principal. To be admissible they must be in the nature of original, and not hearsay, evidence. They must be made, not only during the continuance of the agency, but in regard to a transaction depending at the very time. There are authorities, however, holding that when the statements are made so close upon the time when the act was completed, such statements are a part of the *res gestæ*.

Whether the statements made by Mr. McDougal in the present case were competent or not, as evidence against the defendant, under these rules, and the cases cited upon either side of the proposition, need not be considered here. At the time this testimony was given, it was objected to by defendant's counsel as incompetent. The court admitted it. If the consideration of the question rested here, it would become important to consider the authorities cited by counsel; but it appears that afterwards, and during the trial. the testimony of Mr. McDougal, taken upon the former trial, was produced and read on the part of defend-

ant, by consent of both parties, to the effect that the plaintiff gave him no notice of the broken covering previous to the accident. Mr. McDougal also testified that he remembered when the plaintiff was taken down-stairs, but that he did not stand at the foot of the stairs when the plaintiff was taken down, and had no conversation with plaintiff in regard to his agreeing to fix the covering over the gear wheels. He testified fully upon that subject, and claimed that he was not there at all, but went on ahead to get the carriage ready to take plaintiff home. He testified further:

"I did not have any conversation with Mr. Roux while he was fast in the gearing. He spoke to me several times. When he saw me coming first, he hallooed out to me to send for the priest; and while they were getting him out I think he repeated that as much as five or six times, and I promised to do so. That is all the conversation I can remember. He said nothing to me about it being my fault, while he stood there with his leg in the gearing.

"*Q.* Didn't you say anything to him, that you admitted to him that it was your fault, and that you ought to have had it fixed?

"*A.* No, sir."

Mr. McDougal testified further that about a year before the trial he did have a talk with the plaintiff, and told him that he did not know of this board being off, when the plaintiff said to him that he intended to tell him at noon of the day he got hurt that the board was off.

It appears from this that the defendant on the trial introduced independent evidence upon its part, from the only witness who could testify in that respect, that the plaintiff had given him no notice previous to the accident of the broken condition of this covering, and who also expressly denied the declarations imputed to Mr. McDougal, defendant's foreman, by the testimony of plaintiff and another witness. This testimony being introduced by the

defendant for the purpose of impeaching the testimony of plaintiff and his witness, whatever error—if it was error—there might have been in permitting the plaintiff and his witness to testify to this conversation with McDougal after the accident occurred was cured by defendant, in introducing in evidence the deposition of Mr. McDougal himself, and showing by such deposition the denial made by Mr. McDougal of any and all conversation with plaintiff relative to his agreement to fix the covering over the wheels. If McDougal's deposition had been read in evidence by defendant first, it certainly would have been competent for the plaintiff and his witness to testify upon that subject thereafter, or if Mr. McDougal had been placed upon the witness-stand, and upon cross-examination had been asked if he did not make these statements claimed by plaintiff to have been made by him at the foot of the stairs, and had denied them, it would then have been competent for the plaintiff to introduce testimony showing that he did so state. The whole matter, then, becomes a question simply of the order of proof; and we think it is well ruled that the trial court, under the circumstances here, committed no error in permitting testimony to stand which was afterwards made competent by the introduction of other evidence.

It was held in *Rounsavell v. Pease,* 45 Wis. 506, that where, in an action by the principal, defendants were improperly permitted to introduce evidence of declarations by the agent, but afterwards the agent was called as a witness in plaintiff's behalf, and, after testifying to the facts of the transaction in question, denied that he had ever made the statements imputed to him, the error in admitting the impeaching evidence was cured. This principle was again approved in *Stone v. Sleigh Co.,* 70 Wis. 585. See, also, *Mawich v. Elsey,* 47 Mich. 10; *Roberts v. Pepple,* 55 Id. 367.

It is claimed that the court was in error in instructing the jury in that portion of its charge as follows:

"Did the performance of plaintiff's duties require him to go into the vicinity of this machinery, and was he in the exercise of ordinary care in so going? Was it necessary that he should act promptly and with rapidity, and did the performance of his duty so absorb his attention that he might not always carry in mind the danger lying there? If the plaintiff's claim in this case is the true one, —and the court leaves it to you to say whether it is or not,—then I advise you that it is a case where two reasonable and different views might be taken, and two men of equal candor might differ as to whether the plaintiff was in the exercise of ordinary care in going into the vicinity of this machinery, as it is claimed, and whether he did conduct himself with reasonable care; and therefore the question as to whether he was guilty of contributory negligence in so doing is submitted to you."

It is contended by defendant's counsel that by this charge the jury, in effect, were told that a reasonable view was that the plaintiff was not guilty of contributory negligence, and that a man of candor might think he was not guilty of contributory negligence; and, not only this, but the jury must have understood from the charge that it was a case where a finding that plaintiff was not guilty of contributory negligence was a reasonable view. The plaintiff's counsel answer this by the proposition that the court meant to be understood by this charge that *because* of the fact that the case, as made by the plaintiff, was one concerning which two men of equal candor might differ, the question was one for the decision of the jury.

When the case was in this Court upon the former hearing, the important question considered was whether the plaintiff, as matter of law, was guilty of contributory negligence; and it was held that such question must be submitted to the jury for their determination. Mr. Justice McGRATH, speaking for the Court, then said: "This is one of those cases where two reasonable and different views

might be taken, and two men of equal candor might differ." And for this reason it was held that the court below, upon that trial, was in error in taking the case from the jury, and ruling that, as matter of law, the plaintiff was guilty of contributory negligence. The same rule was laid down in *Brezee v. Powers*, 80 Mich. 172, and cases there cited. On the present trial the court below stated the proposition to the jury in the exact language used by this Court; and it is evident that the jury must have understood from the charge that, inasmuch as men of equal candor might differ on the subject as to whether the plaintiff was in the exercise of due care, and the question was one where different views might reasonably be taken, it was the especial province of the jury to determine it, as a question of fact. We think counsel for defendant are not correct in their claim.

It is said that the court did not fairly submit to the jury the question whether or not the defendant was guilty of negligence. The court, among other things, stated to the jury, in the general charge:

"It is the law that when a servant, having the right to abandon the service because it is dangerous, refrains from so doing in consequence of the assurance that the danger shall be removed, the duty to remove the danger is manifestly imperative; and the master is not in the exercise of ordinary care unless, or until, he makes his assurance good. Were these assurances and promises made as claimed by the plaintiff here? If the plaintiff did not notify the defendant of this defect, and if the defendant did not—as claimed by the plaintiff—make the promise to repair, and by making such promise induce the plaintiff to continue his work there, then the plaintiff cannot recover in this case. If you find that he understood the increased risk of the gears being uncovered, the defendant cannot be held responsible, if he continued his work for any considerable time, knowing the danger, without being induced by his master to believe that a change would be made, and without making any complaint of such dangers or defects, or calling the attention of the master to them.

If the servant, with full knowledge of the facts, and understanding the increased risk and danger occasioned thereby, in the absence of any promise of the master to remedy the same, remains in the master's employ, then the plaintiff voluntarily incurs such increased risk."

It is claimed by counsel that this portion of the charge —and in fact the entire charge—took from the jury the question whether the machinery was out of repair, and that, in effect, the court decided, as matter of law, that it was out of repair, while the question in dispute on the trial was whether or not it was out of repair.

The case, from its commencement to its close, seems to have been defended upon the grounds—

1. That the gear wheels were not uncovered or exposed at all.
2. That the plaintiff had no right to go near the gear wheels, as his duty did not call him there.
3. That Mr. McDougal did not promise to fix the covering to the rollers.
4. That the plaintiff knew as well as McDougal did that if the gears were uncovered they were dangerous.
5. That the plaintiff was careless and negligent in going near them, if he knew they were uncovered.

No claim was made on the trial, so far as shown by this record, that if the gears were uncovered they were not dangerous to one who had occasion to go near them; no request was made to the court to charge that they were not dangerous, if uncovered, but the whole case proceeded upon the lines above indicated. It is apparent from all the facts and circumstances shown that if the gears were uncovered,—rolling inward, as they did,—one would, if getting against them, necessarily be injured. That question did not seem to be in dispute upon the trial, and it seems to be raised for the first time by the brief of defendant's counsel, except under the first request, to charge the jury to find a verdict in favor of the defendant. There was evidence in the case showing the dangerous character

of these gear wheels when uncovered, and which was not disputed. If the defendant desired a more specific charge upon that question than that contained in the general charge, it was its duty to have asked an instruction on that subject.

One other question is raised which we deem necessary to discuss. The court was asked to direct the jury that—

"If the plaintiff's injury was caused solely through the neglect of McDougal to fix or cause the covering of the gearing to be fixed, then plaintiff cannot recover, as that was the negligence of a fellow-servant, under the facts in this case."

This was refused, and we think properly. The rule laid down in *Sadowski v. Car Co.*, 84 Mich. 100, has special reference to the facts in this case. In that case it was said by Mr. Justice CAHILL:

"That doctrine [the non-liability of the master for the negligence of a fellow-servant] was never applied unless the one injured and the one at fault were engaged in the same general employment. Whatever conflict has arisen in cases has been as to what should be considered the same general employment. The rule adopted by the federal courts, and in most of the states, and which seems to us most in consonance with reason and humanity, is that those employed by the master to provide or to keep in repair the place, or to supply the machinery and tools, for labor, are engaged in a different employment from those who are to use the place or appliances when provided, and they are not therefore, as to each other, fellow-servants. In such case the one whose duty it is to provide and look after the safety of the place where the work is to be done represents the master in such a sense that the latter is liable for his negligence."

This rule is supported by *Ford v. Railroad Co.*, 110 Mass. 240, and *Railroad Co. v. Herbert*, 116 U. S. 653, which were cited and approved in the above case. This rule is but the reiteration of the principle laid down in *Van Dusen v. Letellier*, 78 Mich. 492; *Morton v. Railroad*

Co., 81 Id. 423,—and has since been followed in *Fox v. Iron Co.*, 89 Id. 387; *Ashman v. Railroad Co.*, 90 Id. 567.

Here McDougal was the foreman of the mill, and according to the evidence in the case it was his duty to have fixed this covering over the gears, if it was out of repair, as that duty was delegated to him by the master. If the plaintiff's testimony is true, he agreed to do so, and by reason of such promise the plaintiff continued in the service.

But one other point need be noticed. It is claimed that the court failed to instruct the jury that it was for them to say whether the omission to put a board in front of the gears was such a defect in ordinary repairs that none but a reckless servant, entirely careless of his safety, would have worked near the gears without their being covered. We think this question was fully covered by the general charge, so far as the defendant had a right to the instruction.

Several other questions are raised, which will not be discussed, but which have been carefully examined, and are overruled. A fair trial has been had, and the questions involved fairly submitted.

Judgment must be affirmed, with costs.

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

HIRAM V. SMITH v. ALLICK G. RUNNELLS.

94 617
f126 181
94 617
139 1170

Attachment—Affidavit—Personal service of writ—Delay in filing declaration—Partnership—Execution.

1. The failure of a notary public to append to his signature to the jurat to an affidavit the name of the county for which he was appointed, which name does not appear in the body of the affidavit, but does in its caption, will not render the affidavit defective;[1] citing *Wright v. Wilson*, 17 Mich. 203.
2. Personal service of a writ of attachment upon one partner gives the court jurisdiction, though no property is attached, and a judgment based upon such service will support the levy of an execution issued thereon upon the partnership property; citing How. Stat. §§ 7730, 7733.
3. Failure to file a declaration in an attachment suit, in which personal service has been had upon one of the defendants, within the time prescribed by Circuit Court Rule No. 16, is at most an irregularity, which is cured by filing the declaration before the plaintiff's default is entered.
4. The publication of notice of attachment under How. Stat. § 8003, is only required where neither of the defendants can be found.

Error to Newaygo. (Palmer, J.) Argued January 5, 1893. Decided February 17, 1893.

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

Dumon & Cogger and *M. Brown*, for appellant.

Smiley, Smith & Stevens, for plaintiff.

HOOKER, C. J. The plaintiff, claiming to be the owner by purchase from Robinson & Blodgett, copartners, of certain mill machinery, brings trover for its conversion. The defendant attempts to justify his conversion by virtue of

[1] See *Sullivan v. Hall*, 86 Mich. 7.

his office of sheriff, having sold the goods upon an execution. Upon the trial he offered in evidence the files and entries in the case wherein the execution issued, which proof was excluded by the trial court upon plaintiff's objection. The propriety of this ruling is the only question raised by the record.

That action was begun by attachment, and the affidavit is said to be defective, in that the notary before whom it was sworn did not append to his signature to the jurat the name of the county for which he was appointed, and it did not appear in the body of the affidavit. The caption of the affidavit contains the name of the county, and leads to the plain inference that the notary was an officer in and for such county. See *Wright v. Wilson*, 17 Mich. 203.

The attachment issued against Robinson & Blodgett and the Union Tie Company. The sheriff made a return on December 3, 1889, stating that he had that day "seized certain property." He did not state whose property it was, but did return that it was "located in Robinson & Blodgett's mill." January 8, 1890, the defendant, as sheriff, made another return respecting the seizure of the property, and stating that on December 4, 1889, at Woodville, in Newaygo county, he served personally upon Charles E. Robinson a copy of the writ and of the inventories, all duly certified, and that on December 5.he served personally copies of the same papers, duly certified, upon one Capt. Blend, "who claimed to be the agent of J. D. Bancroft, or what was left of the Union Tie Company, Chicago." He further returned that after diligent search and inquiry he had been unable to find within the county either Silas W. Blodgett, one of the defendants, or any of the officers of the Union Tie Company of Chicago, and for that reason he had made no service upon either Blodgett or the tie company. On April 21, 1890, a further return appears to have been made, which stated,

in addition to the other facts above recited, that he showed to Robinson, at the time of service, the original writ. So far as Robinson is concerned, the return of December 3 shows the seizure of the property, and that of January 8 personal service. None of the returns show that the property belonged to Robinson & Blodgett. Perhaps the officer could not safely so certify; but he does say that he found it in their mill. But, if it were necessary that the return should show the ownership (which we do not decide), the personal service upon Robinson would have given jurisdiction though no property had been seized, and the judgment based upon it would have supported a levy upon the partnership property of Robinson & Blodgett. How. Stat. §§ 7730, 7733.

The next alleged defect in the attachment proceeding is that the declaration was not filed in time, thereby ousting the court of jurisdiction. It was filed March 17, the writ being returnable January 7. It is true that the declaration should have been filed within 20 days after the return of the writ, in accordance with Circuit Court Rule 16, providing for cases commenced by summons, which rule is made applicable to attachment cases by statute (How. Stat. §§ 8002, 8007) allowing the same proceedings on return of attachment personally served upon any defendant as in cases of summons. If this provision makes the rule applicable to the filing of declaration, it would seem also to put the case on the *same footing* as cases commenced by summons. In such cases the failure to file declaration could be taken advantage of only by entry of default. No appearance or default having been entered, this delay was at most an irregularity, cured by filing the declaration. And the same may be said of the attempt to bring in the other defendants, Blodgett (who was not found) and the Union Tie Company (which appears to have

been a non-resident corporation), by publication. These proceedings were unnecessary and harmless, publication being required only where neither defendant could be found. How. Stat. §§ 8002, 8003.

The attachment case went to judgment against all defendants, and execution was issued and levied upon the property attached. The property being sold upon the execution, this action of trover followed. Defendant, in offering these proceedings in evidence, claimed that the judgment in the attachment suit was based upon a partnership obligation of Robinson & Blodgett, the Union Tie Company having indorsed their paper. If he could show these facts, the partnership property of Robinson & Blodgett was subject to attachment and levy for such debt, and none the less so because the Union Tie Company was made a party by reason of its indorsement. How. Stat. § 7733.

So far as appears upon the record, these attachment proceedings were valid and admissible to support defendant's alleged title to the property.

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

McGRATH, LONG, and GRANT, JJ., concurred. MONTGOMERY, J., did not sit.

94	621
104	417
94	621
109	420
94	621
118	600

EMBREE P. FORBES ET AL. v. JAMES H. DARLING AND FRANK H. SMITH.

Writ and process—Will—Construction—Nature of estate—Trust—Accounting—Evidence.

1. The object of section 35 of article 6 of the Constitution, which provides that the style of all process shall be, "In the Name of the People of the State of Michigan," is to make this the distinguishing feature of all process.
2. A chancery subpœna which contains as its caption and address, "State of Michigan. The Circuit Court for the County of Newaygo, in Chancery. To Francina Forbes, Greeting,"—does not conform substantially even to the provision of the Constitution cited, and its service will not give the court jurisdiction over the person of the defendant.
3. How. Stat. § 5810, which provides that when any testator shall omit to provide in his will for any of his children, and it shall appear that such omission was not intentional, such child shall take the same share as if he had died intestate, does not apply where the will makes provision for the support and education of all of the testator's children until they attain their majority.[1]
4. A husband devised and bequeathed all of his estate, including a designated farm, to his wife, who was appointed sole executrix. The will directed her to pay his just debts and funeral expenses, and to keep and use the residue of the estate for the support and maintenance of herself and family, and the education of his children. The will declared that, for the better maintenance and education of the children, the testator committed to his wife their guardianship until of full age, during which time the expenses of such maintenance and education were to be paid and borne by his wife out of the moneys and estate given and bequeathed to her; which will is construed as follows:

   a—The first clause devises an estate in fee, which the other clauses burden with a duty or trust.

   b—As the will makes no provision for an accounting, and does not provide to what extent the children shall be educated, while the trust is enforceable in equity, in case of refusal to

[1] See *In re Estate of Stebbins*, 94 Mich. 304.

support or to provide any opportunity for the education of the children, yet, when they have been supported and schooled, although in a meager manner, the court will not inquire further, or require from the mother or her estate a retrospective accounting.

c—There being no ambiguity on the face of the will, extrinsic evidence is not admissible to show an intent other than that expressed therein.

Appeal from Newaygo. (Palmer, J.) Argued January 6, 1893. Decided February 17, 1893.

Bill to enjoin foreclosure proceedings. Complainants appeal. Reversed, and sale under decree enjoined, but without prejudice to any subsequent proceedings to foreclose the mortgage. The facts are stated in the opinion.

George Luton, for complainants.

W. D. Leonardson, for defendants.

McGrath, J. James Forbes, the father of the complainants, died October 24, 1871, leaving a last will, the terms of which are as follows:

"*First.* I do hereby give and devise and bequeath to my wife, Francina Forbes, all of my estate, consisting of my farm, situate in the township of Dayton, aforesaid, and known and described as the north-east quarter of section number thirty (30), in township number thirteen (13) north, range number fourteen (14) west, together with all of my personal estate, consisting of farm implements, teams, stock, grain, etc.

"*Second.* I do also hereby constitute and appoint my said wife, Francina Forbes, to be sole executrix of this, my last will; directing her first to pay, after my decease, all of my just debts and funeral expenses, and, second, to keep and use the residue of said estate for the support and maintenance of herself and family, and the education of my children.

"*Third.* And, for the better maintenance and education of my children, I hereby commit the guardianship of each and all of my children, until they shall respectively attain the age of 21 years, unto my said wife; and I do hereby

declare that the expenses of the maintenance and education of my said children, until they shall attain the age aforesaid, shall be paid and borne by said wife by and out of the moneys and estate given and bequeathed to her in and by this, my will."

Francina Forbes died in 1890. One of the children died in 1879. The others were all of age at the time of the mother's death, except Mary S., who married in the year her mother died.

The widow, in her lifetime, executed a mortgage upon the real estate devised, proceedings to foreclose which had been commenced prior to her death. The heirs seek to have the proceedings to foreclose enjoined, and the mortgage declared null and void. The contention is that the widow took but a life-estate under the will.

This contention cannot be sustained. The "First" clause of the will devises an estate in fee, without any limitations or words indicating an intention to create a trust estate. The other clauses burden the estate so devised with a duty or trust. The widow took the beneficial interest charged with a trust which was enforceable in equity. She could convey, but such conveyance would be subject to the burden imposed upon the estate. The statute provides that any devise shall be construed to convey all the estate, unless it shall clearly appear that there was an intention to convey a less estate. How. Stat. § 5786. It was held in *Bailey v. Bailey,* 25 Mich. 185, that the presumption that a testator means to die intestate as to part of his estate will not be raised where the will does not naturally lead to that inference. The construction which we give to the instrument makes every part of the disposition consistent, and disposes of the entire estate, while that contended for creates an intestacy as to the residue of the estate. *Mann v. Hyde,* 71 Mich. 278; *Toms v. Williams,* 41 Id. 552; *Rood v. Hovey,* 50 Id. 395. The surplus did

not result to the heirs, but belonged to the devisee. *Wood v. Cox*, 1 Keen, 317, 2 Mylne & C. 684; *Irvine v. Sullivan*, L. R. 8 Eq. 673. One of the children had died, the youngest, a daughter, had married, and all the rest were of age, when the mother died; so that no inquiry is necessary as to what part of the estate is needed to maintain and educate the children. *Carr v. Living*, 28 Beav. 644; *Scott v. Key*, 35 Id. 291; Lewin, Trusts, 139.

It is claimed that the children were not properly educated; that the widow did not support the children until they reached the age of 21 years out of the estate devised; that they contributed to their own support while upon the farm; that finally all, with the exception of the daughter, struck out before they became of age, and have since supported themselves.

The will makes no provision for an accounting, nor does it provide to what extent the children shall be educated. The testator evidently intended to leave the question of the extent of the education of the children to the mother, relying upon her natural affection for them. When the children became of age, the widow took what surplus remained for her own benefit. When the children ceased to be members of the establishment contemplated by the testator and went into another, whatever would have been the rule had they returned before they became of age, the obligation to support them was thereby suspended. The extent of the education, as well as the character of the support, must depend materially upon the conditions and circumstances, and both must necessarily be held to rest largely in the discretion of the mother. It was certainly not the intention of the testator that his widow should remain upon this farm, charged with the support of these six children until they became of age, and that they should be discharged of all obligations to the mother; that they should be supported in idleness; that their

time was their own; and that any contribution to their own support, while upon the farm and under her roof, was to be charged up against her. Their duty and obligations to their mother remained unaltered by the burden imposed upon her. While the trust imposed could be enforced in equity, in case of a refusal to support or to provide any opportunity for the education of the children, yet, when the children have been supported, and have been schooled, although the facilities afforded have been meager, the court will not inquire further, or require from her or her estate a retrospective account. *Leach v. Leach*, 13 Sim. 304; *Browne v. Paull*, 1 Sim. (N. S.) 92; *Carr v. Living*, *supra; Hora v. Hora*, 33 Beav. 88; *Scott v. Key, supra.*

The complainants introduced testimony to show what the intention of the testator was, as expressed in the conversation had with the person who drew that instrument, and with others after its execution. There is no ambiguity on the face of this instrument, and in such case extrinsic evidence is not admissible to show an intent other than that expressed. *Kinney v. Kinney*, 34 Mich. 250; *Waldron v. Waldron*, 45 Id. 354.

How. Stat. § 5810, has no application to a case like the present, where the will makes provision for the support and education of each and all of the testator's children until they become of age. None are omitted. Provision is made for all.

The validity of the foreclosure proceeding is attacked on the ground that the subpœna issued in the cause, and returned as served, was not styled, "In the Name of the People of the State of Michigan." The subpœna was returned, served, but Francina Forbes did not appear, and the bill was taken as confessed. The statute (section 7290) provides that the style of all process from courts of record in this State shall be, "In the Name of the People of the

State of Michigan." Section 35 of article 6 of the Constitution provides that the style of all process shall be, "In the Name of the People of the State of Michigan."

In *Tweed v. Metcalf*, 4 Mich. 579, and again in *Wisner v. Davenport*, 5 Id., 501, it was insisted that certain tax rolls were void, because the warrant to the township treasurer was not styled, "In the Name of the People of the State of Michigan;" but the Court held that the common-law definition of the term "process" is a writ issued by some court or officer exercising judicial powers, and, further, that the term "process" was intended to mean writs issued in the exercise of that judicial power created and established by the Constitution.

In *Johnson v. Insurance Co.*, 12 Mich. 216, the objection was made that the *scire facias* was not tested, "In the Name of the People of the State of Michigan." The Court held that neither the Constitution nor the statute required the writ to be so tested; that the objection, which was a purely technical one, was itself insufficiently taken; and that it was therefore unnecessary to determine whether the Constitution could be satisfied by a substantial compliance therewith. There the *scire facias* was styled as follows: "The People of the State of Michigan;" and the Court held that the fact that the words "In the Name of the People of the State of Michigan" were inserted in the Constitution between inverted commas favored the idea that the phrase must be used *verbatim*.

In the present case the caption of the process was as follows:

"STATE OF MICHIGAN.

"The Circuit Court for the County of Newaygo, in Chancery.

"*To Francina Forbes—Greeting.*"

This is not even a substantial compliance with this pro-

vision of the Constitution. The object of this provision undoubtedly is to make this style the distinguishing feature of all process. The requirement is constitutional, and the defect jurisdictional.

The decree below must therefore be reversed, and defendants enjoined from proceeding to sale under the decree for foreclosure, without prejudice, however, to any subsequent proceedings to foreclose said mortgage.

Complainants are entitled to the costs of both courts.

The other Justices concurred.

94 627
105 505
94 627
111 558
94 627
151 127

MERRILL B. MILLS ET AL. v. DUNCAN MCLEOD ET AL.

[See 86 Mich. 290.]

Equity practice—Setting aside order pro confesso—Discretion of court—Appeal.

The action of circuit courts in determining applications to set aside defaults and orders *pro confesso* will not be reviewed, unless there has been a clear abuse of discretion.

Appeal from Wayne. (Brevoort, J.) Submitted on briefs January 13, 1893. Decided February 17, 1893.

Bill to quiet title. Defendant Duncan McLeod appeals from an order denying his motion to set aside an order *pro confesso*. Decree affirmed. The facts are stated in the opinion, and in 86 Mich. 290.

Keena & Lightner, for complainants.

S. E. Engle, for appellant.

GRANT, J. After the decree of affirmance in this cause

by this Court (86 Mich. 290), that decree, upon an *ex parte* application by defendant Duncan McLeod, was modified so as to be without prejudice to the right of the defendant to apply to the court below for such relief as he might be entitled to. He thereupon filed an amended answer, and again applied to that court to set aside the decree and the order *pro confesso*. New affidavits were filed on behalf of both parties, but the issue determined by the court was the same as upon the former hearing, viz. whether the order *pro confesso* was entered by consent of the defendant McLeod. The circuit court has again exercised its discretion, and refused to open the case, and from this order defendant again appeals.

We do not think the court abused its discretion. This Court will not review the action of circuit courts in determining applications to set aside defaults and orders *pro confesso*, unless there has been a clear abuse of discretion. Both parties were represented by able and reputable solicitors, who had been in practice for many years. These solicitors and the defendant disagreed in their affidavits as to the facts. The court below decided between them, and evidently believed the statements of the former, and may have been influenced to a considerable extent by its knowledge of the situation and the facts, as they appeared upon the hearing between the complainants and the city.

If the decree was not in accordance with the statements and prayer of the bill, the defendant's remedy was by appeal.

Decree affirmed, with costs.

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

THE PEOPLE v. FRANK B. WESTBROOK.

94 629
100 521

Criminal law—Complaint—Witness—Competency of wife.

A wife cannot make a complaint against her husband for an indecent assault upon the person of his daughter, nor is she a competent witness against him on his trial for said offense; citing *People v. Quanstrom*, 93 Mich. 254.

Exceptions before judgment from Saginaw. (Gage, J.) Submitted on briefs February 1, 1893. Decided February 17, 1893.

Respondent was convicted of making an indecent assault upon the person of his daughter, a girl of nine years of age. Conviction set aside, and respondent discharged. The facts are stated in the opinion.

W. C. Gallagher, for respondent.

A. A. Ellis, Attorney General, *William R. Kendrick*, Prosecuting Attorney, and *Albert Trask*, Assistant Prosecuting Attorney, for the people.

HOOKER, C. J. Defendant was convicted of an indecent assault upon the person of his daughter, a girl of nine years of age.

The warrant was based upon a written complaint made by defendant's wife, who was also allowed to testify against him at the trial, upon the part of the people, without his consent.

The case falls within the principles laid down in the case of *People v. Quanstrom*, 93 Mich. 254, where a complaint for bigamy made by a wife against her husband was held insufficient.

The conviction will be set aside, and the defendant discharged.

The other Justices concurred.

94 630
97 488

94 630
105 634

94 630
127 689

94 630
e136 5299

94 630
f138 5233
e138 5238
138 4663

94 630
152 5695

The People v. Michael K. Mills.

Criminal law—Carnally knowing girl between 14 and 16 years of age—Previous chastity—Pleading—Evidence—Argument of counsel.

1. It is the duty of police officers, not only to aid by all proper means in the arrest and conviction of criminals, but to detect and discover crime; and it is the duty of prosecuting officers to procure evidence of the commission of crime, taking whatever means are necessary for the securing of witnesses, and their protection when secured.
2. Counsel for a respondent cannot be allowed to provoke comment and criticism on the part of the prosecution, and then procure a reversal because charges and insinuations are resented and criticisms made.
3. Where a respondent's general character is put in issue by the defense, comment upon that character is clearly proper.
4. Where, on the cross-examination of a prosecutrix, testimony is drawn out tending to show that the witness, before the charge was made for which the respondent is being tried, had made general statements, respecting his general conduct, inconsistent with her testimony, it is competent for the prosecution to show on her redirect examination the circumstances under which the statements were made, and that they were made while she was under the influence of the respondent.
5. Lack of chastity cannot be used to impeach the credibility of a female witness.
6. Where a police officer has been present since the commencement of a criminal trial, seated at a table with the prosecuting officers, and his name has been frequently mentioned in the testimony, and it is clearly apparent to the court that the

failure to indorse his name on the information, as a witness for the people, was an oversight, it is not error for the court to permit such indorsement to be made after he is called and sworn as a witness, and his examination to proceed.

7. 3 How. Stat. § 9314*a*, which makes it a felony for any male person of the age of 16 years or more to carnally know any girl, theretofore chaste, of the age of 14 years, and not more than 16 years of age, with her consent, does not exclude from its protection a female who may have erred, but who has reformed, and for years led a virtuous life.

8. The use of the word "ravish," in an information for the offense created by 3 How. Stat. § 9314*a*, is unwarranted, but the addition of the words "with her consent" negatives any possible inference that another than the statutory offense was intended to be charged.

Error to Washtenaw. (Kinne, J.) Argued February 1, 1893. Decided February 17, 1893.

Respondent was convicted under 3 How. Stat. § 9314*a*, of carnally knowing a girl of the statutory age, theretofore chaste, with her consent, and sentenced to imprisonment in the State prison for five years. Judgment affirmed. The facts are stated in the opinion.

Atkinson, Carpenter, Brooke & Haigh, for respondent.

A. A. Ellis, Attorney General, *Allan H. Frazer,* Prosecuting Attorney, and *Samuel W. Burroughs,* ex-Prosecuting Attorney, for the people.

McGRATH, J. Respondent was convicted under Act No. 143, Laws of 1887, which is as follows:

"Any male person of the age of sixteen years or more who shall carnally know any girl, theretofore chaste, of the age of fourteen years, and not more than sixteen years of age, with the consent of such girl, shall, upon conviction thereof, be punished by imprisonment in the State prison," etc.

The complaining witness, Bernice Bickle, was 15 years of age in January, 1892. She had lived in Sarnia until December 21, 1891. Her father and mother were members of a sect styling themselves "Israelites," and respondent claimed to be the leader of that sect, with headquarters at Detroit. In October, 1891, he was at Sarnia, preaching at the home of Bernice. On that occasion Bernice was induced to play on the piano and sing for the respondent, whereupon respondent said to her mother that she should play the piano at headquarters. On December 15, 1891, respondent wrote the following letters, the first to Mr. and Mrs. Bickle, and the second to Bernice, signing them "Michael:"

"*Dear Brother and Sister Bickle:* I wrote Bernice for her to come. See that she comes as soon as possible with her piano here to headquarters, as early Monday morning God made known that she represents obedience, the last piece, the age of youth, or a child. Unless ye become as a little child, ye can in no wise inherit the kingdom of God; and the flesh shall become fresher than a child by obedience."

"Enclosed $10, and I desire you to get it changed in ten gold dollars, and give to her in my behalf; Michael Ishi, husband, representing the ten pieces. We have only had nine, but the women swept the house till she found the tenth, which is now found. Probably pa and ma would like to come too; if so, come on.

"Last Tuesday, as sister Court and I was being driven down town to do my business, where about a mile from our house, the power said, 'Get to the Wabash depot soon as possible, and take train for Toronto,' which I did, just getting there in time to intercept Thomas H. Baxter, and had to fall before the great light, as Saul, which he represented, as he said he went to persecute the Church of God; and it turns out that he is the apostle Paul, the man that has been bound in chains for the hope of Israel, and the learned man who sat at the feet of Gamaliel, the schoolmaster. Mr. John Maxwell' he is security to the pillars, and the one who laid down the laws to Baxter. Bro. Baxter is a changed man, and by the spirit power that is thrown on

him he will understand Paul's writings; and, as I represent both new and old testament, we are the boys to gather Israel.

"See that Bernice is here as soon as possible.

"Yours with love,

"MICHAEL."

"Well, dear Bernice, come to me. You are requested by the living God of Abraham, Isaac, and Jacob to come and place yourself in obedience to Michael, my son, as the last piece is now found, and you are that piece, the tenth piece in the God-Head, obedience; thus saith the Lord God. Come with piano, music, dear one, as you remember the words: piano, with Bernice, to headquarters.

"Thine, with love, thine; praise God, praise God, praise God. MICHAEL."

On December 21, 1891, Mrs. Bickle took Bernice to Detroit, and delivered her over to respondent, at the house occupied by respondent, which was termed the "God-House." The occupants of this house were respondent, his wife, Mrs. Eliza Court, Alice Court, Emma Butler, Nellie Armstrong, May Webster, Carrie Bendry, and Ellen Rowlinson, and Bernice. There were four beds in the house. It is unnecessary to go into the disgusting details of what took place in this abode. It is sufficient to say that respondent, taking advantage of the innocence of the prosecutrix, and of her religious instincts; representing to her that he was inspired, and acting by divine command; that he was the son of man, and had been purified; that his purpose was her purification; and that her duty was obedience to him,—after repeated attempts on different occasions,—overcame her scruples, and had illicit intercourse with her, which he afterwards repeated. The prosecutrix and two other inmates of the house were called by the prosecution, and, although it was shown that for several nights respondent occupied the same bed with prosecutrix, and had reported to other inmates of the house her obstinacy in refusing to submit to him, the respondent did not take the stand to

deny any of these allegations. One of the other inmates of the house was called by the defense, yet she was not interrogated as to these facts, and, although five other persons occupied the house at the time, no one of these was called to deny the story.

Error is assigned upon remarks made by the prosecuting officers in the argument of the case to the jury. At the conclusion of the opening of the case to the jury by the prosecuting attorney, counsel for defendant outlined the defense. He gave a brief history of the sect known as the "New Israelites," and of respondent's connection therewith, stating that in October, 1891, respondent claimed to have undergone a physical change, in which he suffered great agony, and by which the evil was burned out of his body; that from that time he claimed to be, and his followers believed him to be, the "Michael" spoken of in the twelfth chapter of Daniel; that he believed himself to be divinely commissioned to gather the lost tribes of Israel; that the habits of this sect were peculiar; that the presence of these people in such large numbers affected the price of real estate in the part of the city where they resided; that a mass meeting of citizens was called to devise means to rid the community of them; that the newspapers published sensational articles, charging them with immorality; that the chief of police detailed one of the captains of the force to look up evidence upon which to found some accusation against them; that respondent's wife was induced to make a complaint of adultery against him, and respondent was arrested upon that charge; that all of the occupants of the house known as "Headquarters" were taken into custody, and lodged in the police station; that Bernice Bickle, May Webster, Alice Court, Carrie Bendry, and Emma Butler were taken separately before the chief of police, and asked to make a statement against respondent; that they all denied that they knew anything against him; that they were cross-

examined, threatened, and locked up; that a statement was written out by the assistant prosecuting attorney, which Bernice Bickle was directed to sign; that, later, Bernice was ordered to copy a statement which had been made for her, alleging that respondent had had sexual intercourse with her; that the police had had constant charge of Bernice; that, in case she gave the testimony promised by the prosecuting attorney in his opening, it would be shown by her own admission that she was not, at the time alleged, a chaste girl; that she had been assured by the police officers that she would be taken care of after the trial was over; that money and inducements had been offered to one of the people's witnesses, who had been taken from the colony by her parents, to induce her to come from Toronto, to give her testimony; that it would be shown that May Webster, another of the witnesses for the prosecution, had, in a *habeas corpus* proceeding brought before respondent's arrest, testified as to the absolute purity of the respondent and his co-religionists. The learned judge who tried the case gave to respondent's counsel the widest latitude, and the line of defense indicated in this opening was followed in the cross-examination of the witnesses for the people and in the examination of the witnesses for the defense. The press, the police department, the prosecuting officers, and the witnesses for the prosecution were attacked, and the motives of the neighbors were impugned.

It is the duty of police officers, not only to aid by all proper means in the arrest and conviction of criminals, but to detect and discover crime. It is the duty of prosecuting officers to procure evidence of the commission of crime, taking whatever means are necessary for the securing of witnesses, and their protection when secured. The gravity of the offense here charged, the situation of the parties, and the environment of the witnesses would seem to have demanded prompt, vigorous, and heroic action by the

police authorities and prosecuting officers. There was no evidence in the case that would warrant the attack made upon either prosecuting officers or police. The course taken placed the prosecuting officers upon the defensive, and invited comment and criticism of respondent and his counsel that otherwise might not have been proper. Counsel for respondents in criminal trials cannot be allowed to provoke comment and criticism, and then procure a reversal because charges and insinuations are resented and criticisms are made.

Respondent's general character was put in issue by the defense, and comment upon that character was clearly proper. Conduct, rather than professions, is the test of character, and it was not improper to apply that test.

On cross-examination of the prosecutrix, it appeared that a statement of the facts had been prepared and signed by her. The witness testified that this statement had been prepared at the instance of the prosecuting attorney; that it was in his handwriting; that he had told her to make it; and that he drew it up and she signed it. The following question was put to her, and she answered it in the affirmative:

"You were taken by the officers down in a patrol wagon through the streets, put in a station, without seeing your mother, and were told to make these statements, and made them?"

It was entirely competent, upon redirect examination, and especially in view of the opening made by respondent's counsel, to show that this statement was in her own language, that no inducements or threats were held out to her in connection with its preparation, and that she was not asked to make any statement that was not in fact true.

On the cross-examination of the prosecutrix and May Webster, who was also a young girl, a believer, and an

inmate of the "God-House," testimony was drawn out which tended to show that the witnesses, before the present charge was made, had made general statements, respecting the general conduct of the respondent, inconsistent with their testimony. Several witnesses were called by the defense to testify as to respondent's good reputation for morality and virtue. These witnesses were members of the community of which respondent was the leader, and their testimony was that they regarded him "as an inspired being;" as "God's instrument;" that he was incapable of wrong, and that they would believe what he said. It was clearly competent, therefore, to show by the prosecutrix and May Webster, upon redirect examination, the circumstances under which they had made contradictory statements; that they were made while under the influence of respondent; that they were taught that submission to his desires involved no wrong; that, as respondent had been cleansed and purified, the old man had gone away; that they could truthfully say that they had not had anything to do with him; and that any disclosures would be a betrayal of their "Master." It was also proper to show, upon cross-examination of the other witnesses, what the relations were between them and respondent; that they were credulous; how they would be influenced in their estimate of what was right or wrong, immoral or unchaste, by what respondent had said, and their estimate of the character that he represented, or that they had attributed to him.

A witness who occupied the house was called to show that respondent and the prosecutrix had occupied the same bed, and as to statements made by respondent concerning the obstinacy of the prosecutrix. On cross-examination she was asked if she was a chaste girl before she went to "Prince Michael's." The testimony was properly excluded. Lack of chastity cannot be used to impeach the

credibility of a female witness. *Jackson v. Lewis,* 13 Johns. 504; *Com. v. Churchill,* 11 Metc. 538; *Spears v. Forrest,* 15 Vt. 435; *Teese v. Huntingdon,* 23 How. 2; *Smith v. State,* 58 Miss. 867; *State v. Larkin,* 11 Nev. 314; *Jones v. State,* 13 Tex. 168.

A witness for the defense, called to establish respondent's good character, had testified that respondent was pure, kind, and loving in his disposition, and on cross-examination he was asked if he did not know that respondent had handcuffed his wife, and put her in a straight-jacket, and placed her in a back room in the house, and kept her there for a long time. The witness testified that respondent had not handcuffed his wife, but had simply tied her hands and confined her in a back room because she was rebellious; that she was violent; and that her violence was occasioned by her jealousy "of his having the other girls in the house." There was no error in the admission of the testimony.

In the argument to the jury, the prosecuting attorney, commenting upon the story told by the prosecutrix, said: "Now, Eliza Court sits here. Has she denied it? Has anybody denied that statement?" Eliza Court had been intimately associated with all the circumstances of the story. She had been in the house, and had, according to the story told, occupied the same bed with Bernice and respondent during one night, and had left it early in the morning, leaving the prosecutrix alone with respondent. She was in court with respondent. We think the comment was entirely proper.

The deputy superintendent of police of the city of Detroit was the fourth witness called for the people. His testimony was objected to because his name did not appear on the information. It satisfactorily appearing to the court that he had been present since the commencement of the trial, seated at a table with the prosecuting officers, and

that his name was omitted by mistake, the court allowed his name to be indorsed, and his examination to proceed. Under the circumstances, we think the court did not err. The witness was well known as a public officer, and was conspicuously present during the trial. His name had frequently been mentioned in the testimony already taken, and it was clearly apparent that the omission of his name was an oversight.

The principal point relied upon by the defense was that the prosecutrix was not chaste previous to the commission of the offense charged, within the meaning of the statute. The evidence relied upon in support of this claim was a written confession obtained from her during her stay at respondent's house, which purported to set forth all of the sins of her life, and which, among other things, alleged that—

"Six or seven years ago I had to do with a boy named Elias Jones, because he threatened me that the 'Boo-man' would catch me, and also my brother Frank coaxed me several times."

It may well be doubted, under the testimony relating to the occurrences referred to in this confession, whether there was any act which amounted to sexual connection or intercourse, and there was certainly no testimony showing any such indulgence or desire, or capacity or possibility of desire, or capacity for indulgence, as could be attributed to a want of chastity at that time. The age of the prosecutrix at that time affords at least a presumption to the contrary.

Clearly, the statute under which the charge is made does not exclude from its protection a female who may have erred, but who has reformed, and for years has led a virtuous life, nor can it be contended that it includes virgins only within its terms. In prosecutions for seduction, the previous character of the prosecutrix is necessarily in issue

(*People v. Knapp*, 42 Mich. 268); yet it has been held that a woman who had been previously seduced and has reformed may be the subject of a subsequent seduction, and that, if the time between the different acts is sufficiently long, a presumption in favor of reformation may arise. *People v. Clark*, 33 Mich. 112; *People v. Squires*, 49 Id. 487; *People v. Millspaugh*, 11 Id. 278. Under the statutes of many of the states, "previous chaste character" in the person alleged to have been seduced is necessary, and character, under such statutes, has been defined to be not external reputation for chastity, but actual personal possession of chastity; yet it has been held that one who falls from virtue, but afterwards reforms, is chaste, within the meaning of such a statutory provision. Whart. Crim. Law, § 1757; Bish. Stat. Crimes, § 649; *Carpenter v. People*, 8 Barb. 603; *Com. v. M'Carty*, 2 Penn. Law J. Rep. 351; *Wilson v. State*, 73 Ala. 527; *Benstine v. State*, 70 Tenn. 169; *State v. Timmens*, 4 Minn. 325; *State v. Brinkhaus*, 34 Id. 285; *State v. Carron*, 18 Iowa, 372; *State v. Dunn*, 53 Id. 526. In *Carpenter v. People*, the court held that the words "previous chaste character" mean actual personal virtue; that the female must be actually chaste and pure in conduct and in principle up to the time of the commission of the offense; and that the word "previous" must be understood to mean immediately previous, or to refer to a period terminating immediately previous, to the commencement of the guilty conduct of the defendant. And the court also lay down the rule that—

> "If the female had previously fallen from virtue, but has subsequently reformed, and become chaste, there is no doubt but she may be the subject of the offense declared in the statute."

In *State v. Dunn*, testimony was offered tending to show lewd conduct occurring 8 years before the trial, when the prosecutrix was a girl of 14, but the court held that it

was too remote, and would not tend to establish an impure character at the time of the seduction.

"If as a child she was indiscreet, immodest, or impure, she may have reformed, and become a woman of chaste character. A woman who is unchaste may reform and gain a character for chastity, within the meaning of the statute defining the crime of seduction."

In *Wilson v. State,* it is said that it is not intended that the woman who may have at some time fallen cannot be the subject of seduction; that may be true, and there may be reformation, and at the time she yields "she may have the virtue of chastity, not in the high degree of the woman who has not strayed, but yet within the meaning of the statute, entitling her to its protection."

Conceding the possibility of the unchastity of the prosecutrix six or seven years before the act with which respondent is charged, the case comes clearly within the reason and principle of these authorities. It is not necessary to invoke the presumption of chastity arising from the lapse of time, for the evidence is uncontradicted that for six or seven years the prosecutrix had led a virtuous life. This conclusion renders a discussion of many of the allegations of error as to the admission of testimony respecting what the acts recited in the confession involved, and to what extent they were carried, unnecessary.

The court was requested, and properly refused, to instruct the jury that—

"Unless the jury believe that respondent, on the 21st day of February, 1892, with force and arms, in and upon Bernice E. Bickle violently and feloniously did make an assault, and her, the said Bernice E. Bickle, then and there did ravish and carnally know, he must be acquitted upon the information filed in this cause."

The words "with her consent" were contained in the information, but omitted from the request. The use of

the word "ravish" in the information was unwarranted, but the addition of the words "with her consent" negatived any possible inference that another offense was intended to be charged.

The record contains 107 assignments of error, a large number of which are unsupported by objection or exception, hence have not been considered.

Upon a careful examination of the assignments not already noticed, we find no prejudicial error, and the conviction is affirmed.

The other Justices concurred.

94 642
99 620

THE PEOPLE v. THOMAS BETTS.

Criminal law—Trial—Witness—Competency of wife of respondent.

1. Where three respondents are joined in one complaint, and are informed against and tried separately, and two are convicted, it is not error for the court to compel the third respondent to go to trial at the same term, it not appearing from the record that any of the jurors are prejudiced by reason of the former trials, or incompetent to try the respondent.
2. It is reversible error to permit the prosecution in a criminal case to call the respondent's wife as a witness against him, against his objection, and show by her that respondent, when drunk, has abused her, and turned her out of the house, and that she has not lived with him since, and that during the time she lived with him as his wife he admitted that he had another wife living,—under a claim that the object of such examination is to determine whether the wife is a competent witness in the case.

Error to Kalamazoo. (Buck, J.) Argued February 1, 1893. Decided February 17, 1893.

Respondent was convicted of breaking and entering a flouring-mill in the night-time, with intent to commit the crime of larceny, and sentenced to imprisonment in the State prison for 5 years. Judgment reversed, and a new trial ordered. The facts are stated in the opinion.

Oscar T. Tuthill, for respondent.

A. A. Ellis, Attorney General, and *N. L. Burke,* Prosecuting Attorney, for the people.

LONG, J. Respondent was tried and convicted in the Kalamazoo circuit for breaking and entering a flouring-mill in the night-time, with intent to commit a larceny. He was charged in the complaint with two others, who were separately informed against, tried, and convicted at the same term, before the respondent's trial came on. It is claimed that the court was in error in compelling respondent to go to trial before the jury of that term, for the reason that the trials of the others worked a prejudice against him. There is nothing in the record showing that any juror was so prejudiced or incompetent to try respondent's case. This was a matter within the discretion of the trial court, and from this record we are unable to see that there was any abuse of that discretion.

On the trial the people called the respondent's wife as a witness, and were permitted to show by her, against respondent's objection, that she had left him, and that during the time she had lived with him as his wife he admitted that he had another wife living. She was also permitted to testify that he got drunk, and abused her, and turned her out of the house, and that she had not lived with him since. The people did not seek to show by her any fact in connection with this case, but did show—if her testimony be true—that the respondent was guilty of another offense. She had no knowledge of the commission

of the offense of which the respondent is here accused, or that he was in any manner connected with it. After the examination of the witness, no further questions were asked her by the prosecution. The only excuse made in this Court for such an examination of respondent's wife is that these questions were asked for the purpose of allowing the trial court to determine whether she was a competent witness in the case.

The court was in error in permitting this examination to take place. Manifestly, its tendency was to prejudice the defendant's case, and it is difficult to conceive that counsel could have had any other purpose or motive in calling her.

The case must be reversed by reason of this error, and a new trial ordered.

We need not discuss the other errors assigned, as upon a new trial the court will undoubtedly protect the rights of respondent.

The other Justices concurred.

94 644
105 94
105 627

The People v. Charles Smith.

Criminal law—Practice—Receiving stolen property—Punishment—Information—Restitution to owner.

1. It is not necessary in an information for receiving stolen property to allege the time and place of the theft; citing *People v. Goldberg,* 39 Mich. 545; and, if it were, the objection should be taken by demurrer or motion to quash; citing *People v. Schultz,* 85 Mich. 114.
2. How. Stat. § 9142, which provides for a greater maximum punishment for receiving stolen property than for the larceny itself, does not authorize cruel and unusual punishment.

3. A receiver of stolen property, in order to avoid imprisonment in the State prison under How. Stat. § 9143, must make a showing to the court before sentence that it is his first offense, and that he has made satisfaction to the injured party; citing *People v. Hubbard*, 86 Mich. 440.

Error to recorder's court of Detroit. (Chambers, J.) Submitted on briefs February 1, 1893. Decided February 17, 1893.

Respondent was convicted of receiving stolen property, and sentenced to imprisonment in the State prison for 5 years. Judgment affirmed. The facts are stated in the opinion.

Edward S. Grece, for respondent, contended:

1. The information is fatally defective, in that it fails to set out the original larceny; citing *Koster v. People*, 8 Mich. 431; *Enders v. People*, 20 Id. 233; *People v. Chappell*, 27 Id. 488; *Chapman v. People*, 39 Id. 359; *Byrnes v. People*, 37 Id. 515; *People v. Calvin*, 60 Id. 119; Const. art. 6, § 28; and, as no crime was charged, respondent was not bound to object to the information; citing *Hill v. People*, 16 Mich. 351; *Swart v. Kimball*, 43 Id. 443.
2. In support of the claim that the sentence is cruel and unusual, counsel cited How. Stat. § 7133; *Nelson v. People*, 38 Mich. 618; *Brown v. People*, 39 Id. 57; *Gordon v. People*, 44 Id. 485.
3. In a case like this, where by the record simple larceny only was the original crime, a sentence to the State prison cannot be imposed, unless the trial judge makes it to appear by the record that it was not made to appear to him before sentence to be the first offense, and that satisfaction had not been made to the injured party.

A. A. Ellis, Attorney General, and *Samuel W. Burroughs*, ex-Prosecuting Attorney, for the people.

GRANT, J. The respondent was convicted of receiving stolen property, under How. Stat. § 9142. The information charged that the property taken was of the value of one dollar; was the property of one William J. Plackett; and that it had been stolen. The respondent, upon

arraignment, pleaded not guilty, and proceeded to trial without any objections to the form of the information. He was sentenced to the State prison for five years.

1. His counsel now insists that the information is defective, in that it does not allege when, where, or by whom the larceny of the property was committed. The objection comes too late. It should have been taken by demurrer, or by motion to quash. How. Stat. § 9535; *People v. Schultz,* 85 Mich. 114. The objection itself, however, is without merit. This Court has already decided that in such an information it is not necessary to allege the time and place of the theft. *People v. Goldberg,* 39 Mich. 545.

2. It is urged that the sentence is cruel and unusual, since the property received was of the value of less than $25, and the thief, upon conviction, could not have been sentenced to prison for more than one year. Upon the Legislature alone is conferred the power to fix the minimum and maximum of the punishment for all crimes. A law which provides a greater maximum penalty for receiving stolen property than for the larceny of it cannot be held to authorize cruel and unusual punishment.

3. No question of the restitution of the property is raised upon this record. If the respondent desired to avoid imprisonment in the State prison by making restitution, if it was the first offense, it became his duty to show that fact to the court before sentence. *People v. Hubbard,* 86 Mich 440. The record is entirely silent upon this point.

Judgment affirmed.

The other Justices concurred.

INDEX.

Head-note references are to pages.

Cross-references are to *subjects;* and the number of the note is added in parenthesis, unless the reference is to all.

ABANDONMENT—See EVIDENCE (7).

ACCEPTANCE—See CONTRACT (3-5); GIFT; SALE (6).

ACCOUNT STATED.

It is not necessary, in order to a recovery upon an account stated, that the antecedent debt or demand between the parties be proved. *Armitage v. Saunders,* 482.

ACTION.

A promise made by one person to another for the benefit of a third person, who is a stranger to the consideration, will not support an action by the latter. *Wheeler v. Stewart,* 445.

See INSURANCE.

ADVERSE POSSESSION—See OUSTER.

AFFIDAVIT.

The failure of a notary public to append to his signature to the jurat to an affidavit the name of the county for which he was appointed, which name does not appear in the body of the affidavit, but does in its caption, will not render the affidavit defective. *Smith v. Runnells,* 617.

See LIBEL AND SLANDER (8).

AGENT—See PRINCIPAL AND AGENT.

ALIAS WRIT—See EXECUTION (2).

AMENDMENT.

An amendment substituting the brothers and sisters of a member of a mutual benefit association, and the children of a deceased brother,—who, as his heirs, are entitled to the insurance agreed to be paid, by reason of the death of the member's wife, who was named as beneficiary, and of his children, prior to his death,—as plaintiffs in a suit brought at the instance of his administrator in the name of the administrator of his wife's estate, to recover the insurance, is permissible. *Silvers v. Benefit Association*, 39.

See EQUITY PLEADING.

APPEAL—See ESTATES OF DECEASED PERSONS (3-6); JURY TRIAL; LIBEL AND SLANDER (8).

APPLICATION OF PAYMENTS—See PAYMENT (1).

ASSESSMENT—See LIFE INSURANCE (4).

ASSIGNMENT.

1. The right to complain of a fraud is not assignable. *Smith v. Thompson*, 381.
2. A right of action for the conversion of property is assignable. *Id.*

See ESTATES OF DECEASED PERSONS (2); MORTGAGE (3, 4).

ASSIGNMENT FOR BENEFIT OF CREDITORS.

A *bona fide* purchaser for value from the grantee of the assignee of an insolvent debtor, who executed his trust without filing the required statutory bond, and without objection from the assignor and the creditors on that ground, will be protected as against a deed executed by the assignor before the assignment, but not recorded until after the execution of the deed to the purchaser. *Munro v. Meech*, 596.

ATTACHMENT.

1. The effect of suing out a writ of *certiorari* by a defendant to review a justice's judgment in an attachment suit, and of giving the statutory bond for the payment of any judgment that may be rendered in the circuit court, is to dissolve the attachment. *Vanderhoof v. Prendergast*, 18.

ATTACHMENT—Continued.

2. Where, in replevin for attached property, there is evidence tending to show its purchase in good faith by the plaintiff from the attachment debtor before the levy of the attachment, the defendant can only justify his holding on the ground that the transfer was fraudulent as to creditors, and this is a question for the jury. *Id.*
3. Temporary residence in another state, caused by the unlawful seizure of household goods, will not subject the goods to attachment at the suit of the party guilty of the original trespass, on the ground that the owner is a non-resident of this State, and not a householder therein. *Erickson v. Drazkowski*, 552.
4. Personal service of a writ of attachment upon one partner gives the court jurisdiction, though no property is attached, and a judgment based upon such service will support the levy of an execution issued thereon upon the partnership property. *Smith v. Runnells*, 617.
5. Failure to file a declaration in an attachment suit, in which personal service has been had upon one of the defendants, within the time prescribed by Circuit Court Rule No. 16, is at most an irregularity, which is cured by filing the declaration before the plaintiff's default is entered. *Id.*
6. The publication of notice of attachment under How. Stat. § 8003, is only required where neither of the defendants can be found. *Id.*

ATTORNEY AND CLIENT.

1. Plaintiff sued to recover moneys received by the defendant as his agent. The defendant limited his claim under his notice of set-off to a stated sum for services rendered the plaintiff. On the trial it appeared that, by an arrangement with the plaintiff, the defendant had paid off a mortgage on the plaintiff's property at a discount, he being at the time the attorney for the mortgagee. And it is held that defendant's recovery is limited under the pleadings to the amount actually paid. *Cleveland v. Miller*, 97.
2. It is error to permit an attorney, in a suit brought by him to recover for professional services rendered the defendant in a particular suit, to testify to a conversation had with the defendant before the suit in which the services were rendered was commenced, in which the plaintiff objected to

ATTORNEY AND CLIENT—Continued.

being retained to defend a pending criminal suit against the defendant because defendant had had trouble with all the lawyers he came in contact with. *Crowell v. Truax*, 585.

3. Evidence that, two years before the services sued for were rendered, some negotiations had been had by letter, resulting in plaintiff's agreement to accept $10 per day for services, has no bearing upon the value of the services sued for, and is inadmissible. *Id.*

4. Where, in a suit by an attorney to recover for professional services rendered in a specified suit, the bill of particulars includes charges for making trips to two certain cities, without fixing a price, and the making of the trips is not disputed, nor the claim that no price was agreed upon, plaintiff's testimony that he "made no charges for the trips" cannot be taken as meaning that he did not expect pay for making them, and the jury are correctly instructed that he is entitled to what they were reasonably worth. *Id.*

BANKS AND BANKING.

1. Where a depositor pays his note, held by his bank for collection, with his check, the drawing of which is warranted by the state of his account, and the bank is at the time insolvent, and no money is set apart by it for the owners of the note, or reaches the hands of the receiver soon after appointed for the bank, the owners cannot claim that by the transaction a trust fund is created, which must be treated as such by the receiver, and paid to them in full, without regard to the claims of other creditors of the bank. *Sherwood v. State Bank*, 78.

2. Where the only authority given to a bank to pay a draft is the oral agreement of the drawer made with the acceptors that he will take care of a sight draft drawn by them on him in favor of the bank for the amount of the first draft, there is no such privity of contract between the drawer and the bank as will entitle the bank to recover the money paid on the first draft under a count for money paid for the use of the drawer. *Bay City Bank v. Lindsay*, 176.

3. Either member of a copartnership has the power to protect himself by stipulating that the other member shall not have authority to bind the firm by signing checks, if notice is

BANKS AND BANKING Continued.

given to the bank which is the depository of the firm. *Gladstone Bank v. Keating*, 429.

4. Where, in a suit by a bank against copartners to recover for overdrafts paid on the defendants' checks, it appears from the plaintiff's own testimony that it had been instructed by the defendants to pay no checks not countersigned by their bookkeeper, and that the checks in suit were not so countersigned, the plaintiff, in order to recover, must show that the firm received the benefit of the money so paid, and it has the burden of making such showing. *Id.*
5. In a suit by a bank to recover for overdrafts paid on the defendants' checks in violation of their instructions to the bank, the defendants are not estopped from relying upon such fact as a defense on the ground that it was their duty to examine the checks when returned to them, and notify the bank of its violation of said instructions. *Id.*
6. One partner drew his individual check, payable to the order of the bookkeeper of the firm, for the firm. The bookkeeper indorsed the check, and deposited it to the credit of the firm in the bank where it kept its account. The check, not being paid, was charged back in the firm account. And it is held that recovery can be had on the check in a suit brought by the bank against the firm to recover for overdrafts paid on the firm checks, it having been sent as a firm asset, and received and deposited as such to the knowledge of the drawer. *Id.*

BENEFIT ASSOCIATIONS—See LIFE INSURANCE.

BILL OF EXCEPTIONS—See PRACTICE IN SUPREME COURT.

BILL OF PARTICULARS—See ATTORNEY AND CLIENT (4); EVIDENCE (16).

BILLS AND NOTES.

1. Interest does not begin to run on a demand note until an actual demand of payment is made, or a suit is instituted, which is treated as a sufficient demand. *In re Estate of King*, 411.
2. In response to the request of a payee that the maker give him a new note for the principal and interest of the old one, made a day or two before its outlawry, the maker indorsed on the note, "the within note shall not be outlawed," and

BILLS AND NOTES—Continued.

signed the indorsement, and delivered the note to the payee, with the remark that that would make it all right with him. And it is held that the effect of the indorsement was to renew the original promise to pay, and that it was a sufficient acknowledgment to take the case out of the statute of limitations. *Id.*

3. A note given to settle the embezzlement of an agent is valid, if there is no agreement to stifle a prosecution for the embezzlement. *Wolf v. Estate of Troxell*, 573.
4. The charge in this case is open to the objection that the jury would be likely to infer from it that, if the father was induced to give his notes by a threat to prosecute his son for a felony, the notes were necessarily void, unless plaintiff was shown to be a *bona fide* holder, whereas the crucial question in the case was the illegality of the consideration, as based upon the alleged promise not to prosecute, which the threats only tended to prove. *Id.*
5. A note given upon a promise to compound a felony is void, whether made at the solicitation of the maker, or by reason of the threats of the payee or his agent. *Id.* 574.
6. A note given to settle a just debt is valid, although its making was induced by threats to prosecute, in the absence of duress or fraud, and of a promise not to prosecute if the note is given. *Id.*

See BANKS AND BANKING; MECHANIC'S LIEN (4).

BONA FIDE PURCHASER—See ASSIGNMENT FOR BENEFIT OF CREDITORS; EXECUTION (1).

BONDS.

1. Act No. 321, Local Acts of 1891, which authorizes the City of Saginaw to borrow $75,000 for bridge purposes, did not repeal the provision of the charter of said city (section 25, tit. 5, Act No. 455, Local Acts 1889) authorizing the common council to issue bonds to the amount of $125,000 for the construction of the bridges therein named, but was intended to continue in force said charter provision, and to authorize the issuance of bonds for $200,000. *Tillotson v. City of Saginaw*, 240.
2. It was entirely competent for the Legislature, in the act of 1891, to place any restrictions it chose upon the council in issuing the bonds authorized by the act, although such

BONDS—Continued.

restrictions are not found in the provision of the charter authorizing the issuance of the first bonds. *Id.*

See ASSIGNMENT FOR BENEFIT OF CREDITORS; ATTACHMENT (1); MUNICIPAL CORPORATIONS (3).

BOODLE—See LIBEL AND SLANDER (1, 2).

BROKER—See REAL-ESTATE BROKER.

BURDEN OF PROOF—See BANKS AND BANKING (4); JURY (4).

CAPIAS.

When an application is made to a circuit judge to hold to bail, it is his duty to hear and investigate; and if the affidavit sets up facts and circumstances tending to show fraud or breach of trust, thus bringing the case within the exceptions of the Constitution, authority to act depends upon the facts, and the determination of the judge has all of the qualities of a judicial decision, and as such protects the judge, the officer, and the party. *Johnson v. Morton*, 1.

CARRIERS.

1. Where goods are expressed C. O. D., the liability of the express company as a common carrier terminates upon the safe carriage of the goods to their place of destination, notice to the consignee of their arrival, and an offer to deliver upon payment of the amount charged against them. *Hasse v. American Express Co.*, 133.
2. In case the consignee is not ready to receive and pay for the goods, it is the duty of the company to safely store and care for them, and to hold them for a reasonable time to enable the consignee to make such payment, and to notify the consignor, and the liability of the company meanwhile is that of a warehouseman. *Id.*

CERTIORARI.

1. The effect of suing out a writ of *certiorari* by a defendant to review a justice's judgment in an attachment suit, and of giving the statutory bond for the payment of any judgment that may be rendered in the circuit court, is to dissolve the attachment. *Vanderhoof v. Prendergast*, 18.
2. *Certiorari* will not lie to review the proceedings of the board of supervisors organizing a township, after officers have

CERTIORARI—Continued.

been elected and property assessed for taxation therein. *Atlee v. Board of Supervisors*, 562.

3. The docket entry of a justice of the peace of the date when a judgment was rendered cannot be changed by his return to a writ of *certiorari*, so as to show that he was out of the State on the day named, and that the judgment was actually rendered the day previous, when he was within his jurisdiction, and erroneously entered on his docket as of the following date. *Toliver v. Brownell*, 577.

CHARGE TO JURY.

1. It is error to instruct the jury that, if they discredit one of the plaintiff's witnesses, their verdict must be for the defendant, where there is other competent testimony before them to support the averments of the declaration. *Sterling v. Callahan*, 537.
2. Counsel can be usually safely trusted to pass such criticisms upon witnesses as the occasion demands, and the circuit judge should avoid anything calculated to impress the jury with his own views as to the facts. *Id.*
3. Where the jury have apparently accepted and acted upon an erroneous instruction of the circuit judge given on his own motion, the error is none the less damaging because the instruction was accompanied by an opposing one, given on the request of one of the parties. *Id.*
4. If the authority of an agent to make a sale of property is not continuous, it is error for the court to refer to a conversation had with the principal six months before the sale, in which, as claimed, such authority was admitted, and instruct the jury that the right to recover depends upon the existence of authority at that time. *Hensel v. Maas*, 563.
5. Where a payment by a defendant on the account sued on is admitted, and, for aught that appears in the record, was considered by the jury, error cannot be assigned upon the failure of the court to mention the subject in his charge, his attention not having been called to it by appellant's counsel. *Crowell v. Truax*, 585.
6. Assuming the existence of a fact, which the undisputed evidence tends to prove, cannot be assigned as error where its existence is not questioned on the trial except by a gen-

CHARGE TO JURY—Continued.

eral request that a verdict be directed in favor of the appellant. *Roux v. Lumber Co.*, 607.

See ATTORNEY AND CLIENT (4).

CHASTITY—See CRIMINAL LAW (9, 11).

CHATTEL MORTGAGE.

1. An unfiled *bona fide* chattel mortgage is valid as against creditors whose claims accrued prior to its execution, but not as against creditors who became such during the time between the execution of the mortgage and its filing, without knowledge of its existence. *First National Bank v. Guntermann*, 125.
2. A chattel mortgage given for $340 more than the amount actually owing to the mortgagee, for the purpose of delaying and defrauding the other creditors of the mortgagor, is void; but the question whether or not it was so given is one for the jury, when fairly submitted for their consideration. *Ferris v. McQueen*, 367.
3. A creditor has a right to extend further credit to a debtor, even though he is largely indebted to the creditor and to others at the time, and he has the right to secure his debt by a mortgage on the debtor's stock in trade in preference to other creditors; but he cannot enter into a fraudulent scheme to hold the debtor out as deserving of credit, and thus enable him to purchase goods of other creditors, for the very purpose of taking security upon them, knowing that they are not paid for. *Id.*

COMMISSION—See REAL-ESTATE BROKER.

COMPOUNDING FELONY—See BILLS AND NOTES (3-6).

CONGRESSMAN—See ELECTIONS (18).

CONSIDERATION.

1. A parol agreement with a tenant from year to year, that if he sows wheat he may reoccupy the leased premises after the expiration of the tenancy for the purpose of harvesting the wheat, is enforceable, if founded upon a sufficient consideration. *Ladd v. Brown*, 136.
2. Where a tenant agrees to leave crops upon the ground corresponding to those which were growing at the time he

CONSIDERATION—Continued.

took possession, an agreement with the landlord that if he sows such crops he may come back and harvest them after the expiration of the tenancy is without consideration. *Id.*

3. A promise made by one person to another for the benefit of a third person, who is a stranger to the consideration, will not support an action by the latter. *Wheeler v. Stewart*, 445.
4. The rent reserved in a lease signed by both parties is a sufficient consideration for the agreement of the lessor to convey the land to the lessee at the expiration of the lease upon the payment of the agreed purchase price. *Guslin v. Union School-dist.*, 502.

See BILLS AND NOTES (3-6).

CONSTITUTIONAL LAW.

The constitutional requirement that all process shall run "In the name of the People of the State of Michigan," is mandatory. *Forbes v. Darling*, 621.

See CRIMINAL LAW (15).

CONTRACT.

1. Where a traveling salesman is entitled to receive the excess on sales above the list price of the goods, the consent of his employer to his making sales at less than the list price will not imply an agreement to pay him the discount thus made to effect a sale. *Rosenfield v. Fortier*, 29.
2. A claim made by the salesman for credit for such discount, on reporting the sales, will not affect the right of the employer to fill the orders at the reduced price, and thus secure the benefit of the trade, he allowing the salesman the agreed commission for making them. *Id.* 30.
3. It is now generally held that if a proposition be made, to be accepted within a given time, it constitutes a continuing offer, which, however, may be retracted at any time. But if, at any time before it is retracted, it is accepted, such offer and acceptance constitute a valid contract. *Cooper v. Lansing Wheel Co.*, 272.
4. Where carriage manufacturers make an order for whatever wheels they may want during a specified season, at prices stated in the order, which is accepted by the orderee, the order and acceptance, when supplemented by the filling

CONTRACT—Continued.
of one or more orders for wheels, become a valid and binding contract for the entire season. *Id.*

5. The procurement by a traveling agent of an order for goods, signed by the orderer, in which the prices and date of shipment are specified, supplemented by a paper signed by the agent and delivered to the orderer, acknowledging the ordering of the goods, describing them, and giving prices and time of shipment the same as in the order, creates a contract for the sale of the goods. *Leo Austrian & Co. v. Springer*, 343.
6. A contract by which an employer agreed to pay an employé, who entered his service on June 2, 1890, $35 per week, and in January, 1891, $100 as extra pay, and, furthermore, for the year 1891 said salary and 5 per cent. of the net profits of the department of the business in which he was employed, is held to have covered all of the year 1891. *Koehler v. Buhl*, 496.
7. Where a person contracts to do work to the satisfaction of his employer, the employer is the judge, and the question of the reasonableness of his judgment is not for the jury. *Id.* 497.
8. The employer is not obliged in such a case to take advantage of the first infraction of the contract. *Id.*

See ACTION; LAND CONTRACT; SALE (4-8).

CONTRIBUTORY NEGLIGENCE—See NEGLIGENCE (1-3, 10, 11, 13, 15, 18).

CORPORATIONS.

1. The general rule is that a stockholder's suit must be brought in a court of equity, but there are exceptions to this rule. *Hanley v. Balch*, 315.
2. The right of the directors of a corporation to execute a mortgage to secure its indebtedness does not include the right of a member of that corporation, who is under obligations to carry the corporation paper, to introduce a dummy into the board of directors, and, confederating with him, direct the execution of a mortgage to another confederate, to whom the paper has been assigned for the purpose of avoiding these obligations, wrecking the corporation, and appropriating its assets; nor does the right of a creditor to fore-

CORPORATIONS—Continued.

close include the right of such confederate fraudulently to obtain the security for the purpose named, and to foreclose it in furtherance of that purpose. *Id.*

3. A declaration charging, in effect, that the defendants have procured the stock and control of a corporation by deception and fraud, and for the purpose of wrecking the corporation, is a declaration in case for fraud. *Smith v. Thompson*, 381.

See MUNICIPAL CORPORATIONS.

COSTS—See JUSTICES' COURTS (2); PRACTICE IN SUPREME COURT (1).

COVENANTS—See DEED (2).

CRIMINAL LAW.

1. Emission is necessary to the consummation of the offense of sodomy, and, while it may be inferred from proof of penetration and the other circumstances of the case, it is a fact which the prosecution must establish before a conviction can be claimed. *People v. Hodgkin*, 27.
2. A respondent has the right under How. Stat. §§ 7097, 7099, to be tried, for an offense cognizable by a justice of the peace, by a jury, or by the justice without a jury, as he may elect. *People v. Steele*, 437.
3. A witness who is required to recognize for his appearance to testify on behalf of the people, and is committed to jail on his failure to enter into such recognizance, must be held to have been in attendance upon the court during the time of his commitment, and is entitled to the fees allowed by law to witnesses for the people in criminal cases. *Robinson v. Chambers*, 471.
4. A wife cannot make a complaint against her husband for an indecent assault upon the person of his daughter, nor is she a competent witness against him on his trial for said offense. *People v. Westbrook*, 629.
5. It is the duty of police officers, not only to aid by all proper means in the arrest and conviction of criminals, but to detect and discover crime; and it is the duty of prosecuting officers to procure evidence of the commission of crime, taking whatever means are necessary for the securing of wit-

CRIMINAL LAW—Continued.

nesses, and their protection when secured. *People v. Mills*, 630.

6. Counsel for a respondent cannot be allowed to provoke comment and criticism on the part of the prosecution, and then procure a reversal because charges and insinuations are resented and criticisms made. *Id.*

7. Where a respondent's general character is put in issue by the defense, comment upon that character is clearly proper. *Id.*

8. Where, on the cross-examination of a prosecutrix, testimony is drawn out tending to show that the witness, before the charge was made for which the respondent is being tried, had made general statements, respecting his general conduct, inconsistent with her testimony, it is competent for the prosecution to show on her redirect examination the circumstances under which the statements were made, and that they were made while she was under the influence of the respondent. *Id.*

9. Lack of chastity cannot be used to impeach the credibility of a female witness. *Id.*

10. Where a police officer has been present since the commencement of a criminal trial, seated at a table with the prosecuting officers, and his name has been frequently mentioned in the testimony, and it is clearly apparent to the court that the failure to indorse his name on the information, as a witness for the people, was an oversight, it is not error for the court to permit such indorsement to be made after he is called and sworn as a witness, and his examination to proceed. *Id.*

11. 3 How. Stat. § 9314*a*, which makes it a felony for any male person of the age of 16 years or more to carnally know any girl, theretofore chaste, of the age of 14 years, and not more than 16 years of age, with her consent, does not exclude from its protection a female who may have erred, but who has reformed, and for years led a virtuous life. *Id.* 631.

12. The use of the word "ravish," in an information for the offense created by 3 How. Stat. § 9314*a*, is unwarranted, but the addition of the words "with her consent" negatives any possible inference that another than the statutory offense was intended to be charged. *Id.*

CRIMINAL LAW—Continued.

13. Where three respondents are joined in one complaint, and are informed against and tried separately, and two are convicted, it is not error for the court to compel the third respondent to go to trial at the same term, it not appearing from the record that any of the jurors are prejudiced by reason of the former trials, or incompetent to try the respondent. *People v. Betts*, 642.
14. It is not necessary in an information for receiving stolen property to allege the time and place of the theft. *People v. Smith*, 644.
15. How. Stat. § 9142, which provides for a greater maximum punishment for receiving stolen property than for the larceny itself, does not authorize cruel and unusual punishment. *Id.*
16. A receiver of stolen property, in order to avoid imprisonment in the State prison under How. Stat. § 9143, must make a showing to the court before sentence that it is his first offense, and that he has made satisfaction to the injured party. *Id.* 645.

CUSTOM.

1. Custom cannot change a definite contract, and no custom is binding which is not certain, definite, uniform, and notorious. *Pennell v. Transportation Co.*, 247.
2. A custom which is restricted to a certain locality or business, though shown to have become general and uniform, is not conclusive on the party, so that he may not give evidence that it was unknown to him. *Id.*
3. A general custom, so well settled and notorious as to raise the presumption that it was known to buyer and seller, cannot be rebutted by the testimony of the seller that he was not aware of its existence. *Leo Austrian & Co. v. Springer*, 344.

See EVIDENCE (8).

DAMAGES.

1. The proper measure of damages in a suit for a breach of warranty on the sale of mining stock, which is not shown to be absolutely worthless, is the difference between the market value of the stock as represented and what it was in fact worth at the time of its transfer to the plaintiff. *Maxted v. Fowler*, 107.
2. A judgment for $30,000 in a negligence case, as compensa-

DAMAGES—Continued.

tion for the pain and suffering endured by the plaintiff, and the loss to him for the remainder of his life of both feet, will not be reversed upon the ground that the damages awarded are excessive. *Retan v. Railway Co.*, 146.

3. The general rule is that the measure of damages for the breach of a contract to sell and deliver personal property, when the purchase price has not been paid, is the difference between the contract price and the market price at the time and place of the promised delivery. *Leo Austrian & Co. v. Springer*, 344.

See LIBEL AND SLANDER (4–6); LIQUOR TRAFFIC (3).

DECLARATION OF TRUST.

There is no prescribed form of words in which a declaration of trust must be made in order to make it valid, yet the writing evidencing it must contain the substantial terms of the trust, or at least sufficient to identify the subject-matter by writing. *Renz v. Stoll*, 377.

DEED.

1. The rule that the delivery of a deed is presumed from the fact of its being placed on record by the grantor applies to a case where the grantor, as register of deeds, records the deed and remains in possession of the land conveyed. *Fenton v. Miller*, 204.

2. The right of action, if any, of a grantee of part-paid swamp land, who secures the payment of a portion of the purchase price by mortgage, and remains in undisturbed possession for five years before the grantor secures his patent, and for ten years after its issuance, without being threatened with litigation growing out of the state of the title, or the non-payment of taxes assessed against the land before the patent was issued, which patent contained a reservation of liens which the State might have therefor, is upon the covenants of warranty in his deed. *McLelland v. A. P. Cook Co.*, 528.

3. Deeds executed by a father to his children, and a lease of a life-estate in the land executed by them to him as a part of the same transaction, will be construed as one instrument, and the estate conveyed to the children held to be subject to the life-estate reserved to the father. *Nichols v. Nichols*, 569.

4. A deed by which the grantor, after reciting his ownership

DEED—Continued.

in fee of a certain parcel of land, grants, bargains, sells, and quitclaims to the grantee, his heirs and assigns, forever, "the right to build and use a dock upon the front of" a certain portion of the land, only conveys the right to *use* the portion designated for the purpose mentioned in the granting clause. *Id.*

See ASSIGNMENT FOR BENEFIT OF CREDITORS; EXECUTION (1).

DELIVERY—See DEED (1).

DEMAND—See BILLS AND NOTES (1).

DESCRIPTION.

Where both parties fully understand the subject-matter in a controversy, an erroneous description of the property will not operate to defeat the effect of a written document. *Fenton v. Miller*, 205.

DISCONTINUANCE—See PRACTICE IN CIRCUIT COURT.

DISSOLUTION OF ATTACHMENT—See ATTACHMENT (1).

DIVORCE.

1. A party coming into a court of equity, and asking to be released from the bonds of matrimony and its obligations, must come with clean hands, and must keep them clean, so far as relates to the procurement of testimony to make out his case. *Van Voorhis v. Van Voorhis*, 60.
2. An answer in a divorce suit in the nature of a cross-bill, filed under Chancery Rule No. 123, must be verified in order to authorize a decree for the defendant, but, if not, it may be amended, where the proof shows an absence of collusion. *Harrison v. Harrison*, 559.
3. Pregnancy before marriage, concealed from the husband, who has not, previous to the marriage, sustained improper relations with the wife, is a fraud which is a sufficient ground for annulling the marriage, if the discovery of the fact is followed by a cessation of cohabitation, and abandonment. *Id.*

DOCKET ENTRY—See JUSTICES' COURTS (3).

DRUGGISTS—See LIQUOR TRAFFIC (1, 2).

DURESS.

1. Duress implies a constraint which overcomes the will of the person constrained, and it may be the result of imprisonment, or threats of immediate imprisonment. *Wolf v. Estate of Troxell*, 574.
2. The weight of authority is to the effect that imprisonment of one cannot be treated as duress or constraint of another, except in the case of husband and wife, who are treated as one in law. *Id.*

See BILLS AND NOTES (6).

EJECTMENT—See EXECUTION (1); OUSTER.

ELECTIONS.

1. The election law of 1891 is designed to secure absolute secrecy to the elector, and thus prevent all opportunity for corrupt practices; and no voter can be compelled to remove the secrecy of his ballot, and state how he voted. *Attorney General v. McQuade*, 439.
2. Under our statutes, no unregistered person possesses the right to vote. If unable to attend the meetings of the board of registration for reasons specified in the statute, he may be registered on election day upon taking the prescribed oath. *Id.*
3. The provisions of section 26 of the election law of 1891, requiring the elector to enter the voting booth alone, after receiving his ballot from the inspector, and there prepare it concealed from the view of all persons, and then fold it so that no part of its face shall be exposed, and with the initials of the inspector on the outside, and hand it to the inspector, who shall deposit it in the ballot-box; and of section 32, for the marking of ballots of illiterate or physically disabled electors by an inspector to be designated by the board of inspectors for that purpose, who is not a candidate on the ticket, in the presence of at least two of the inspectors,—are mandatory. *Id.*
4. The action of the chairman of the board of inspectors, in receiving and depositing in the ballot-box the ballots of 13 unregistered persons, and the ballots of a large number of persons who had shown them after they had been marked, and in allowing and instructing third persons to enter the voting booths with a large number of electors, and, after

ELECTIONS—Continued.

their ballots had been marked by such third persons, depositing them in the ballot-box, is held to have vitiated the vote of the election precinct. *Id.*

5. Act No. 208, Laws of 1887 (3 How. Stat. § 234*a*), which provides for the correction of frauds and mistakes in the canvass and returns made by inspectors of elections, does not apply to the office of State Senator. *Wheeler v. Board of Canvassers*, 448.

6. Should a board of canvassers refuse to recount under Act No. 208, Laws of 1887 (3 How. Stat. § 234*a*), when the application is filed in time, a writ of *mandamus* would issue to set the board in motion; but when they have recounted and declared the result, and made their return and adjourned, they become *functus officio*, and the remedy of the party claiming to be aggrieved is by a *quo warranto* proceeding to test the validity of the election. *Packard v. Board of Canvassers*, 450.

7. The provision of the act requiring the recounting committee to make a return to the board of canvassers, "showing the whole number of votes given, the names of the candidates, and the number of votes given to each, written out in words and figures as upon the ballots," cannot be construed as calling for a statement of every contested ballot, showing the reasons for which it was rejected, so that the contestant may take advantage of any error by writ of *certiorari* to the circuit court. *Id.*

8. An application by a candidate for Supreme Judge to the board of county canvassers for a recount under Act No. 208, Laws of 1887 (3 How. Stat. § 234*a*), made on the last day on which the Board of State Canvassers can, if the direction of the statute is to be observed, canvass the returns and issue the certificate of election, is not in time, and *mandamus* will not lie to compel such recount. *Newton v. Board of Canvassers*, 455.

9. The evident purpose of the act of 1887 was to provide for a recount antecedent to the determination by the board of county canvassers of the number of votes cast for the office as to which a recount is applied for. *Id.*

10. It is clearly intended by the act that, in case of various contests arising before the board, different committees may

ELECTIONS—Continued.

be appointed, and the recount in all cases proceed at once. *Id.*

11. The board of county canvassers acting on a contest may well be held to constitute a special tribunal when in session only for the purpose of considering such contest, and it was not the legislative intent that the presentation of an application for a recount to the body when so acting, and after a full determination of the result as to the candidates for other offices, should entitle the party presenting such petition to a recount. *Id.* 456.
12. Relator has an ample remedy in this case under section 5, art. 8, of the Constitution, which provides that, when the determination of the Board of State Canvassers is contested, the Legislature in joint convention shall decide which person is elected. *Id.*
13. It will be assumed that the Legislature will deal fairly in case of such a contest, and there can be no doubt of its right in joint session to ascertain, by means of the best evidence attainable, the actual state of the vote. *Id.*
14. The provision of section 36 of the election law of 1891, voiding all ballots "which shall bear any distinguishing mark or mutilation," was intended to provide against voters marking the individual ballot which they cast in such manner as to distinguish it. *Lindstrom v. Board of Canvassers*, 467.
15. But one vignette is provided for, to be printed on ballots to be used at a general election, under the election law of 1891. *Id.*
16. A voter who votes a ticket appearing upon the official ballot, duly certified by the board of election commissioners, cannot be disfranchised by the action of the board in printing a separate vignette at the head of the county ticket, or by a failure to have a proof copy of the ballot on file at the office of the county clerk, and open for inspection, at least 10 days prior to the election; nor can a candidate who is not shown to have participated in any fraud be defeated of his election on these grounds. *Id.*
17. Act 208, Laws of 1887 (3 How. Stat. § 234*a*), which provides for the correction of frauds and mistakes in the canvass and returns made by inspectors of election, is construed as follows:

a—The statute gives an aggrieved party the *right* to a

ELECTIONS—Continued.

recount of the votes cast for and against him for the office for which he was a candidate, upon his complying with its provisions, enforceable by *mandamus*.

b—The purpose of the provision of the act giving the board of canvassers *power* to cause the ballot-boxes, used in the election districts in which the errors, mistakes, or frauds complained of are alleged to have occurred, to be brought before it, is not to enable the board to ascertain whether a recount shall be had, but whether there was fraud or mistake in the original count.

c—This provision is not mandatory, but was intended to confer a *right* which the board might exercise in case of necessity, and its non-exercise is not jurisdictional.

d—The statute gives to neither the board of canvassers nor to the committee appointed to make the recount power to enter upon an investigation of alleged frauds committed at the election; nor does it confer power upon the board to compare the registration lists with the poll-lists for the purpose of determining whether the votes of unregistered persons were received, and to exclude the entire vote of a precinct on that ground.

e—If the resolution of the board directs the committee to proceed to investigate the matters set forth in the petition, a further provision authorizing them to open *all* ballot-boxes containing votes cast for the office for which the petitioner was a candidate should be construed as having relation to the investigation thus directed, and as being limited to the ballot-boxes in the precincts named in the petition.

f—It was held in *Maynard v. Board of Canvassers*, 84 Mich. 228, that where the facts are not in dispute, and it appears that the relator is not entitled to the office, the Court will not compel the issue of a certificate by *mandamus;* but it does not follow that the Court will accept an unauthorized count as finally establishing such fact.

g—Where upon the face of the returns of the inspectors of election, as corrected by the authorized recount, the petitioner is shown to have received a plurality of the votes cast for the office for which he was a candidate, and the board of canvassers assumes to change said result by correcting the returns from a precinct according to an unauthorized recount of the ballots cast therein for said office, and by the rejection

ELECTIONS—Continued.

of the vote of an entire precinct on the ground that votes were cast therein by persons who were not registered, *mandamus* will lie to compel the board to reconvene, and vacate a resolution directing the issuance of a certificate of election to the candidate thus shown to have been elected, and direct that a certificate be issued to the petitioner. *May v. Board of Canvassers*, 505, 506.

18. Act No. 208, Laws of 1887 (3 How. Stat. § 234*a*), which provides for the correction of frauds and mistakes in the canvass and returns made by inspectors of election, does not apply to the office of Congressman. *Belknap v. Board of Canvassers*, 516.

19. Where the board of canvassers of a county have canvassed the votes cast therein for Congressman from the returns of the inspectors as corrected by a recount had under the statute cited, *mandamus* will lie to compel them to reconvene, and recanvass the votes according to the original returns, and report the result to the Secretary of State. *Id.*

EMISSION—See CRIMINAL LAW (1).

EQUITY JURISDICTION.

The general rule is that a stockholder's suit must be brought in a court of equity, but there are exceptions to this rule. *Hanley v. Balch*, 315.

EQUITY PLEADING.

An answer in a divorce suit in the nature of a cross-bill, filed under Chancery Rule No. 123, must be verified in order to authorize a decree for the defendant, but, if not, it may be amended, where the proof shows an absence of collusion. *Harrison v .Harrison*, 559.

EQUITY PRACTICE.

The action of circuit courts in determining applications to set aside defaults and orders *pro confesso* will not be reviewed, unless there has been a clear abuse of discretion. *Mills v. McLeod*, 627.

See EVIDENCE (13).

ESTATES OF DECEASED PERSONS.

1. A mortgage upon land belonging to the estate of a deceased

ESTATES OF DECEASED PERSONS—Continued.

person, not given by the decedent, and not therefore a personal debt, is a debt against the estate, within the meaning of 3 How. Stat. § 6105, which authorizes the probate court to license an executor or administrator to borrow money by way of mortgage on the estate of the decedent "for the purpose of paying the debts against the estate." *In re Estate of Lambie*, 489.

2. A lease containing an agreement by the lessor to convey the leased premises to the lessee at the expiration of the term, upon payment of an agreed purchase price, vests in the lessee a right to purchase, which, with the lease, passes to his administrator, who may assign it, and, upon payment of the purchase price by the assignee within the time limited, the contract becomes a completed purchase, and is enforceable in equity. *Gustin v. Union School-Dist.*, 502.
3. *Mandamus* will not lie to compel a circuit judge to vacate an order allowing an appeal to the circuit from an order of the probate court under How. Stat. § 6784, where the petition for leave to appeal sets forth facts sufficient to call for the exercise of the discretion of the circuit court, and such discretion has been exercised. *Sanborn v. Circuit Judge*, 519.
4. The appeal is not to be refused upon the denial of an interested party of the facts alleged in the petition for leave to appeal. *Id.*
5. It is within the power and the duty of the circuit court to consider both the petition and the answer, and determine whether the petitioner is without default, and whether it appears that justice requires a revision of the case. *Id.*
6. Where it appears from the petition that the account of an executor has been improvidently allowed, and that the property rights of wards have been injuriously affected, it would be a very exceptional case in which the court should not grant the leave to appeal. *Id.*

See WILL.

ESTOPPEL.

A lessor who executes a lease to a husband and wife, and insists that the wife shall be a party thereto, and puts the lessees jointly into possession of the leased premises under the lease, is estopped from claiming that they have no right

ESTOPPEL—Continued.

to join in a suit against him when he unlawfully disturbs them in that possession, and they sustain damage by reason of such disturbance. *Gillespie v. Beecher*, 374.

See BANKS AND BANKING (5); CONTRACT (2); FIRE INSURANCE; FRAUDULENT REPRESENTATIONS; LANDLORD AND TENANT (2); SALE (6); TAXES (9).

EVIDENCE.

1. The disability of a widow, who claims to be the owner by gift from her husband of certain notes which the heirs seek to charge her with on the final settlement of her account as administratrix, to testify in her own behalf to the entire transaction between herself and husband relative to the gift to her of the notes, is waived by the heirs calling her as a witness, and interrogating her as far as they see fit as to such transaction. *In re Estate of Dunlap*, 11.
2. Plaintiff sued to recover $100, which he claimed defendant agreed to pay him, in addition to surrendering his note for $1,200, as the purchase price of certain property sold defendant. The only dispute was as to the agreement to pay the $100. And it is held that it was competent for plaintiff to show that the value of the property was largely in excess of the note, as a circumstance which the jury might consider in determining which of the parties was entitled to belief as to the agreement to pay the $100. *Banghart v. Hyde*, 49.
3. The principle of the maxim, *falsus in uno, falsus in omnibus*, may be extended to the entire testimony offered in behalf of a litigant who is shown to have been guilty of corrupt practices in procuring the testimony, or any part of it. *Van Voorhis v. Van Voorhis*, 60.
4. A party coming into a court of equity, and asking to be released from the bonds of matrimony and its obligations, must come with clean hands, and must keep them clean, so far as relates to the procurement of testimony to make out his case. *Id.*
5. Testimony tending to show that plaintiff's work in constructing a mill was not well done cannot be rebutted by proof of his ability as a carpenter and joiner, coupled with the opinion of the witness that plaintiff is a first-class man in every respect. *Maxted v. Fowler*, 106.
6. Where, in an action of ejectment against a mother and her

EVIDENCE—Continued.

infant children, the mother is disqualified under the statute from testifying to a conversation with plaintiff's deceased grantor, such disability extends to her co-defendants, who would be benefited by such testimony. *Fenton v. Miller*, 205.

7. Where a railroad company ceases to run cars over a portion of its road for 12 years, the question of abandonment is one to be determined from the facts, and not from testimony as to the intention of the officers of the railroad company either at the outset or during such period. *Hickox v. Railway Co.*, 237.

8. Evidence of usage is admissible only on the ground that the parties who made the contract were both cognizant of the usage, and must be presumed to have made their engagements with reference to it. *Pennell v. Transportation Co.*, 247.

9. The decisions in this State are uniform that custom cannot change a definite contract, and that no custom is binding which is not certain, definite, uniform, and notorious. *Id.*

10. A custom which is restricted to a certain locality or business, though shown to have become general and uniform, is not conclusive on the party, so that he may not give evidence that it was unknown to him. *Id.*

11. When a debtor undertakes to assign and convey his property in recognition of an indebtedness to his wife, originating 25 years before, no account of which has been kept, no evidence of the debt given, and no interest or principal paid or requested, the financial condition of both parties for the entire period is a proper subject of inquiry, and the broadest latitude should be allowed to the judgment creditor. *Miller v. Hanley*, 253.

12. Where in a suit brought to set aside a deed from a husband to his wife, charged to have been given in fraud of creditors, the complainant relies upon the testimony of the husband and wife to make out his case, he cannot discriminate between favorable and unfavorable testimony, where it is all equally probable, merely on suspicion that the unfavorable testimony is false. *Hicks v. McLachlan*, 278.

13. In the submission of any special question to a jury, whether the verdict is to be regarded as final or as advisory only, the same rules of evidence should be observed as in the ordinary

EVIDENCE—Continued.

jury trial; otherwise, the verdict should have little weight. *Worthington v. Major*, 325.

14. A question calling for the name of an association, to which the witness has referred in a letter written by him, does not necessarily call for the contents of a written instrument. *Leo Austrian & Co. v. Springer*, 344.
15. Fraud may be proved, like any other fact, by facts and circumstances which satisfy the mind of its existence, and it is a question for the jury when there is any evidence to warrant the finding. *Ferris v. McQueen*, 367.
16. The admission in evidence of plaintiff's bill of particulars, against his objection, is held to have been non-prejudicial error, if error at all, the Court failing to see how such admission could have influenced the jury against the plaintiff, and the defendants having the right to read and comment upon the bill of particulars to the jury, or in their presence, even though not in evidence. *Stevens v. Pendleton*, 406.
17. Testimony objected to as "incompetent" is properly admitted if competent for any purpose. *Gladstone Bank v. Keating*, 429.
18. Where a widow sues in her individual capacity to recover a demand belonging to her husband's estate, but which she claims as her own, evidence that she is administratrix and sole heir of the estate is properly excluded, no amendment being asked permitting her to maintain the suit as administratrix. *Wheeler v. Stewart*, 445.
19. It is not necessary, in order to a recovery upon an account stated, that the antecedent debt or demand between the parties be proved. *Armitage v. Saunders*, 482.
20. Where an employé agrees that his work shall be done to the satisfaction of his employer, a letter received from a customer for whom the employé has done a piece of work is not admissible to show the employer's dissatisfaction, or that the work was not well done, in the absence of proof that a conversation occurred between the employer and employé about it. *Koehler v. Buhl*, 496.
21. Evidence that the same fur cutters were employed while a furrier was working for the common employer as before, and that before his employment the work had been good, has no tendency to show that the furrier was an incompetent workman. *Id.*

EVIDENCE—Continued.

22. An impeaching question which fails to include the time and place of an alleged conversation, or the circumstances under which it took place, is insufficient, it not satisfactorily appearing that the witness identified the occasion. *Id.* 497.
23. Householders must be presumed to have such knowledge on the subject so as to render them competent to testify as to the value of articles of household furniture owned by them, such as householders are accustomed to buy. *Erickson v. Drazkowski,* 551.
24. Where, in a suit upon the alleged promise of the defendant to pay the plaintiffs a debt due them from a third party, it appears that an order was given to the plaintiffs by the defendant upon a fourth party, at the time the promise was made, for the amount of the debt, the order is admissible as a part of the *res gestæ. Bond v. McMahon,* 557.
25. The question whether the order was received in payment of the debt is one of fact for the jury. *Id.*
26. It is error to admit testimony of the statements of an agent, well calculated to induce the belief that his authority is unlimited, and at the same time exclude testimony offered by the principal to show its real extent. *Hensel v. Maas,* 563.
27. Where a suit upon notes is defended upon the ground that they were given to prevent the prosecution of the maker's son for felony, the will of the father, made some years before he gave the notes, by which he disinherited the son, is inadmissible in evidence. *Wolf v. Estate of Troxell,* 573.
28. Where, in a suit by an attorney to recover for professional services rendered in a specified suit, the bill of particulars includes charges for making trips to two certain cities, without fixing a price, and the making of the trips is not disputed, nor the claim that no price was agreed upon, plaintiff's testimony that he "made no charges for the trips" cannot be taken as meaning that he did not expect pay for making them, and the jury are correctly instructed that he is entitled to what they were reasonably worth. *Crowell v. Truax,* 585.
29. It is error to permit an attorney, in a suit brought by him to recover for professional services rendered the defendant in a particular suit, to testify to a conversation had with the defendant before the suit in which the services were rendered.

EVIDENCE—Continued.

was commenced, in which the plaintiff objected to being retained to defend a pending criminal suit against the defendant because defendant had had trouble with all the lawyers he came in contact with. *Id.*

30. Evidence that, two years before the services sued for were rendered, some negotiations had been had by letter, resulting in plaintiff's agreement to accept $10 per day for services, has no bearing upon the value of the services sued for, and is inadmissible. *Id.*

31. This case involves the question whether stock was taken as collateral security to, or in payment of, the notes sued upon. And it is held that the circuit judge erred in submitting the question to the jury, the evidence showing conclusively that the stock was taken as security, and not as payment. *Webber v. Turner*, 589.

32. Parol testimony is admissible to show that the merits of the case were not decided in a former suit, pleaded in bar. *Munro v. Meech*, 596.

33. Error in admitting testimony of the statements of an agent is cured by the principal calling the agent as a witness, and his denial that he made such statements. *Roux v. Lumber Co.*, 607.

See ATTACHMENT (2); ATTORNEY AND CLIENT (2-4); CHARGE TO JURY (1, 4, 6); CRIMINAL LAW (1, 3-5, 8, 9); CUSTOM (3); LIBEL AND SLANDER (5, 6); NEGLIGENCE (3-6, 9); PRINCIPAL AND AGENT (5).

EXCESSIVE DAMAGES—See DAMAGES (2).

EXECUTION.

1. The return of a sheriff of the levy of an execution on real estate, for want of goods or chattels whereof the damages and costs could be made, cannot be questioned in an action of ejectment brought by a purchaser at the execution sale, for value and without notice, against a prior grantee of the execution debtor, whose deed was not recorded until after the sale. *Luton v. Sharp*, 202.

2. Where an officer seeks to justify under an *alias* execution issued after the return-day of the original writ, and while it is in the officer's hands with a return *nulla bona* indorsed thereon after the release of a levy upon real estate which was found not to belong to the judgment debtor, it is in the

EXECUTION—Continued.

power of the court to direct a return of the original execution *nunc pro tunc*, and thus cure the irregularity in the issuance of the *alias* writ. *Miller v. Hanley*, 253.

3. An objection to an officer's justifying his seizure of property under an execution, because no notice of such defense has been given, is waived if not made in the trial court. *Id.*

See ATTACHMENT (4).

EXECUTORS AND ADMINISTRATORS—See AMENDMENT; ESTATES OF DECEASED PERSONS; EVIDENCE (18).

EXEMPLARY DAMAGES—See LIBEL AND SLANDER (4).

EXEMPTIONS—See ATTACHMENT (3).

EXPRESS COMPANIES—See CARRIERS.

FACTORS AND BROKERS—See REAL-ESTATE BROKER.

FALSE IMPRISONMENT—See CAPIAS.

FALSE REPRESENTATIONS—See SALE (1, 2, 11).

FEES—See CRIMINAL LAW (3).

FELLOW-SERVANT—See NEGLIGENCE (20).

FIRE INSURANCE.

1. Where insurance is written upon the oral application of the insured, who is not asked for any statement as to the title to the land on which the buildings stand, and makes none, the agent knowing that the land is held under a lease, the company cannot escape liability under a clause in the policy voiding it if the ground is not owned by the insured in fee, unless otherwise provided by agreement indorsed on the policy. *Ahlberg v. Insurance Co.*, 259.

2. Where an insurance agent, with full knowledge of the exact amount of continuous clear space kept and to be kept by the assured between the insured property and adjacent mills, decides that such clear space, in consideration of the situation of the property and its surroundings, is equivalent to a certain number of feet, as ordinarily understood by insurance men, and inserts that distance in a clause in the policy by which the assured warrants that such clear space shall be maintained, and receives the premium, the rate of which is

FIRE INSURANCE—Continued.

fixed in view of the premises, the company is estopped from avoiding the policy under the claim that the warranty as to clear space must be literally construed, without regard to the knowledge of the agent as aforesaid. *Michigan Shingle Co. v. Insurance Co.*, 389.

FRAUD—See ASSIGNMENT (1); CORPORATIONS (2, 3); EVIDENCE (15).

FRAUDULENT CONVEYANCES.

1. When a debtor undertakes to assign and convey his property in recognition of an indebtedness to his wife, originating 25 years before, no account of which has been kept, no evidence of the debt given, and no interest or principal paid or requested, the financial condition of both parties for the entire period is a proper subject of inquiry, and the broadest latitude should be allowed to the judgment creditor. *Miller v. Hanley*, 253.
2. Where in a suit brought to set aside a deed from a husband to his wife, charged to have been given in fraud of creditors, the complainant relies upon the testimony of the husband and wife to make out his case, he cannot discriminate between favorable and unfavorable testimony, where it is all equally probable, merely on suspicion that the unfavorable testimony is false. *Hicks v. McLachlan*, 278.
3. A husband conveyed 80 acres of land, including his homestead, to his wife, in payment of a *bona fide* indebtedness amounting, with the homestead exemption, to the value of the entire land, which conveyance is sustained as within the decision in *Brigham v. Fawcett*, 42 Mich. 542. *Id.*
4. An alleged course of dealing between a husband and wife, by which he becomes indebted to her for moneys advanced and loaned by her from time to time, the aggregate amount claimed to be due being the various sums originally advanced, with interest, without any deduction whatever on any account, is so against common experience as to call for a very careful scrutiny of the testimony by the court. *Ball v. Phenicie*, 355.
5. The court is not precluded from construing the testimony of a husband and wife, when called as witnesses for the complainant, in a suit brought to set aside a deed executed by the husband to the wife as fraudulent as to his creditors. *Id.*

FRAUDULENT CONVEYANCES—Continued.

6. In this cause the Court find that it was the intent of the husband to sell the land to his wife at an agreed price of $10,000, which it is found to have been worth, and that from mistake, or for other reason, she failed to pay him the full consideration price, his indebtedness to her, which was the sole consideration paid, being $2,169 less than the $10,000 and the value of certain personal property received by her; and the land is subjected to a vendor's lien for $2,169 in favor of the husband, to which lien the complainant, who is an execution creditor of the husband, is subrogated. *Id.*

7. A chattel mortgage given for $340 more than the amount actually owing to the mortgagee, for the purpose of delaying and defrauding the other creditors of the mortgagor, is void; but the question whether or not it was so given is one for the jury, when fairly submitted for their consideration. *Ferris v. McQueen*, 367.

8. A creditor has a right to extend further credit to a debtor, even though he is largely indebted to the creditor and to others at the time, and he has the right to secure his debt by a mortgage on the debtor's stock in trade in preference to other creditors; but he cannot enter into a fraudulent scheme to hold the debtor out as deserving of credit, and thus enable him to purchase goods of other creditors, for the very purpose of taking security upon them, knowing that they are not paid for. *Id.*

See ATTACHMENT (2).

FRAUDULENT REPRESENTATIONS.

Where a purchaser of land combines with the agent of the owners to buy the land of the principals, and to take advantage of the agent's betrayal of his trust, and profit by a reduction from the price which he had previously agreed with the agent to pay, he is not in a position to complain of the misstatements of the agent in regard to the land, nor will equity relieve him if, under such circumstances, he is deceived by the agent. *Pearce v. Ware*, 321.

GIFT.

Donees will be deemed to have accepted a gift, unless the contrary appears, where the donation is for their advantage. *In re Estate of Dunlap*, 11.

HIGHWAYS.

Failure to serve notice of an application to lay out a highway upon the occupant, who is a tenant of the owner of a life-estate in the land through which the highway is to run, is fatal to the proceedings. *Welch v. Hodge*, 493.

See NEGLIGENCE (4-11, 15).

HOUSEHOLDER—See ATTACHMENT (3); EVIDENCE (23).

HUSBAND AND WIFE—See CRIMINAL LAW (4); DIVORCE; DURESS (2); ESTOPPEL; FRAUDULENT CONVEYANCES (1-6); MARRIED WOMAN.

IMPEACHMENT—See CHARGE TO JURY (1); EVIDENCE (22).

IMPRISONMENT—See DURESS.

INDIANS.

Under a patent to a "not-so-competent Indian," in which the power of alienation is suspended except with the consent of the Secretary of the Interior, the patentee has a right to the use, occupancy, and enjoyment of the land, but has not the right to alienate it, either by direct or indirect means. *Auditor General v. Williams*, 180.

INFANTS—See ESTATES OF DECEASED PERSONS (6); STATUTE OF LIMITATIONS (1, 2).

INFORMATION—See CRIMINAL LAW (12, 14).

INSURANCE.

Where an accident insurance policy provides that no suit shall be brought, or arbitration required, to recover any sum, unless commenced within one year after the injury, and more than five months elapse, after the assured is fully advised that the company refuses to pay or arbitrate the claim, before the expiration of the year, a suit thereafter brought is barred by the provision cited, unless it has been waived by the company. *Law v. Accident Ass'n*, 266.

See FIRE INSURANCE; LIFE INSURANCE.

INTEREST.

Interest does not begin to run on a demand note until an actual demand of payment is made, or a suit is instituted, which is treated as a sufficient demand. *In re Estate of King*, 411.

See TENDER (2).

JUDGMENTS—See STATUTE OF LIMITATIONS (4).

JURAT—See AFFIDAVIT.

JURISDICTION—See ATTACHMENT (4); JUSTICES' COURTS (1, 3); PROCESS.

JURY.

1. Error cannot be assigned upon the ruling of the court sustaining a challenge to a juror upon the regular panel on the ground that he is over the statutory age; and especially is this so where the appellant expresses himself as satisfied with the jury as finally made up, and goes to trial without exhausting his peremptory challenges. *McGrail v. City of Kalamazoo*, 52.
2. While the fact that a juror is over the statutory age is not a ground for challenge for cause, the action of the circuit judge in excusing such a juror is not prejudicial error where it does not appear that there were not remaining a sufficient number of jurors of the regular panel to form a jury to try the case, or that the party complaining of such action had any ground of objection to any of the jurors who sat in the case, or that he had exhausted his peremptory challenges. *Luebe v. Thorpe*, 268.
3. In the submission of any special question to a jury, whether the verdict is to be regarded as final or as advisory only, the same rules of evidence should be observed as in the ordinary jury trial; otherwise, the verdict should have little weight. *Worthington v. Major*, 325.
4. Jurors generally understand that the burden of proof is upon the plaintiff in all cases, and it is reversible error to refuse to instruct them, in a case involving that question, when, and under what circumstances, the burden shifts to the defendant. *Stevens v. Pendleton*, 405.
5. While a party is ordinarily entitled to have his proper requests to charge given as proposed by him, or nearly so, yet, if they are substantially given in the general charge, even though in somewhat different language, error cannot be properly claimed. *Id.* 406.

JURY TRIAL.

The fullest latitude has been given, both by the profession and the courts, to How. Stat. § 6783, which provides that upon

JURY TRIAL—Continued.

an appeal from the probate court, if there be any question of fact to be decided, issue may be joined thereon under the direction of the court, and a trial thereof had by jury; and the absolute right of a party to have all questions of fact in this class of cases tried by a jury was determined in *Grovier v. Hall*, 23 Mich. 11, and such right may well be considered as settled in this State. *In re Estate of Stebbins*, 304.

See CRIMINAL LAW (2).

JUSTICES' COURTS.

1. A defendant in justices' court may show by affidavit, in support of a motion to dismiss the suit, that the summons was served more than 12 days before the return-day. *Lane v. Jones*, 540.
2. How. Stat. § 6940, which provides that "whenever a judgment shall be rendered by any justice of the peace against any party, unless otherwise herein provided, it shall be with costs of suit," applies to a judgment dismissing a suit upon motion of the defendant, supported by affidavit showing that the summons was served more than 12 days before the return-day. *Id.*
3. The docket entry of a justice of the peace of the date when a judgment was rendered cannot be changed by his return to a writ of *certiorari*, so as to show that he was out of the State on the day named, and that the judgment was actually rendered the day previous, when he was within his jurisdiction, and erroneously entered on his docket as of the following date. *Toliver v. Brownell*, 577.

See CRIMINAL LAW (2); LIBEL AND SLANDER (8).

LAND BROKER—See REAL-ESTATE BROKER.

LAND CONTRACT.

1. Many of the adjudicated cases upon what are termed "options" for the purchase of land have arisen upon unilateral contracts, which do not vest any interest in the land in the vendee, and only become binding by acceptance or performance of their conditions before the offer is withdrawn. *Gustin v. Union School-Dist.*, 502.
2. The rent reserved in a lease signed by both parties is a sufficient consideration for the agreement of the lessor to con-

LAND CONTRACT—Continued.

vey the land to the lessee at the expiration of the lease upon the payment of the agreed purchase price. *Id.*

3. A lease containing an agreement by the lessor to convey the leased premises to the lessee at the expiration of the term, upon payment of an agreed purchase price, vests in the lessee a right to purchase, which, with the lease, passes to his administrator, who may assign it, and, upon payment of the purchase price by the assignee within the time limited, the contract becomes a completed purchase, and is enforceable in equity. *Id.*

LANDLORD AND TENANT.

1. A parol agreement with a tenant from year to year, that if he sows wheat he may reoccupy the leased premises after the expiration of the tenancy for the purpose of harvesting the wheat, is enforceable, if founded upon a sufficient consideration. *Ladd v. Brown*, 136.

2. Where a tenant agrees to leave crops upon the ground corresponding to those which were growing at the time he took possession, an agreement with the landlord that if he sows such crops he may come back and harvest them after the expiration of the tenancy is without consideration. *Id.*

3. Where a tenant in possession under a lease for one year assents to its termination, and continues to hold from day to day under a new arrangement, which he afterwards repudiates, and claims the right to hold for another year under the terms of the prior lease, to which holding the landlord does not assent, he is not entitled to notice to quit. *Lane v. Ruhl*, 474.

4. Where, for 10 or 11 years after the filling up of an old well under a dwelling-house, the premises are continuously occupied, and no complaint is made to the landlord that, through the settling of the filling and the accumulation of water, the well has become a cesspool, or that disagreeable odors exist on the premises, he is not chargeable with such negligent ignorance as is equivalent to actual knowledge of such facts. *Kern v. Myll*, 477.

See ESTOPPEL; LAND CONTRACT (2, 3).

LIBEL AND SLANDER.

1. In these times, when it is charged that a franchise has been procured by the use of "boodle," there can be but one infer-

LIBEL AND SLANDER—Continued.

ence, namely, that the persons granting the franchise were, as officials, bribed by money to make the grant. *Boehmer v. Free Press Co.*, 7.

2. Where a publication charges a township board with granting a franchise, and the officers composing the board, naming them, and the highway commissioner, naming him, with signing it, and then refers to the transaction as suspicious, and expresses the opinion that "boodle" was used in obtaining the franchise, it is for the jury to say whether, from the whole of the article, the defamatory language used applies to the highway commissioner as well as to the township board. *Id.*

3. Any printed publication, the natural result of which is to bring ridicule or contempt upon the plaintiff, is, if untrue, libelous. *Hatt v. Evening News*, 114.

4. Where, in a suit for libel, it appears that information of the falsity of the statements contained in the article was brought home to the reporter of the defendant newspaper before the article was published, the jury may properly award exemplary damages. *Id.*

5. In an action for libel for publishing an article charging that the plaintiff was engaged to a young lady, and had the wedding set for the evening on which the article was published, and that another man, to whom she had been married on the same day, was a cousin of the plaintiff, and that plaintiff denied both the engagement and alleged relationship, testimony offered for the purpose of showing that plaintiff's associates ridiculed him, and that he left his employment in consequence, is inadmissible under an allegation that plaintiff "has been and now is greatly injured in his good name, fame, and credit, and brought into public scandal, humiliation, ridicule, and disgrace, and has suffered much annoyance, and incurred public derision, sarcasm, and contempt, and has otherwise been greatly injured." *Id.* 119.

6. Words, spoken or written, injurious to a person in his business, which are false and malicious, are actionable *per se*, and special damages need not be alleged or proved. *Henkel v. Schaub*, 542.

7. Plaintiffs' declaration is held to state a cause of action for slander upon their business of keeping the stallion named therein for breeding purposes, for gain and reward. *Id.*

LIBEL AND SLANDER—Continued,

8. The affidavit counted upon in this case, which was filed in support of an application for leave to appeal from a justice's judgment, does not charge fraud and dishonesty upon the justice, and is not libelous *per se*. *Murphy v. Nelson*, 554.

LIEN—See FRAUDULENT CONVEYANCES (6); MECHANIC'S LIEN.

LIFE INSURANCE.

1. The statute under which a mutual benefit association is organized, in force when a contract of insurance is made, forms a part of the contract, and governs as to its construction. *Silvers v. Benefit Association*, 39.
2. Under a certificate of insurance issued by a mutual benefit association organized under Act No. 104, Laws of 1869, prior to the revisory act of 1887 (Act No. 187) taking effect, by which the association agrees to pay the insurance to the wife, *heirs*, administrator, or assigns of the member, the insurance is payable to his surviving brothers and sisters and the children of a deceased brother, in case his wife and children and father and mother do not survive him. *Id.*
3. Act No. 187, Laws of 1887, which revises the laws providing for the incorporation of mutual benefit associations, and prohibits the issuance of a policy or certificate "upon any life in which the beneficiary named has not an insurable interest," but which provides that in case of a violation of said prohibition the insurance shall be payable to the *heirs* of the deceased member, is construed as embracing heirs who have not an insurable interest in the life of the member. *Id.*
4. Where the heirs of a deceased member of a mutual benefit association are entitled to a certain sum specified in the certificate of insurance if the assessment, which it is the duty of the association to make, produces that amount, and the association refuses to make such payment, the heirs may recover the sum named under a declaration alleging such facts, and the performance of the contract on the part of the member, supported by proof of such performance and of the refusal of the association to make the assessment, and that, if made, it would have produced more than the amount claimed. *Id.*

LIQUOR TRAFFIC.

1. Druggists in local option counties are governed as to the sale of liquor therein by the provisions of the general liquor law of the State. *Bishopp v. Circuit Judge*, 461.

LIQUOR TRAFFIC—Continued.

2. A druggist in a local option county, who has filed his bond, and who sells liquor in violation of the restrictions and requirements of the general liquor law, should be prosecuted under the local option law. *Id.*
3. Proof of the furnishing of intoxicating liquors to a minor is sufficient to warrant a recovery by the father of at least $50 damages, under section 20 of Act No. 313, Laws of 1887, which makes any person who sells or furnishes intoxicating liquors to a minor liable for both actual and exemplary damages therefor, to the father or mother, in such sum, *not less than $50 in each case,* as the court or jury shall determine. *Sterling v. Callahan,* 536.
4. In *Theisen v. Johns,* 72 Mich. 285, it was held that the phrase, "not less than $50 in each case," refers to the cause tried, and that where the claim for damages alleged in the declaration brings the case within the jurisdiction of a court of record, if the plaintiff is entitled to recover at all, he shall at least recover $50 and the costs of suit; and in *People v. Neumann,* 85 Mich. 98, it was held that furnishing liquor to a minor is "letting him have it," and that it is not necessary to hand the liquor to the minor in order to furnish it to him. *Id.*

LOCAL OPTION—See LIQUOR TRAFFIC (1, 2).

MANDAMUS.

1. A *mandamus* will not be granted to compel the assessment of taxable personal property, which has been omitted from the roll, at a time when the owner will be deprived of the substantial right of a review of the assessment, either as to the amount, or, if the property is assessed elsewhere, the legality of that assessment. *Maurer v. Cliff,* 194.
2. The writ of *mandamus* is a discretionary writ, and will not be granted to accomplish a confessedly illegal purpose, even though the officer against whom it is invoked is charged with an express duty under the statute. *Board of Supervisors v. Township of Mentor,* 386.
3. *Mandamus* will not lie to compel a circuit judge to vacate an order allowing an appeal to the circuit from an order of the probate court under How. Stat. § 6784, where the petition for leave to appeal sets forth facts sufficient to call for the exercise of the discretion of the circuit court, and

MANDAMUS—Continued.

such discretion has been exercised. *Sanborn v. Circuit Judge*, 519.

See ELECTIONS (6, 8, 17, 19).

MARKET—See MUNICIPAL CORPORATIONS (6).

MARRIED WOMAN.

1. A married woman may enter into partnership relations with others than her husband, and thus make her separate estate liable for the debts of the firm. *Vail v. Winterstein*, 230.
2. A married woman is liable for services rendered for her under an agreement made with her husband as her authorized agent. *Luebe v. Thorpe*, 268.
3. The married woman's act was passed for the protection of married women, and its purpose was to enlarge their rights, not to contract them, and it was not meant to deprive them of the right, either acting alone or jointly with others, of protecting their interests in property, either real or personal. *Gillespie v. Beecher*, 374.

MASTER AND SERVANT.

1. Where a person contracts to do work to the satisfaction of his employer, the employer is the judge, and the question of the reasonableness of his judgment is not for the jury. *Koehler v. Buhl*, 497.
2. The employer is not obliged in such a case to take advantage of the first infraction of the contract. *Id.*

See CONTRACT (1, 2, 6); EVIDENCE (20, 21); NEGLIGENCE (1, 2, 13, 14, 20).

MECHANIC'S LIEN.

1. The rights of a material-man at the time he files his lien cannot be other or greater than would be those of the contractor in a different action. *Jewell v. Paron*, 83.
2. A bill to enforce the lien of a material-man will be dismissed when it appears that the value of the work done on the building at the time the lien was filed was less than the sum before then paid to the contractor, and that the necessary cost of completing the building will exceed the unpaid portion of the contract price. *Id.*

MECHANIC'S LIEN—Continued.

3. A lien once waived cannot afterwards be revived. *Blakeley v. Moshier*, 299.
4. Taking a note in settlement of the amount due a material-man, which does not mature until after the expiration of the 30 days within which he is required to file his claim of lien in order to make it effectual as against a *bona fide* purchaser or incumbrancer without notice, amounts to a waiver of such lien to the extent of the items then furnished. *Id.*
5. In such a case, the refusal of the material-man to accept pay for materials furnished after the giving of the note, coupled with the statement that "he would collect it all together," is held a waiver of his right to claim a lien therefor. *Id.*

MENTAL CAPACITY.

Upon the facts in this case, a discharge of mortgage, executed by the mortgagee a few hours before her death, is set aside upon the grounds of undue influence and incapacity to make it. *Worthington v. Major*, 325.

MORTGAGE.

1. A mortgage upon land belonging to the estate of a deceased person, not given by the decedent, and not therefore a personal debt, is a debt against the estate, within the meaning of 3 How. Stat. § 6105, which authorizes the probate court to license an executor or administrator to borrow money by way of mortgage on the estate of the decedent "for the purpose of paying the debts of the estate." *In re Estate of Lambie*, 489.
2. The right of action, if any, of a grantee of part-paid swamp land, who secures the payment of a portion of the purchase price by mortgage, and remains in undisturbed possession for five years before the grantor secures his patent, and for ten years after its issuance, without being threatened with litigation growing out of the state of the title, or the non-payment of taxes assessed against the land before the patent was issued, which patent contained a reservation of liens which the State might have therefor, is upon the covenants of warranty in his deed. *McLelland v. A. P. Cook Co.*, 528.
3. Where, pursuant to the verbal instructions of the mortgagee, an agent executes an assignment of the mortgage, and

MORTGAGE—Continued.

delivers both instruments to the assignee, a sufficient title to the mortgage is transferred to the assignee to entitle him to foreclose it in equity. *Moreland v. Houghton*, 548.

4. Where, in such a case, it appears that the purpose of the transfer of the mortgage was to secure the assignee as surety, the fact that the assignment does not in terms purport to convey any right or title in the mortgage notes or debt will not prevent the vesting in the assignee of a beneficial interest in the mortgage. *Id.* 549.
5. The only question open to contest by the mortgagee in such foreclosure suit, in which he is made a defendant, is the superiority of complainant's title to his, and he cannot complain because of the non-production of the original mortgage notes, or a failure to account for their absence by satisfactory proof. *Id.*

See CHATTEL MORTGAGE; CORPORATIONS (2).

MUNICIPAL CORPORATIONS.

1. Act No. 321, Local Acts of 1891, which authorizes the City of Saginaw to borrow $75,000 for bridge purposes, did not repeal the provision of the charter of said city (section 25, tit. 5, Act No. 455, Local Acts 1889) authorizing the common council to issue bonds to the amount of $125,000 for the construction of the bridges therein named, but was intended to continue in force said charter provision, and to authorize the issuance of bonds for $200,000. *Tillotson v. City of Saginaw*, 240.
2. It was entirely competent for the Legislature, in the act of 1891, to place any restrictions it chose upon the council in issuing the bonds authorized by the act, although such restrictions are not found in the provision of the charter authorizing the issuance of the first bonds. *Id.*
3. Under section 12, tit. 9, of the charter of the city of Muskegon (Act No. 304, Local Acts of 1889), the common council has power, without a vote of the electors, to raise money for general purposes by the issue of bonds of the city, provided that the amount thereof, with that ordered to be raised by tax for such purposes, does not exceed the limit fixed by section 5 of that title. *Common Council v. Gow*, 453.
4. Strictly speaking, a resolution fixing a salary cannot be termed an act appropriating money, but it is, nevertheless,

MUNICIPAL CORPORATIONS—Continued.

an act making an appropriation of the compensation so fixed obligatory. *Fournier v. Common Council*, 463.

5. A provision of a city charter that no resolution appropriating money shall be passed, except by a majority of all of the aldermen elect, applies to a resolution fixing a *per diem* compensation for the street commissioner, under a provision requiring the council to determine annually the salary to be paid to the several city officers. *Id.*

6. Where a city erects a market building under a provision of its charter authorizing, but not requiring, it to erect and maintain market houses, it will be held to the same degree of care, not only in the construction, but in the plan of the construction itself, as a private corporation or an individual. *Barron v. City of Detroit*, 601.

See CERTIORARI (2); NEGLIGENCE (4–7).

MUTUAL BENEFIT ASSOCIATIONS—See LIFE INSURANCE.

NEGLIGENCE.

1. An employé of a railroad company who violates rules made for the protection of its employés is guilty of contributory negligence, unless he is compelled by positive orders of the company to violate such rules, or by the adoption of such a system of timing trains or conducting the business of the company as to make such violation necessary in order to do the work required of him. *Wilson v. Railroad Co.*, 20.

2. Where an experienced freight brakeman, instead of using side ladders provided by the company for mounting cars, goes between the cars of a moving train, and crawls over or under the bumpers of the cars, in order to reach a foothold or handhold on the opposite side, which he could use as a ladder to enable him to get to the top of the cars, no claim can be sustained for damages on account of the resulting consequences. *Id.*

3. Plaintiff was injured by being thrown from a street car while preparing to alight after signaling the conductor at one of the usual stopping places. The negligence complained of was that the conductor lead plaintiff to believe that he was about to stop the car by reaching his hand to the bell rope, and, in reliance upon his action, plaintiff put himself in a position to step safely off, which he could have done had the car stopped, but the conductor wrongfully neglected

NEGLIGENCE—Continued.

to stop the car, whereby plaintiff, by a *sudden jerk*, was thrown off and injured. There was no evidence to show what caused the sudden jerk which threw plaintiff off. And it is held:

a—The question of plaintiff's contributory negligence was properly left to the jury; but—

b—It is not made to appear by affirmative testimony that the street-car company neglected any duty, except to stop when first signaled by plaintiff, which neglect does not appear to have caused the injury, but rather the sudden jerk, the cause of which is not shown. *Bradley v. Railway Co.*, 35.

4. It is not competent for the plaintiff in a negligence case, who was injured by falling on a defective sidewalk by reason of the tipping up of a loose plank, to show that others fell upon the same walk three or four days *after* the accident to the plaintiff. *McGrail v. City of Kalamazoo*, 52.

5. It is competent in such a case, to rebut the theory of the plaintiff that the defect in the walk caused by the loose plank had existed so long, and that the walk was in such a bad state of repair, as to charge the city with notice of the particular defect complained of, for the defendant to show, by witnesses who testify to having frequently passed over the walk without noticing the defect, that if there had been a loose plank they would have noticed it. *Id.*

6. Notice to the proper officers of a city that a sidewalk is out of repair cannot be inferred unless the defect is open and notorious, of long standing, and of such a character as would naturally arrest the attention of passers-by; and the burden of proof to establish these facts is upon the party complaining of non-repair. *Id.*

7. Where, in a negligence case, it appears that the sidewalk inspector, some 10 days before the accident, went over the walk upon which plaintiff was injured by reason of the tipping up of a loose plank therein, tested the plank at the ends, and, finding some of them loose, nailed them down, and left the walk in a condition reasonably safe for public travel, in order to charge the city with such constructive notice as to render it liable for any *after* defect developing in the walk it must have been of such a character as naturally to arrest the attention of a passer-by, and the city must have had

NEGLIGENCE—Continued.

reasonable time, after such defect was noticeable, to repair it. *Id.*

8. Where a railroad company, acting under a notification from the common council of a village, constructs a sidewalk across its right of way at a street crossing, and for years assumes to keep the walk in repair, it becomes its duty to keep the walk in a reasonably safe condition for public travel. *Retan v. Railway Co.*, 146.
9. The testimony is held sufficient to authorize a finding by the jury that, though the defendant had no actual notice of the hole in the walk in which plaintiff's foot was caught, it had existed long enough to charge the defendant with such knowledge. *Id.*
10. The question of plaintiff's contributory negligence in returning to the crossing in face of the approaching train, which was nearly 600 feet away when he stepped upon the track, is held to have been properly left to the jury. *Id.*
11. It cannot be said that a person traveling along a way must at all times look where he steps or be charged with negligence as a matter of law, it being a question for the jury under all of the testimony. *Id.*
12. A judgment for $30,000 in a negligence case, as compensation for the pain and suffering endured by the plaintiff, and the loss to him for the remainder of his life of both feet, will not be reversed upon the ground that the damages awarded are excessive. *Id.*
13. Where an employé is familiar with a freight elevator, its construction, and use, and knows that, unless the brake is properly set and locked, a weight placed upon the car will cause it to descend, and that the brake must be set according to the weight of the material placed upon it for carriage, it is his duty to see that the brake is properly set and locked before using the elevator. *Robinson v. Wright & Co.*, 283.
14. The sudden breaking or giving way of a piece of machinery, properly constructed, is not sufficient to justify the conclusion of negligence. *Id.*
15. The primary purpose of a street-car track is not travel by the general public, but use by the street-railway company, and a person driving upon it must be deemed to have assumed the ordinary risks attending such use, one of which

NEGLIGENCE—Continued.

is held to be the dropping of a wheel into a rut outside the rail, worn by such frequent dropping of wheels. *Kornetzski v. City of Detroit*, 341.

16. Where, for 10 or 11 years after the filling up of an old well under a dwelling-house, the premises are continuously occupied, and no complaint is made to the landlord that, through the settling of the filling and the accumulation of water, the well has become a cesspool, or that disagreeable odors exist on the premises, he is not chargeable with such negligent ignorance as is equivalent to actual knowledge of such facts. *Kern v. Mull*, 477.

17. A brakeman who sees a man approaching a railroad track at a street crossing, who can stop with perfect safety when within three or four feet of the track, has a right to presume that he will do so, and is under no obligation to attempt to stop the cars until he sees that the man intends to step in front of them, regardless of the danger. *Graf v. Railway Co.*, 579.

18. Plaintiff's decedent is held to have been guilty of such negligence, in walking for 30 feet in plain view of an approaching train, and in attempting to cross defendant's track at a street crossing in front of the train, as to bar a recovery. *Id.*

19. Where a city erects a market building under a provision of its charter authorizing, but not requiring, it to erect and maintain market houses, it will be held to the same degree of care, not only in the construction, but in the plan of the construction itself, as a private corporation or an individual. *Barron v. City of Detroit*, 601.

20. A foreman whose duty it is to see that certain machinery, which is dangerous to employés working around it if uncovered, is covered, is not a fellow-servant of such employés in that regard. *Roux v. Lumber Co.*, 607.

NOTARY PUBLIC—See AFFIDAVIT.

NOTICE.

While it is true that notice to the agent is notice to the principal, yet the knowledge of the principal cannot be imputed to the agent with respect to a matter in which the latter is acting in his own interest. *Luton v. Sharp*, 202.

See ATTACHMENT (6); HIGHWAYS; LANDLORD AND TENANT (3); NEGLIGENCE (5-7, 9, 16).

NUISANCE—See LANDLORD AND TENANT (4).

OPINIONS—See EVIDENCE (5, 23).

OPTIONS.

Many of the adjudicated cases upon what are termed "options" for the purchase of land have arisen upon unilateral contracts, which do not vest any interest in the land in the vendee, and only become binding by acceptance or performance of their conditions before the offer is withdrawn. *Gustin v. Union School-dist.*, 502.

ORDER TO HOLD TO BAIL.

An order to hold to bail, granted by a circuit judge upon an affidavit setting forth facts indicating fraud or breach of trust, protects the party making the affidavit and applying for the issuance of the *capias*, when no malice or want of probable cause is averred or shown. *Johnson v. Morton*, 1.

OUSTER.

1. Until an heir who is in possession of the joint real estate has done or said something which is unequivocal notice to his co-heirs that he claims the entire property as against them, there can be no ouster and no adverse possession. *Fenton v. Miller*, 204.
2. The refusal of a guardian, who is in the possession of land owned by her wards as tenants in common with other heirs, to recognize the rights of such co-tenants in the land, a plea by the guardian of the general issue in an ejectment suit brought by the co-tenants on such refusal, and a plea by her of adverse possession to a bill for partition filed by the grantee of such co-tenants, amount to a total denial of the rights of such grantee, within the meaning of How. Stat. § 7812, which provides that in an action of ejectment brought by one tenant in common against a co-tenant, the plaintiff must show an actual ouster by the defendant, or the commission of some other act amounting to a total denial of plaintiff's right as such co-tenant. *Id.* 205.
3. Mere possession by one co-tenant is not sufficient to establish ouster and adverse possession, and especially where the co-tenants are brothers and sisters. Some clear, positive, and unequivocal act must be shown which amounts to an open denial of the co-tenant's rights. *Id.*

PAROL EVIDENCE—See EVIDENCE (32).

PARTIES.

1. An amendment substituting the brothers and sisters of a member of a mutual benefit association, and the children of a deceased brother,—who, as his heirs, are entitled to the insurance agreed to be paid, by reason of the death of the member's wife, who was named as beneficiary, and of his children, prior to his death,—as plaintiffs in a suit brought at the instance of his administrator in the name of the administrator of his wife's estate, to recover the insurance, is permissible. *Silvers v. Benefit Association*, 39.
2. Where a vendee secures a portion of the purchase price by his note and a mortgage on the land, and the securities are assigned to one of the two vendors, who receives enough of the cash payment to make, with the securities, his half of the purchase price, and he brings a suit to foreclose the mortgage, and the vendee defends on the ground of alleged fraudulent representations by the vendors and their agent, who negotiated the sale, and who was to share equally with the vendee in the profits realized from the land, no decree of rescission can be made until the other vendor and the agent are made parties to the foreclosure suit. *Pearce v. Ware*, 321.
3. A lessor who executes a lease to a husband and wife, and insists that the wife shall be a party thereto, and puts the lessees jointly into possession of the leased premises under the lease, is estopped from claiming that they have no right to join in a suit against him when he unlawfully disturbs them in that possession, and they sustain damage by reason of such disturbance. *Gillespie v. Beecher*, 374.
4. Where a widow sues in her individual capacity to recover a demand belonging to her husband's estate, but which she claims as her own, evidence that she is administratrix and sole heir of the estate is properly excluded, no amendment being asked permitting her to maintain the suit as administratrix. *Wheeler v. Stewart*, 445.

PARTNERSHIP.

1. A married woman may enter into partnership relations with others than her husband, and thus make her separate estate liable for the debts of the firm. *Vail v. Winterstein*, 230.
2. Either member of a copartnership has the power to protect

PARTNERSHIP—Continued.

himself by stipulating that the other member shall not have authority to bind the firm by signing checks, if notice is given to the bank which is the depository of the firm. *Gladstone Bank v. Keating*, 429.

3. Where, in a suit by a bank against copartners to recover for overdrafts paid on the defendants' checks, it appears from the plaintiff's own testimony that it had been instructed by the defendants to pay no checks not countersigned by their bookkeeper, and that the checks in suit were not so countersigned, the plaintiff, in order to recover, must show that the firm received the benefit of the money so paid, and it has the burden of making such showing. *Id.*

4. One partner drew his individual check, payable to the order of the bookkeeper of the firm, for the firm. The bookkeeper indorsed the check, and deposited it to the credit of the firm in the bank where it kept its account. The check, not being paid, was charged back in the firm account. And it is held that recovery can be had on the check in a suit brought by the bank against the firm to recover for overdrafts paid on the firm checks, it having been sent as a firm asset, and received and deposited as such to the knowledge of the drawer. *Id.*

5. Upon the transfer of the business of a copartnership, one of its creditors carried the balance due him into his account with the succeeding firm, and thereafter rendered monthly statements, showing a varying balance in his favor, amounting, when the account was closed, to more than the original debt. The payments made largely exceeded the original debt, and some of them exceeded the balance due at the time on the new account. And it is held that it was competent for the new firm to pay the debt of the old firm in the manner stated, and that the creditor had the right to apply the payments upon said debt in the order in which they were made. *Armitage v. Saunders*, 482.

6. In this case it is held that the question whether the defendants continued to do business as copartners under the old firm name after the retirement of plaintiff, and whether defendant Lobdell had knowledge of such retirement, and of the giving of a new note by the new firm to renew notes due at the time of such retirement, which the new firm were to pay, and which new note plaintiff indorsed and paid at

PARTNERSHIP—Continued.

maturity, was properly submitted to the jury, and that an affirmative finding by them warranted a verdict in favor of plaintiff for the amount so paid. *Berridge v. Slawson*, 484.

See ATTACHMENT (4).

PATENT—See INDIANS.

PAYMENT.

1. Upon the transfer of the business of a copartnership, one of its creditors carried the balance due him into his account with the succeeding firm, and thereafter rendered monthly statements, showing a varying balance in his favor, amounting, when the account was closed, to more than the original debit. The payments made largely exceeded the original debt, and some of them exceeded the balance due at the time on the new account. And it is held that it was competent for the new firm to pay the debt of the old firm in the manner stated, and that the creditor had the right to apply the payments upon said debt in the order in which they were made. *Armitage v. Saunders*, 482.
2. This case involves the question whether stock was taken as collateral security to, or in payment of, the notes sued upon. And it is held that the circuit judge erred in submitting the question to the jury, the evidence showing conclusively that the stock was taken as security, and not as payment. *Webber v. Turner*, 589.

See EVIDENCE (25).

PENETRATION—See CRIMINAL LAW (1).

PLEADING.

1. A declaration charging, in effect, that the defendants have procured the stock and control of a corporation by deception and fraud, and for the purpose of wrecking the corporation, is a declaration in case for fraud. *Smith v. Thompson*, 381.
2. It is not necessary to set forth, in a declaration in trover, in what way or by what means the conversion was accomplished. *Id.*

See AMENDMENT; ATTACHMENT (5); ATTORNEY AND CLIENT (1); CRIMINAL LAW (12, 14); EQUITY PLEADING; EXECUTION (3); LIBEL AND SLANDER (5–7); LIFE INSURANCE (4).

POOR DEBTORS.

Chapter 309, How. Stat., which provides for the release of poor debtors from imprisonment, does not apply to a debtor who has given a bond for the jail limits. *Griffin v. Helme*, 494.

PRACTICE IN CIRCUIT COURT.

1. Where, upon the trial of a suit brought against a husband and wife to recover commissions claimed to have been earned in negotiating a sale of real estate owned by the wife, it appears that if any liability exists it is that of the wife alone, the court may allow the plaintiff to discontinue as to the husband, and proceed against the wife, and to that end make the necessary amendments to his declaration. *Codd v. Seitz*, 191.
2. Circuit Court Rule No. 71, which provides that when an action *ex contractu* is brought against several persons the plaintiff may, at any time before the final submission of the cause, be allowed to discontinue as against any of the defendants, and proceed thereafter in like manner as if the action had been originally brought against the remaining defendants, does not authorize the plaintiff to proceed and take judgment against a joint obligor, or against more than one and less than all upon a joint and several obligation. *Id.* 192.
3. 3 How. Stat. § 7370*a*, which provides that where the defendant has given notice of set-off the plaintiff shall not be allowed to discontinue his suit or submit to a nonsuit, does not prevent the plaintiff from withdrawing certain items of his claim from the consideration of the court and jury. *Busch v. Jones*, 223.
4. How. Stat. § 7370*a*, which forbids a discontinuance or submission to a nonsuit by a plaintiff where the defendant has given notice of set-off, is construed as follows:

a—The object of the statute is to enable the defendant to proceed and prove his set-off in the case begun against him, and not to permit the plaintiff, at his own convenience or desire, to discontinue the suit, and thus deprive the defendant of a right which he acquires as soon as he submits his demand by way of set-off to adjudication in said suit.

b—This right is to be determined by the conditions existing at the time the notice of set-off is given; and, if at that time the defendant's demand is of such a character that it can be

PRACTICE IN CIRCUIT COURT—Continued.

legally set off, he is entitled to remain in court in that suit until an adjudication is had upon said demand, and if he establishes it he is entitled to a judgment for all exceeding the claim the plaintiff may prove against him in the case, which right remains, regardless of the fact that the plaintiff proves or does not prove any claim against him, and regardless of whether or not the plaintiff withdraws any portion of his claim from consideration in the case, or whether or not he offers any proof at all in his behalf. *Id.*

See AMENDMENT; ATTACHMENT (5).

PRACTICE IN SUPREME COURT.

1. The cost for printing the record in this case is limited to 200 pages, which it is held would have fairly presented all the questions the Court have been called upon to consider. *Maxted v. Fowler*, 107.
2. Where the record fail to show that the bill of exceptions contains all of the evidence, the Court are bound to presume that there was sufficient evidence to justify the instructions given by the trial court. *Bond v. McMahon*, 557.
3. Where the record fails to show that all of the testimony is included in the bill of exceptions, it will not be assumed that no foundation was laid for hypothetical questions. *Crowell v. Truax*, 585.

See MANDAMUS.

PRINCIPAL AND AGENT.

1. Plaintiff sued to recover moneys received by the defendant as his agent. The defendant limited his claim under his notice of set-off to a stated sum for services rendered the plaintiff. On the trial it appeared that, by an arrangement with the plaintiff, the defendant had paid off a mortgage on the plaintiff's property at a discount, he being at the time the attorney for the mortgagee. And it is held that defendant's recovery is limited under the pleadings to the amount actually paid. *Cleveland v. Miller*, 97.
2. While it is true that notice to the agent is notice to the principal, yet the knowledge of the principal cannot be imputed to the agent with respect to a matter in which the latter is acting in his own interest. *Luton v. Sharp*, 202.
3. Parties dealing with an agent have a right to presume that

PRINCIPAL AND AGENT—Continued.

his agency is general. *Leo Austrian & Co. v. Springer*, 344.

4. The presumption is that one known to be an agent is acting within the scope of his authority. *Id.*
5. Evidence of persons who have dealt with the principal through the agent is competent to show the character of the agency. *Id.*
6. The authority of the agent must depend, so far as it involves the rights of innocent third persons who have relied thereon, upon the character bestowed, rather than the instructions given. *Id.*
7. Whatever attributes properly belong to the character bestowed upon an agent will be presumed to exist, and they cannot be cut off by private instructions of which those who deal with the agent are ignorant; and among those attributes is the power to do all that is usual and necessary to accomplish the object for which the agency was created. *Id.*
8. Agents sent out by manufacturers to solicit orders are held out to the trade as having authority to act according to the general usage, practice, and course of business conducted by such manufacturers through such agents; and the question of what is usual or necessary to be done by such agents is ordinarily for the jury. *Id.*
9. Where, pursuant to the verbal instructions of the mortgagee, an agent executes an assignment of the mortgage, and delivers both instruments to the assignee, a sufficient title to the mortgage is transferred to the assignee to entitle him to foreclose it in equity. *Moreland v. Houghton*, 548.
10. The authority of an agent to make a sale of specific property, given six months prior to the sale, will be presumed to have continued until the time of the sale, in the absence of contrary proof. *Hensel v. Maas*, 563.
11. It is error to admit testimony of the statements of an agent, well calculated to induce the belief that his authority is unlimited, and at the same time exclude testimony offered by the principal to show its real extent. *Id.*
12. If the authority of an agent to make a sale of property is not continuous, it is error for the court to refer to a conversation had with the principal six months before the sale, in which, as claimed, such authority was admitted, and instruct

PRINCIPAL AND AGENT—Continued.

the jury that the right to recover depends upon the existence of authority at that time. *Id.*

See CONTRACT (1); EVIDENCE (33); REAL-ESTATE BROKER.

PRIVITY OF CONTRACT—See ACTION; BANKS AND BANKING (2).

PROBATE COURTS—See ESTATES OF DECEASED PERSONS (3-6); JURY TRIAL.

PROCESS.

The constitutional requirement that all process shall run "In the Name of the People of the State of Michigan" is mandatory. *Forbes v. Darling*, 621.

See JUSTICES' COURTS (1).

PROSECUTING ATTORNEY—See CRIMINAL LAW (5).

RAILROAD COMPANIES.

1. Where a railroad company, acting under a notification from the common council of a village, constructs a sidewalk across its right of way at a street crossing, and for years assumes to keep the walk in repair, it becomes its duty to keep the walk in a reasonably safe condition for public travel. *Retan v. Railway Co.*, 146.
2. Where a railroad company ceases to run cars over a portion of its road for 12 years, the question of abandonment is one to be determined from the facts, and not from testimony as to the intention of the officers of the railroad company either at the outset or during such period. *Hickox v. Railway Co.*, 237.

See NEGLIGENCE (1, 2, 10-12, 15, 17, 18).

REAL-ESTATE BROKER.

1. A broker who simply brings the parties together, and has no hand in the negotiations between them, they making their own bargain without his aid or interference, can legally receive compensation from both of them, although each was ignorant of his employment by the other. *Montross v. Eddy*, 100.
2. A commission dealer in lands, who makes a sale under an agreement with the owners that, if he effects a sale at a price fixed by them, they will pay him for it, can recover what his services were reasonably worth. *Id.*

REAL-ESTATE BROKER—Continued.

3. A land broker who negotiates a sale under an arrangement with the purchaser, which is unknown to the land-owner, that he is to have a commission on the sale, and who also receives a commission from the land-owner, which fact he conceals from the purchaser, cannot recover the agreed commission, it appearing that both parties relied to some extent upon his judgment as to the amount of timber on the land, and its value. *McDonald v. Maltz*, 172.

RECEIVING STOLEN PROPERTY—See CRIMINAL LAW (14-16).

RECORDING LAWS—See ASSIGNMENT FOR BENEFIT OF CREDITORS; EXECUTION (1).

RECOUNT—See ELECTIONS (5-11, 17-19).

REPRESENTATIONS—See SALE (1, 2, 11).

REQUESTS TO CHARGE—See JURY (5).

RES JUDICATA.

1. Where a plaintiff withdraws certain items of his claim from the consideration of the court and jury, and the parties proceed to trial upon the remaining items, and upon the items of defendant's set-off, and a judgment is rendered in favor of the defendant, the items so withdrawn are not *res judicata*. *Busch v. Jones*, 223.
2. It is a well-settled rule that courts will not review former decisions made by the same court in the same cause, and on the same state of facts. *Hickox v. Railway Co.*, 237.
3. A rule of law, as laid down by the Court in the decision of a cause, is to be applied, upon the same state of facts, in all subsequent proceedings in that cause. *Damon v. DeBar*, 594.

See EVIDENCE (32).

RETURN.

A defendant in justice's court may show by affidavit, in support of a motion to dismiss the suit, that the summons was served more than 12 days before the return-day. *Lane v. Jones*, 540.

See EXECUTION (1, 2).

SALE.

1. Where a vendor knows that the vendee is ignorant of the value of the property, and is relying upon his representation as to such value, and such representation does not take the form of a mere expression of opinion, and is in the nature of a statement of fact, the rule of *caveat emptor* does not necessarily apply. *Maixted v. Fowler*, 106.
2. A representation by the owner of mining stock to a proposed purchaser, who is unacquainted with mining property, that the stock is readily selling at one dollar per share, is a representation of a fact upon which the purchaser has a right to rely. *Id.*
3. In a suit by a vendee for breach of warranty as to the value of mining stock purchased by him, his right of recovery will not be affected by proof of his retention of the stock and employment by the mining company to assist in developing the mine. *Id.*
4. Under a contract for the purchase at an agreed price per thousand feet of all of certain grades of lumber which the vendor can manufacture from a specified class of logs, which lumber is to be paid for after its inspection by an inspector agreed upon by the parties, and its shipment, such inspection, in the absence of evidence showing a contrary intention by the parties, is a condition precedent to the passing of title. *Slade v. Lee*, 127.
5. In view of the conflict of testimony as to the contract of sale; of the manner in which the vendees treated the lumber after it was piled; what they said in regard to its ownership; the payment by them of $2,000 upon it; their direction to the vendor to ship the unburned though damaged lumber; and all of the other surrounding circumstances,—the question whether the title to the lumber passed before its inspection should have been left to the jury. *Id.* 128.
6. Where a number of cheeses are purchased by sample, with the right to return them if, after the lapse of 10 days in which to examine them, the vendee determines to do so, and complaint is made to him within the 10 days of the quality of some of the cheeses, which are returned to him, but he continues making sales for 16 days thereafter without notice to the vendor, he must be considered as having accepted the cheeses, and cannot set up a warranty and its breach. *Potter v. Lee*, 140.

SALE—Continued.

7. Where the minds of the parties to a proposed contract for the sale of machinery negotiated by correspondence never meet as to the time and terms of payment of the purchase price, no valid contract for such sale is made. *Wilkin Manfg. Co. v. Lumber Co.*, 158.

8. Where in such a case the vendor sues for the balance due on the machinery, which has been delivered to the vendee, and the vendee is permitted to recoup damages on account of the failure of the vendor to perform the claimed contract, and to make good the warranties therein contained, the vendee is not in a position to assign error upon the charge of the court upon the latter branch of the case. *Id.*

9. It is now generally held that if a proposition be made, to be accepted within a given time, it constitutes a continuing offer, which, however, may be retracted at any time. But if, at any time before it is retracted, it is accepted, such offer and acceptance constitute a valid contract. *Cooper v. Wheel Co.*, 272.

10. Where carriage manufacturers make an order for whatever wheels they may want during a specified season, at prices stated in the order, which is accepted by the orderee, the order and acceptance, when supplemented by the filling of one or more orders for wheels, become a valid and binding contract for the entire season. *Id.*

11. Where a purchaser of land combines with the agent of the owners to buy the land of the principals, and to take advantage of the agent's betrayal of his trust, and profit by a reduction from the price which he had previously agreed with the agent to pay, he is not in a position to complain of the misstatements of the agent in regard to the land, nor will equity relieve him if, under such circumstances, he is deceived by the agent. *Pearce v. Ware*, 321.

12. The procurement by a traveling agent of an order for goods, signed by the orderer, in which the prices and date of shipment are specified, supplemented by a paper signed by the agent and delivered to the orderer, acknowledging the ordering of the goods, describing them, and giving prices and time of shipment the same as in the order, creates a contract for the sale of the goods. *Leo Austrian & Co. v. Springer*, 343.

See CONTRACT (1, 2); DAMAGES (1, 3).

SCHOOLS AND SCHOOL-DISTRICTS.

1. A high school is not a "college" within the meaning of Act No. 147, Laws of 1891, creating the office of county commissioner of schools. *People v. Howlett*, 165.
2. A special first-grade certificate not granted at a regular public examination, or granted without an examination, or at a public examination after the election of the holder, will not make him eligible to said office. *Id.*
3. Holding the office of secretary of the board of examiners, under Act No. 266, Laws of 1887, is not equivalent to having held the office of county commissioner of schools under the act creating that office. *Id.*
4. A purchase of "Yaggy's Anatomical Study" can only be made so as to charge a school-district when authorized by a vote of the qualified electors thereof, lawfully assembled. *Western Publishing House v. School-dist.*, 262.
5. While the atlas may be convenient, it is not absolutely necessary in order that effect may be given to the purpose of 3 How. Stat. § 5067, which requires that instruction shall be given in physiology and hygiene, with special reference to the nature of alcohol and narcotics and their effect upon the human system, by the aid of text-books in the case of pupils who are able to read, and as thoroughly as in other studies pursued in the same school, said text-books to be first approved by the State Board of Education and selected by the school board. *Id.*

SET-OFF.

Where a plaintiff withdraws certain items of his claim from the consideration of the court and jury, and the parties proceed to trial upon the remaining items, and upon the items of defendant's set-off, and a judgment is rendered in favor of the defendant, the items so withdrawn may be set off by the plaintiff in a suit pending against him in favor of the defendant at the time of such withdrawal, if a proper subject of set-off. *Busch v. Jones*, 223.

See ATTORNEY AND CLIENT (1); PRACTICE IN CIRCUIT COURT (3, 4).

SODOMY—See CRIMINAL LAW (1).

SPECIFIC PERFORMANCE.

1. A father and mother agreed orally with their son that if he

SPECIFIC PERFORMANCE—Continued.

would return home, and build a house and settle down upon 40 acres of land owned by the father, they would convey the land to him. And it is held that equity will enforce such an agreement if clearly established by the testimony, and the son has actually entered upon the occupancy of the land, and performed on his part. *Russell v. Russell*, 122.

2. A lease containing an agreement by the lessor to convey the leased premises to the lessee at the expiration of the term, upon payment of an agreed purchase price, vests in the lessee a right to purchase, which, with the lease, passes to his administrator, who may assign it, and, upon payment of the purchase price by the assignee within the time limited, the contract becomes a completed purchase, and is enforceable in equity. *Gustin v. Union School-Dist.*, 502.

STATUTES.

1. Where two acts of the Legislature cover the same subject, both must be given effect, if possible. *Tillotson v. City of Saginaw*, 240.
2. Repeals by implication are not favored, and will be allowed only when the inconsistency and repugnancy are plain and unavoidable. *Id.*

STATUTE OF FRAUDS.

1. Where money is loaned upon the credit of the president of a corporation, for which he gives his individual notes, and it is sought to charge the corporation with liability on the ground that it received the money, as shown by certain entries on its books, its liability, if any, is collateral, and its promise must be evidenced in writing, signed by it. *Baumann v. Manistee Salt & Lumber Co.*, 363.
2. A writing which is relied upon to take the promise out of the statute of frauds must contain all the terms of the contract. Such promise cannot rest partly in parol and partly in writing. *Id.*
3. While a declaration of trust need not be contained in the conveyance to the trustee, and any form of instrument, whether a letter addressed to a third person or the answer of the alleged trustee in a chancery proceeding, will be sufficient to answer the requirements of the statute, there being no prescribed form of words in which the declaration must

STATUTE OF FRAUDS—Continued.

be made in order to make it valid, yet it must contain the substantial terms of the trust, or at least sufficient to identify the subject-matter by writing. *Renz v. Stoll*, 377.

STATUTE OF LIMITATIONS.

1. How. Stat. § 8713, which bars an action on the case unless commenced within six years after the cause of action accrues, does not commence to run as against an infant until he attains his majority. *Keating v. Railroad Co.*, 219.
2. The commencement of suit by an infant, by his next friend, will not set the statute of limitations in motion, so as to deprive him of its full benefit after he becomes of age. *Id.*
3. While the statute of limitations should be construed according to its terms, it is not proper to give it a construction so technical in its character as to deprive a party of a legal right, which the terms of his contract plainly give to him. *Busch v. Jones*, 223.
4. Under How. Stat. § 8736, an action of *assumpsit* may be brought upon a circuit court judgment at any time within ten years after its entry. *Snyder v. Hitchcock*, 313.
5. In response to the request of a payee that the maker give him a new note for the principal and interest of the old one, made a day or two before its outlawry, the maker indorsed on the note, "the within note shall not be outlawed," and signed the indorsement, and delivered the note to the payee, with the remark that that would make it all right with him. And it is held that the effect of the indorsement was to renew the original promise to pay, and that it was a sufficient acknowledgment to take the case out of the statute of limitations. *In re Estate of King*, 411.

STATUTES CONSTRUED.

1. Under a certificate of insurance issued by a mutual benefit association organized under Act No. 104, Laws of 1869, prior to the revisory act of 1887 (Act No. 187) taking effect, by which the association agrees to pay the insurance to the wife, *heirs*, administrator, or assigns of the member, the insurance is payable to his surviving brothers and sisters and the children of a deceased brother, in case his wife and children and father and mother do not survive him. *Silvers v. Benefit Association*, 39.

STATUTES CONSTRUED—Continued.

2. Act No. 187, Laws of 1887, which revises the laws providing for the incorporation of mutual benefit associations, and prohibits the issuance of a policy or certificate "upon any life in which the beneficiary named has not an insurable interest," but which provides that in case of a violation of said prohibition the insurance shall be payable to the *heirs* of the deceased member, is construed as embracing heirs who have not an insurable interest in the life of the member. *Id.*

3. Section 3 of Act No. 147, Laws of 1891, which provides that no person shall be eligible to the office of county commissioner of schools who shall not be a graduate in the literary department of some reputable college, university, or State normal school, or hold a State teacher's certificate, or who shall not have held a first-grade certificate within two years next preceding the time of his or her election, or shall [not] have held the office of county commissioner under the act, is construed as follows:

a—A high school is not a "college," within the meaning of the act.

b—A person holding a special first-grade certificate not granted at one of the regular public examinations provided for in Act No. 266, Laws of 1887, and Act No. 147, Laws of 1891, or who holds a first-grade certificate granted to him without an examination, or who receives such a certificate upon a public examination after his election, is not eligible to the office of county commissioner of schools.

c—Holding the office of secretary of the board of examiners under Act No. 266, Laws of 1887, is not a compliance with the provision, "or shall have held the office of county commissioner under this act." *People v. Howlett*, 165.

4. Logs and lumber piled along a railroad track, awaiting the convenience of the owner or the facilities for shipment, are not *in transit*, within the meaning of the tax laws of 1885 and 1891, and are liable to assessment in the township where situate. *Maurer v. Cliff*, 195.

5. The refusal of a guardian, who is in the possession of land owned by her wards as tenants in common with other heirs, to recognize the rights of such co-tenants in the land, a plea by the guardian of the general issue in an ejectment suit brought by the co-tenants on such refusal, and a plea by her

STATUTES CONSTRUED—Continued.

of adverse possession to a bill for partition filed by the grantee of such co-tenants, amount to a total denial of the rights of such grantee, within the meaning of How. Stat. § 7812, which provides that, in an action of ejectment brought by one tenant in common against a co-tenant, the plaintiff must show an actual ouster by the defendant, or the commission of some other act amounting to a total denial of plaintiff's right as such co-tenant. *Fenton v. Miller*, 205.

6. How. Stat. § 8713, which bars an action on the case unless commenced within six years after the cause of action accrues, does not commence to run as against an infant until he attains his majority. *Keating v. Railroad Co.*, 219.

7. 3 How. Stat. § 7370*a*, which provides that where the defendant has given notice of set-off the plaintiff shall not be allowed to discontinue his suit or submit to a nonsuit, does not prevent the plaintiff from withdrawing certain items of his claim from the consideration of the court and jury. *Busch v. Jones*, 223.

8. 3 How. Stat. § 7370*a*, which forbids a discontinuance or submission to a nonsuit by a plaintiff where the defendant has given notice of set-off, is construed as follows:

a—The object of the statute is to enable the defendant to proceed and prove his set-off in the case begun against him, and not to permit the plaintiff, at his own convenience or desire, to discontinue the suit, and thus deprive the defendant of a right which he acquires as soon as he submits his demand by way of set-off to adjudication in said suit.

b—This right is to be determined by the conditions existing at the time the notice of set-off is given; and, if at that time the defendant's demand is of such a character that it can be legally set off, he is entitled to remain in court in that suit until an adjudication is had upon said demand, and if he establishes it he is entitled to a judgment for all exceeding the claim the plaintiff may prove against him in the case, which right remains, regardless of the fact that the plaintiff proves or does not prove any claim against him, and regardless of whether or not the plaintiff withdraws any portion of his claim from consideration in the case, or whether or not he offers any proof at all in his behalf. *Id.*

9. Act No. 321, Local Acts of 1891, which authorizes the City

STATUTES CONSTRUED—Continued.

of Saginaw to borrow $75,000 for bridge purposes, did not repeal the provision of the charter of said city (section 25, tit. 5, Act No. 455, Local Acts 1889) authorizing the common council to issue bonds to the amount of $125,000 for the construction of the bridges therein named, but was intended to continue in force said charter provision, and to authorize the issuance of bonds for $200,000. *Tillotson v. City of Saginaw*, 240.

10. The fullest latitude has been given, both by the profession and the courts, to How. Stat. § 6783, which provides that upon an appeal from the probate court, if there be any question of fact to be decided, issue may be joined thereon under the direction of the court, and a trial thereof had by jury; and the absolute right of a party to have all questions of fact in this class of cases tried by a jury was determined in *Grovier v. Hall*, 23 Mich. 11, and such right may well be considered as settled in this State. *In re Estate of Stebbins*, 304.

11. Under How. Stat § 8736, an action of *assumpsit* may be brought upon a circuit court judgment at any time within 10 years after its entry. *Snyder v. Hitchcock*, 313.

12. The married woman's act was passed for the protection of married women, and its purpose was to enlarge their rights, not to contract them, and it was not meant to deprive them of the right, either acting alone or jointly with others, of protecting their interests in property, either real or personal.

13. A respondent has the right under How. Stat. §§ 7097, 7099, to be tried, for an offense cognizable by a justice of the peace, by a jury, or by the justice without a jury, as he may elect. *People v. Steele*, 437.

14. Under section 12, tit. 9, of the charter of the city of Muskegon (Act No. 304, Local Acts of 1889), the common council has power, without a vote of the electors, to raise money for general purposes by the issue of bonds of the city, provided that the amount thereof, with that ordered to be raised by tax for such purposes, does not exceed the limit fixed by section 5 of that title. *Common Council v. Gow*, 453.

15. A witness who is required to recognize for his appearance to testify on behalf of the people, and is committed to jail on his failure to enter into such recognizance, must be held to have been in attendance upon the court during the time

STATUTES CONSTRUED—Continued.

of his commitment, and is entitled to the fees allowed by law to witnesses for the people in criminal cases, under How. Stat. § 9472. *Robinson v. Chambers*, 471.

16. A mortgage upon land belonging to the estate of a deceased person, not given by the decedent, and not therefore a personal debt, is a debt against the estate, within the meaning of 3 How. Stat. § 6105, which authorizes the probate court to license an executor or administrator to borrow money by way of mortgage on the estate of the decedent "for the purpose of paying the debts against the estate." *In re Estate of Lambie*, 489.
17. Chapter 309, How. Stat., which provides for the release of poor debtors from imprisonment, does not apply to a debtor who has given a bond for the jail limits. *Griffin v. Helme*, 494.
18. *Mandamus* will not lie to compel a circuit judge to vacate an order allowing an appeal to the circuit court from an order of the probate court under How. Stat. § 6784, where the petition for leave to appeal sets forth facts sufficient to call for the exercise of the discretion of the circuit court, and such discretion has been exercised. *Sanborn v. Circuit Judge*, 519.
19. Proof of the furnishing of intoxicating liquors to a minor is sufficient to warrant a recovery by the father of at least $50 damages, under section 20 of Act No. 313, Laws of 1887, which makes any person who sells or furnishes intoxicating liquors to a minor liable for both actual and exemplary damages therefor, to the father or mother, in such sum, *not less than $50 in each case*, as the court or jury shall determine. *Sterling v. Callahan*, 536.
20. How. Stat. § 6940, which provides that "whenever a judgment shall be rendered by any justice of the peace against any party, unless otherwise herein provided, it shall be with costs of suit," applies to a judgment dismissing a suit upon motion of the defendant, supported by affidavit showing that the summons was served more than 12 days before the return-day. *Lane v. Jones*, 540.
21. The publication of notice of attachment under How. Stat. § 8003, is only required where neither of the defendants can be found. *Smith v. Runnells*, 617.
22. How. Stat. § 5810, which provides that when any testator

STATUTES CONSTRUED—Continued.

shall omit to provide in his will for any of his children, and it shall appear that such omission was not intentional, such child shall take the same share as if he had died intestate, does not apply where the will makes provision for the support and education of all of the testator's children until they attain their majority. *Forbes v. Darling*, 621.

23. How. Stat. § 9142, which provides for a greater maximum punishment for receiving stolen property than for the larceny itself, does not authorize cruel and unusual punishment. *People v. Smith*, 644.

See ELECTIONS.

STREET RAILWAYS.

The primary purpose of a street-car track is not travel by the general public, but use by the street-railway company, and a person driving upon it must be deemed to have assumed the ordinary risks attending such use, one of which is held to be the dropping of a wheel into a rut outside the rail, worn by such frequent dropping of wheels. *Kornetzski v. Detroit City Railway*, 341.

See NEGLIGENCE (3).

SUBROGATION—See FRAUDULENT CONVEYANCES (6).

TAXES.

1. Land patented to a "not-so-competent Indian," under a treaty prohibiting its alienation by the patentee without the consent of the government, which provision is incorporated in the patent, is not subject to taxation. *Auditor General v. Williams*, 180.
2. The intentional omission from the tax roll of a township of $800,000 worth of personal property taxable therein, and the assessment of the real estate of the township at one-fourth of its cash value, will invalidate the State and county taxes levied upon the lands of a tax-payer in other townships in the same county, which were assessed at their cash value. *Auditor General v. Prescott*, 190.
3. A *mandamus* will not be granted to compel the assessment of taxable personal property, which has been omitted from the roll, at a time when the owner will be deprived of the substantial right of a review of the assessment, either as to

TAXES—Continued.

the amount, or, if the property is assessed elsewhere, the legality of that assessment. *Maurer v. Cliff*, 194.

4. Logs and lumber piled along a railroad track, awaiting the convenience of the owner or the facilities for shipment, are not *in transit*, within the meaning of the tax laws of 1885 and 1891, and are liable to assessment in the township where situate. *Id.* 195.

5. In such a case the fact of the existence of contracts to load the logs and lumber, or that some event has transpired to prevent shipment, or that it is the intention of the owner to ship in the near future, should have no weight with the supervisor. *Id.*

6. The curative provisions of the tax law do not apply to jurisdictional defects in the tax proceedings. *Township of Caledonia v. Rose*, 216.

7. The provision of the tax law requiring the board of review of a township to meet upon certain specified days for the purpose of reviewing and correcting the assessment roll is mandatory. *Id.*

8. A tax-payer has the right to assume that the board of review will remain in session the full statutory time, and to arrange to be present on any day he may choose, and if, by reason of the failure of the board to perform this statutory duty, he is prevented from appearing and objecting to his assessment, the tax levied against him thereon is void. *Id.*

9. The board of review is a tribunal provided by law, in which the tax-payer may appear to contest an unequal or excessive assessment, and his failure so to appear estops him from assailing the assessment afterwards. *Id.*

10. The question whether an assessment is excessive or not is not for the courts to try, the board of review being the only tribunal having jurisdiction of that question. *Id.*

11. A writ of *mandamus* will not be granted to compel a supervisor to spread upon his roll that portion of the county tax certified to him which, while purporting to have been voted for the purchase of a poor-farm, is really being raised to aid in securing a location for a tannery in the county. *Board of Supervisors v. Township of Mentor*, 386.

TENANCY IN COMMON.

A tenancy in common exists where two or more persons hold

TENANCY IN COMMON—Continued.

possession of lands and tenements at the same time, by several and distinct titles. The quantities of their estate may be different, their proportionate shares of the premises may be unequal, the modes of acquiring their titles may be unlike, and the only unity between them be that of possession. *Fenton v. Miller*, 205.

See OUSTER.

TENDER.

1. A tender in bank notes is good, unless objected to on the ground that they are not legal tender. *Koehler v. Buhl*, 496.
2. Upon the facts stated in the opinion, the Court find that the tender made by complainant to defendant's son was sufficient to relieve her from the payment of interest on the amount due the defendant after such tender was made. *Crawford v. Osmun*, 533.

THREATS OF PROSECUTION—See BILL AND NOTES (4–6).

TOWNSHIPS—See CERTIORARI (2).

TROVER.

1. Trover lies for the conversion of shares of stock. *Smith v. Thompson*, 381.
2. It is not necessary to set forth, in a declaration in trover, in what way or by what means the conversion was accomplished. *Id.*

See ASSIGNMENT (2).

TRUSTS AND TRUSTEES.

1. Where a depositor pays his note, held by his bank for collection, with his check, the drawing of which is warranted by the state of his account, and the bank is at the time insolvent, and no money is set apart by it for the owners of the note, or reaches the hands of the receiver soon after appointed for the bank, the owners cannot claim that by the transaction a trust fund is created, which must be treated as such by the receiver, and paid to them in full, without regard to the claims of other creditors of the bank. *Sherwood v. Milford State Bank*, 78.
2. There is no prescribed form of words in which a declaration

TRUSTS AND TRUSTEES—Continued.

of trust must be made in order to make it valid, yet the writing evidencing it must contain the substantial terms of the trust, or at least sufficient to identify the subject-matter by writing. *Renz v. Stoll*, 377.

See WILL (4–6).

USAGE—See CUSTOM; EVIDENCE (8).

VENDOR AND VENDEE—See ASSIGNMENT FOR BENEFIT OF CREDITORS; EXECUTION (1); SALE.

VENDOR'S LIEN—See FRAUDULENT CONVEYANCES (6).

WAIVER—See EVIDENCE (1); EXECUTION (3); INSURANCE; MECHANIC'S LIEN (2, 3).

WAREHOUSEMAN—See CARRIERS (2).

WARRANTY—See DAMAGES (1); DEED (2); FIRE INSURANCE (2); SALE (3, 6, 8).

WILL.

1. The question whether or not a testator omitted to provide in his will for certain of his children unintentionally or by accident or mistake is one of fact, which the contestant has a right to have submitted to a jury, whose verdict in his favor is conclusive, if there is any competent evidence submitted to them upon which to base it. *In re Estate of Stebbins*, 304.
2. A clause in a will by which the testator bequeaths to his son the family Bible, if he desires it, and, if not, providing that it may be put into the hands of a granddaughter, naming her, and a clause directing the division of his books and clothing among his brothers and their families, but giving the granddaughter the privilege of selecting from them, if it is her wish, cannot be said, as matter of law, to make provision for the granddaughter, within the meaning of How. Stat. § 5810, which provides that when any testator shall omit to provide in his will for any of his children, or for the issue of any deceased child, and it shall appear that such omission was not intentional, but was made by mistake or accident, such omitted heir shall have the same share in the estate as if the testator had died intestate. *Id.*

WILL—Continued.

3. The omission to provide may be shown to have been unintentional either by the terms of the will or by extrinsic parol testimony; and the relation of the testator to the objects of his bounty and to the omitted heir, as well as his intelligence, his mental and physical condition, and the circumstances connected with the making of the will, are all proper matters for consideration by the jury. *Id.* 305.
4. A devise of all of the testator's property, including his farm, to his wife, with directions to pay his debts and funeral expenses, and to keep and use the residue for the support and maintenance of herself and family and the education of his children, is construed as a devise in fee of the farm, burdened with the duty or trust aforesaid, which is enforceable in equity. *Forbes v. Darling*, 621.
5. Where a will provides for the support and education of all of the testator's children during their minority, he cannot be charged under How. Stat. § 5810, with having omitted to provide for his children. *Id.*
6. If the children have been supported and schooled, although in a meager manner, the court will not inquire further, or require from the wife or her estate a retrospective accounting. *Id.*

WITNESSES—See CHARGE TO JURY (1); CRIMINAL LAW (3-5, 8-10); EVIDENCE (1, 3, 6, 12).

WRIT AND PROCESS—See PROCESS.

LAWS REFERRED TO.[1]

Constitution of Michigan.[2]

	PAGE
Art. iv. § 9	449
Art. vi. §§ 18, 35	438, 626
Art. viii. § 5	459
Art. xiii. § 4	168
Art. xvi. § 5	232
Art. xviii. § 12	573

Revised Statutes of 1846.

Page 730	28

[1] See Statutes Construed.
[2] See Constitutional Law.

LAWS REFERRED TO.—*Continued.*

Howell's Statutes.

Chap. 309 495
§ 93 441
179, 181, 203, 206, 217 457
1583 ..... 126, 179
3949-3960 ..... 42, 43
5052, subd. 7, 12 265
5067 265
5073, subd. 6 264
5786 623
5810 ..... 307, 311, 625
6105 491
6179, 6185 ..... 365, 379
6295 232
6485 438
6783, 6784 ..... 308, 524
§ 6940 541
7097 438
7290 625
7302, 7304 4
7305 4
7555, 7571 54
7730, 7733 ..... 619, 620
7812 211
8002, 8003 620
8002, 8007 619
8713, 8718 ..... 220, 314, 315
8719, 8736 ..... 314, 315
9142 645
9292 27
9535 646

Three Howell's Statutes.

§ 234*a* 508, 517
11706*b*8, *i*4, 5 ..... 217, 218
1298 494
2283*e*3 539
§ 3960*d*5 ..... 43, 44
7099 438
7370*a* 225
7545 ..... 212, 365

Session Laws.

PAGE

1881, Act 149 397
1885, Act 216 300
1887, Act 143 631
1887, Act 165 265
1887, Act 187, § 16 43
1887, Act 208 ..... 449, 451, 456, 508, 517
1887, Act 266 170
1887, Act 313 462
1889, Act 67 491
1889, Act 195, § 52 181
1889, Act 207 ..... 462, 463
1889, Act 227 203
1889, Act 455 (Local) 241
1889, Page 120, §§ 5, 12, 19, (Local) 454
1891, Act 147 ..... 166, 167, 170
1891, Act 190 ..... 441, 442, 469, 470
1891, Act 200, § 11 198
1891, Act 321 (Local) 241, 242

Circuit Court Rules.

No. 16 619
No. 71 193

4997 078