MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

OCTOBER 31 1883 TO FEBRUARY 8 1884

HENRY A. CHANEY

STATE REPORTER

VOL 52

CHICAGO
CALLAGHAN & CO
1885

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Rec. Apr. 23, 1885

SUPREME COURT OF MICHIGAN

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(To January 1, 1884.)

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of Battle Creek.

(From December 31, 1883.)

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of Ann Arbor

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(To January 1, 1884.)

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MR. JUSTICE CHRISTIANCY.

On Tuesday, June 3, 1884, the Honorable Otto Kirchner, formerly Attorney General of the State, speaking in behalf of the Bar presented to the Supreme Court a portrait by Ives of the Honorable Isaac Peckham Christiancy, formerly one of the Judges of the Court.

Mr. Kirchner addressed the Court as follows:

May it please your honors!

I have been requested by my brethren of the bar to present to you the portrait of Isaac P. Christiancy.

When this Court was re-organized in 1857 Mr. Christiancy was elected to a seat upon its bench. He entered upon its duties in January of the following year and adorned this Court from that time until the winter of 1875 when he resigned to enter the Senate of the United States, His opinions, scattered through thirty volumes of the official reports of this Court, are his most enduring monument. No mere words can add to its glory. His brethren of the bar, impelled by a desire to testify their high appreciation of his worth and to keep green his memory in the place where, as a judge, he achieved distinguished success, have caused his portrait to be painted and to be presented to this Court.

In obedience to their expressed wishes and in accordance with my own as well, I ask your honors to accept the picture and give it a permanent place upon the walls of this room.

The Chief Justice replied: The Court take great pleasure in receiving the very fine portrait of their former associate so fittingly presented to them by the bar of the State. The Court respond to every word that has been said in the presentation of this picture. They remember with pride

and great pleasure their former association with Mr. Justice Christiancy. They can very feelingly recall at this time, as they do at all times, the kindness and courtesy that characterized all their association with him. He was emphatically a man of kind and tender feelings. He was a man with whom it was a pleasure at all times to be associated. He was a man, as has been truly said in the address that has now been made, whose ability reflected credit to the State, and credit especially upon the Court of which he was a member. Of his great ability the reports and opinions that were prepared by him are sufficient evidence, but the members of the Court more than the general public felt the strength and greatness of his power, because it was displayed in a great many ways so that it compelled recognition from his associates. Sometimes there was an entire modification of views, and sometimes an entire surrender of their own opinions when considered with his own clear and strong convictions. We remember these things with pleasure because we participated to a considerable extent in the credit brought to the Court by a member of the Court. We take pleasure in saying to the bar of the State that in doing this honor to Judge Christiancy, in presenting this likeness to adorn this room, they at the same time have done credit to themselves and credit to the cause of justice, of which he was so fitting and honorable a representative.

OCTOBER TERM 1883.*

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ELISHA BUCKLEY v. OBED WHEELER AND THOMAS T. ELLIOTT.

Debtor's absolute control of exempt property.

1. A debtor can do what he pleases with any of his property that is exempt from execution, and his disposition of it cannot subject it to execution or affect the exemption.

2. The purchaser of goods exempt from execution obtains a title which overrides the lien of any subsequent attachment levy, and indeed of any previous levy unless it be for unpaid purchase money; and the title cannot be destroyed by subsequent admissions or acts of the debtor.

Error to Berrien. (A. J. Smith, J.) Oct. 17.—Oct. 31.

REPLEVIN. Plaintiff brings error. Reversed.

Geo. S. Clapp and *Geo. W. Bridgman* for appellant. The purchaser of goods exempt from execution can hold them against any levy of attachment whether made before or after: *Rosenthal v. Scott* 41 Mich. 632; *Waite v. Mathews* 50 Mich. 393; the sale is not in fraud of creditors: *Smith v. Rumsey* 33 Mich. 183.

James A. Kellogg and *O. W. Coolidge* for appellees. A debtor's right of exemption is a mere personal privilege of which no one can claim the benefit but himself: *Mickes v. Tousley* 1 Cow. 114; *Earl v. Camp* 16 Wend. 571; *Smith v. Hill* 22 Barb. 660; Thompson on Homesteads § 820; *Butt v. Green* 29 Ohio St. 670; nor can the owner of

* Continued from Vol. 51.

property levied upon transfer, subsequent to the levy, to a third party his exemption right, so as to defeat the claim of an attachment or execution creditor in an action by the purchaser against him: *Conley v. Chilcote* 25 Ohio St. 324; *Vanderhorst v. Bacon* 38 Mich. 669; whenever a levy has been made upon property notoriously in the possession of the debtor, and without any notice whatever, actual or constructive, of any sale of the property, the duty devolves upon the purchaser under the statute of showing that he was a bona fide purchaser: Bump on Fraudulent Conveyances 132, 134; *Stoddard v. Butler* 20 Wend. 507; Benj. Sales 697; Comp. L. § 4703.

CAMPBELL, J. Buckley replevied certain goods which had been attached on the 4th of October, 1878, at the suit of Wheeler against Alonzo L. Blake. On the same 4th of October Buckley obtained from Blake a chattel mortgage and, as he claims, a bill of sale of the attached goods. There was a dispute as to priority of date between these papers and the levy. The goods were all exempt from execution, but there was evidence tending to show that a part of them had been sold on credit by Wheeler to Blake, and were not paid for.

The charge of the court made the priority of the rights of the parties depend upon their priority in time. There was no testimony to impugn the interest of Buckley to some extent at least, and we can see no reason why there could be allowed any complete disregard of it. But the main question is the one referred to.

It has been repeatedly held by this Court that a debtor may dispose of his exempt property as he pleases, and such disposal cannot subject it to execution or affect the exemption. Buckley's claim, whether under sale or mortgage, was superior to the attachment levy except so far as this levy may have included property sold by Wheeler the purchase price of which was involved in the attachment suit. If prior to the attachment levy, it would, of course, be

superior as to all the property. And if Buckley held, as is unquestioned, any title or lien, Blake could not destroy it by his admissions or acts thereafter.

We do not think it necessary to discuss any other questions.

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

The other Justices concurred.

JAY BASSETT, ADM'R v. NOAH SHEPARDSON.

Public policy—Fraudulent Settlements—Dissolution of partnership by marriage—Testimony.

1. It is against public policy to permit a party to a written settlement to contest his liabilities thereunder on the ground that he had fraudulently contrived it for the purpose, merely, of screening his property from justice.
2. Partnership relations between a man and a woman are dissolved by their marriage; and the man's continued possession of property owned by the woman but used by the firm is by virtue of a license, merely, which would cease at her death.
3. Defendant in a suit brought by an administrator cannot testify to matters known to no one else besides the decedent.

Error to Wayne. (Jennison, J.) Oct. 17.—Oct. 31.

REPLEVIN. Plaintiff brings error. Reversed.

Wilkinson, Post & Wilkinson for appellant.

George W. Coomer for appellee.

GRAVES, C. J. November 1st, 1881, the decedent, who was then a widow bearing the name of Olive L. Brunthaver, entered into the following written agreement with the defendant.

"An article of an agreement between Olive L. Brunt-

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52 3
92 365
52 3
94 233
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haver, of Erie, Monroe county, Michigan, of the first part, and N. Shepardson, M. D., of Fremont, Ohio, of the second part, witnesseth:

That said party of the first part agrees to furnish to the said party of the second part the sum of three thousand dollars, to be used in the drug business at such place or places as they both may agree upon; and that said party of the second part agrees to give his entire time and experience to the party of the first part in attention to said drug business; that said party of the first part also agrees to furnish said party of the second part a team, harness and wagon for the express use of said drug business, and that said party of the first part and said party of the second part are to share alike in the profits of said drug business after all the expenses has been paid; that said agreement is to hold good for the term of ten years, unless the party of the first part and the party of the second part agree mutually to withdraw from said drug business, or by their consent change it into some other business; also that the party of the first part and the party of the second part agree that after all the expenses has been paid, the remaining profits, if any, are to be used in the increase of said drug business, both sharing alike in all profits and losses.

In witness whereof we have this day Nov. 1, 1881, subscribed our names.

N. Shepardson, M. D.
Olive L. Brunthaver."

At this time the defendant had a wife living, who was prosecuting proceedings against him for a divorce.

The decedent was holding a mortgage against him for $600, and on the 19th of November, 1881, and nearly three weeks subsequent to the foregoing agreement for going into the drug business, he executed and delivered to her the following paper:

"Erie, Monroe Co., Mich., November 19th, 1881.

This is to certify that I have this day made a full and complete settlement with Mrs. Olive L. Brunthaver, and to pay up all my indebtedness to her I have sold to her my two bay mares, harness and buggy for four hundred and fifty dollars, to be delivered to her at any time which she may wish. I also state that I have bought out all interest and right of J. B. Miles, of Wyandotte, in the Miles drug-store!

drugs and fixtures, in my name, but for Mrs. Olive L. Brunthaver, and with her own money, I acting as her agent by reason of a power of attorney,—said drug-store to be conducted in my name, but for her special interest and profit,—paying for the same twenty-nine hundred dollars of money given me by her for the purpose above stated.

N. SHEPARDSON, M. D., Agt.

I further state that I have in my possession a combination safe bought of Mr. Peck, which belongs to Mrs. Olive L. Brunthaver, and which is used for the purpose of keeping her papers and money in. Said safe to be used in the said drug-store at Wyandotte, Mich., for her benefit, and to be delivered with the balance of stock and fixtures into her hands whenever said Olive L. Brunthaver chooses, as she has free and full control of them.

N. SHEPARDSON, M. D."

The mortgage was discharged by decedent at the date of this paper. He had already engaged in the drug business at Wyandotte, under the arrangement of November first. June 3d, 1882, the former wife of defendant obtained a decree of divorce from him, and five days later he intermarried with decedent and she died about six weeks afterwards.

The defendant having possession of the mares with the buggy and harness specified in the writing of November 19th, the plaintiff, as special administrator of decedent, claimed the property as belonging to her estate, but the defendant refused to deliver it. The plaintiff then seized it on this writ of replevin. Under the rulings of the circuit judge the jury found in favor of defendant.

The plaintiff relied on the writing of November 19th, and the defendant resisted the action chiefly on two grounds: *first*, that the writing of November 19th was not meant to have effect as between the parties, but was simply a contrivance to make it appear that the defendant was not the owner and to perpetrate a cheat: *second*, that by means of the instrument of November 1st the decedent and himself became copartners, and in pursuance of the same agreement this property was furnished by decedent for the use of the firm, and that on her death the right of use and possession devolved to him as surviving partner.

The first proposition was based on defendant's testimony. He swore that the reason for giving the instrument of November 19th was "to prevent his first wife and her lawyers getting hold of this property, coming onto the store or anything connected with it; and that it had nothing to do with the payment of any debt; and that he had no settlement with Mrs. Brunthaver on that day, except that the mortgage had been settled and she signed the discharge on that day; and that there was no settlement on that day in regard to what had been done with her funds in the drug-store; that he had a power of attorney from her at that time; and that he himself put into said drug-store purchase about six hundred dollars." The circuit judge adopted as correct the theory of these propositions, and left it to the jury to find in defendant's favor, if satisfied the facts were as supposed. We are compelled to differ from the circuit judge.

As to the first proposition, it was not competent for the defendant to impeach the paper of November 19th by any such showing as he was allowed to offer. He was not to be permitted to set up that the instrument was a fraud; that it was concocted to screen his property from justice; that the design of the transaction was to conceal his effects so as to preclude his wife, who was suing for a divorce, from having such interest as the law might give her in case the truth was not covered up. The ruling operated to allow him to allege his own turpitude to show that his agreement was a scheme to impose on the court having cognizance of the divorce proceedings, and perpetrate a fraud upon his wife. Public policy will not tolerate such a defense.

The second proposition is equally untenable. What particular effect in point of law may have been wrought to the partnership agreement by the subsequent paper we have no occasion to consider. Admitting that the defendant and the decedent were brought into the partnership relation by the first agreement, the fact is certain that the subsequent intermarriage of the parties worked an instantaneous dissolution

of the relation,—Pars. Partn. (3d ed.) 399, 462; Lindl. Partn. (3d ed.) 240, 241,—and the right over this property by the defendant ceased. The firm being dissolved, the privilege to use and hold the decedent's team, which was nothing more than an incident, terminated at the same time. There was no longer a legal right. The subsequent possession was no more than a license which ceased at her death. Hence, the claim that the defendant was entitled to continue in possession as surviving partner had no basis.

The defendant was allowed to testify concerning several matters which must have been equally within decedent's knowledge, and at the same time unknown to others. It is scarcely necessary to refer separately to these rulings. We are not able to affirm them. *Downey v. Andrus* 43 Mich. 65.

These views dispose of the case as it appears on this record.

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

The other Justices concurred.

PETER L. RYNEARSON v. JESSE W. TURNER, CYRIL H. TYLER, ELI H. COLLAR, MARIA LYNN, GEO. W. LYNN ET AL.

Sureties on bond—Contribution—Consideration—Creditor's bill against representatives of co-surety—Circuity of action—Status of heirs.

1. A bill in equity for contribution from the representatives of a surety on a bond will lie in the circuit court if the case involves an inquiry into the liability and solvency of the other sureties that cannot be settled before the probate court or commissioners.

2. An agreement to support one's parents is not, as against creditors, a valid consideration for a deed from the parents if made with the purpose of putting the property beyond the reach of execution; such an agreement is for the direct benefit of the grantors.

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3. Where a surety on a bond has had to pay the whole of a judgment recovered thereon, his position as a judgment creditor of the other defendants is as perfectly defined as if he had taken a new judgment for the amount they owe him in contribution; and a creditor's bill filed by him against the representatives of a deceased co-surety should not be dismissed for that reason where no other creditors have sought to prove claims and all the facts have been investigated in a proceeding to which the co-surety's administrator is a party. It would be circuity of action to require the co-surety's administrator to file the bill in behalf of creditors.
4. Heirs are not, as such, held responsible for the delinquencies of their ancestors, in the probate system of Michigan.

Error to Kalamazoo. (Mills, J.) Oct. 17–18.—Oct. 31.

CREDITOR'S bill, etc. Complainant appeals. Reversed.

Edwards & Stewart for complainant, cited as to jurisdiction 1 Story's Eq. Jur. §§ 492–6; Adams' Eq. 267–270; 4 Bouv. Inst. 227; a transfer for a pre-existing debt is no protection against creditors: Bump. on Fraud. Conv. 483; Willard's Eq. Jur. 256; *Padgett v. Lawrence* 10 Paige 170; an agreement to support the debtor or his family is not sufficient to uphold a transfer when the grantor is insolvent: Bump 214–218; *Jackson v. Parker* 9 Cow. 73; *Robinson v. Stewart* 10 N. Y. 189; *Albee v. Webster* 16 N. H. 362; *Church v. Chapin* 35 Vt. 223; *Gunn v. Butler* 18 Pick. 248; a debtor's reservation of support for himself and family for a limited time or for himself and wife while they live or a stipulation for payment of debtor's current family expenses before payment of any debts, is void as against creditors: *Mackie v. Cairns* 5 Cow. 547; *Richards v. Hazzard* 1 Stew. & P. 139; *Johnston v. Harvey* 2 P. & W. 82; *Henderson v. Downing* 24 Miss. 106; *Harris v. Sumner* 2 Pick. 129; to support the plea of a bona fide purchaser, not only must there be no notice of plaintiff's rights before purchase, but that the purchase money was paid before such notice; and though the purchase money was secured, if not in fact paid before notice, it will not maintain the plea: *Jewett v. Palmer* 7 Johns.

Ch. 65; *Harrison v. Southcote* 1 Atk. 538; *Story v. Lord Windsor* 2 Atk. 630; *Hardingham v. Nicholls* 3 Atk. 304; *Hildreth v. Sands* 2 Johns. Ch. 35; *Sands v. Hildreth* 14 Johns. 493; the law implies no promise to pay for services rendered by members of a family to each other; such services are not performed in the expectation or on the faith of receiving compensation: *Updike v. Titus* 13 N. J. Eq. 151; *Hack v. Stewart* 8 Penn. St. 213; *Van Wyck v. Seward* 18 Wend. 375.

Oscar T. Tuthill for defendants. Everything pertaining to the settlement of estates must be brought in the probate court by the executor or administrator: *Bate v. Graham* 11 N. Y. 237; *Brownell v. Curtis* 10 Paige 218; *Babcock v. Booth* 2 Hill 186; *Dox v. Backenstose* 12 Wend. 543; *Kellogg v. Aldrich* 39 Mich. 578; *Morris v. Morris* 5 Mich. 182; *Holbrook v. Campau* 22 Mich. 289; *Patrick v. Howard* 47 Mich. 40; *Green v. Probate Judge* 40 Mich. 244; nothing can be done in equity which could be as well or better done in other tribunals where the case was already under jurisdiction: *Shelden v. Walbridge* 44 Mich. 252; *Dickinson v. Seaver* 44 Mich. 630; *Pitcher v. Douglas* 37 Mich. 341; equity cannot relieve a creditor until his demand is established at law: *Dunlevy v. Tallmadge* 32 N. Y. 457; the remedy at law must be exhausted: *Tyler v. Peatt* 30 Mich. 63; a creditor at large must submit to the remedy given by law: *Shannon v. Shannon* 48 Mich. 183; a claim against an estate cannot be recognized until it has been allowed: *Clark v. Davis* 32 Mich. 154; an administrator paying any other claim would be liable: *Palms' Appeal* 44 Mich. 637; claimants must follow the statute; *Winegar v. Newland* 44 Mich 370; see also *Patton v. Bostwick* 39 Mich. 218; *Wheeler v. Arnold* 30 Mich. 304; *Hill v. Bowman* 35 Mich. 192; *McElroy v. Hatheway* 44 Mich. 401; a debtor's preference of his wife against other creditors will be upheld: *Brigham v. Fawcett* 42 Mich 542; *Allen v. Antisdale* 38 Mich. 229; *Jordan v. White* 38 Mich. 253;

a conveyance made with intent to delay creditors will not be set aside unless it appears that the purchaser did not buy in good faith and for value: *Spring Lake Iron Co. v. Waters* 50 Mich. 13.

CAMPBELL, J. This is a bill filed by a surety against the principal debtor, two surviving co-sureties and the representatives of a third, to obtain contribution towards a debt which complainant paid in full. The bill also attempts to reach property of the deceased co-surety alleged to have been conveyed in fraud of complainant. The ground of action was that in 1870, Jesse W. Turner, desiring to get rid of an injunction granted against him at the suit of Benjamin Atwood, in Kalamazoo county, complainant and William Lynn, Cyril Tyler and Eli H. Collar signed a bond with Turner agreeing to perform any decree which might be rendered in said cause. The decree, which was in a foreclosure suit, being granted in favor of Atwood and affirmed by the Supreme Court, was executed, and resulted in a deficiency after sale. Suit was then brought on the injunction bond, and judgment rendered in May, 1879, for $1402.55 and costs, which complainant paid. He now alleges that the other sureties and principal are irresponsible, and asks relief to the extent of half his outlay, against the estate of Lynn, who is dead. And he seeks to reach the property of Lynn conveyed under the following circumstances:

On May 26, 1876, Lynn conveyed to his son George W. Lynn, by deed not recorded till November 9, 1877, a farm known as the northwest quarter of section 12, town 4 south of range 9 west, (except a small parcel of half an acre,) for a consideration expressed in the deed at $12,000. George W. Lynn mortgaged the property, by mortgage bearing date the same day with the deed, for $1200. This mortgage was not recorded until May 23, 1879. William Lynn also transferred considerable personal estate to his son George with the farm.

This conveyance to George W. Lynn was made, if cor-

rectly dated, but a short time before the foreclosure decree, which was rendered in June, 1876; and the record of George W. Lynn's mortgage to his mother, the defendant Maria Lynn, was recorded on the day when the verdict was rendered on the bond against complainant.

William Lynn died intestate in September, 1878, and, so far as appears, left no estate. An administrator was appointed, who is a defendant in this cause. Complainant claims that the dealings with George were fraudulent, and seeks to subject the property to the payment of Lynn's half of the debt, the other parties being insolvent. Maria Lynn and the remaining children of William Lynn are brought in as in fact enjoying the possession with George as heirs of their father.

Defendants answered, claiming the benefit of a demurrer, and also setting up the good faith of the bargain and dealings. Testimony was taken on this subject. The court below dismissed the bill on the ground that the jurisdiction belonged to the court of probate, and was beyond the equity powers of the circuit court. It is also claimed that complainant is not entitled to relief because not a judgment creditor.

We think the court erred in taking this view of the jurisdiction. The determination of the terms of contribution involved an inquiry into the liability and solvency of Turner, Tyler and Collar as well as of Lynn's estate, and these complex equities could not be settled before the probate court or commissioners. To that extent, at least, the bill was well founded on any theory, and inasmuch as the jurisdiction was necessary to determine Lynn's share, there was nothing left after such determination to be ascertained. And while it would probably be convenient for purposes of administration to have this amount in some way certified and found in the probate records, there could be no revision of it after the decree once fixed the sum of the liability. The bill could not properly be dismissed.

A somewhat different question arises concerning relief

against the property. But inasmuch as Lynn's insolvency might have some effect on the other sureties, it seems to have been necessary to inquire whether he was insolvent in fact. So that, at any rate, there was sufficient ground for investigating the facts. It depends, therefore, on the result of that investigation how far we need inquire into the further questions as to relief.

The value of the land in question is variously estimated. It does not appear to have been worth $12,000, but it may be roughly placed at between six and seven thousand dollars. We are inclined to credit substantially the defendant's theory, that George W. Lynn, who had been working for his father for some years, was anxious to set up for himself and wished to have his pay for his past services to enable him to purchase a smaller farm. The claim is that it was proposed that he should take this, and give a mortgage to his mother for $1200 and pay off debts of about $800, cancel his own claim, and support his parents. The evidence is not satisfactory upon all these points, but it is, we think, beyond question that a very considerable part of the consideration, in order to make up the full value of the property, would consist of the agreement to support Lynn and wife. As against his creditors no such provision could be sustained. It would be a provision for the direct benefit of the grantor. It is difficult to believe the arrangement was not made with some idea on George's part that the scheme was for the purpose of defeating the recovery on this suretyship obligation. But, be this as it may, William Lynn could not make such an arrangement lawfully, and the whole matter appears to have been left at loose ends, without any such action as could place George in the position of a bona fide purchaser who had paid the consideration in full. It is evident that the amount left open was considerably larger than would suffice to pay this debt, and we think George must account for it.

The only remaining question is whether this relief can be granted in the present case. The objection made is that

complainant is not a judgment creditor, and that the bill should be filed by the administrator of William Lynn, under the statute, to avoid the conveyance on behalf of the creditors who were to indemnify him for so doing. It does not appear that other creditors have proved claims, or sought to have this done. And in our opinion the facts having all been investigated and the conclusion having been pertinent to the inquiry, there is no reason for circuity of action. Complainant is entitled to the same consideration as an ordinary judgment creditor, since his position as a judgment defendant defines his rights as perfectly as a new judgment would. And, inasmuch as the administrator is a party to the record, every one interested is before the Court, and full justice can be done.

The decision is not put upon the ground of holding heirs responsible as such. Our probate system has abolished that method. But the case is one of a creditor seeking relief against a conveyance made in his fraud.

We think that a decree must be made that complainant is entitled to contribution from William Lynn's estate in the sum of one-half of the judgment and costs paid by him, with interest from the date of payment, and that unless George W. Lynn pay the amount, with costs of this Court and of the circuit court, within four months, then a sale may be made by a circuit court commissioner of so much of the land as is necessary, subject to the mortgage to Mrs. Lynn.

The decree must be reversed, with costs of both courts, and a new decree entered accordingly.

GRAVES, C. J., and COOLEY, J., concurred. SHERWOOD, J. did not sit in this case.

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GEORGE G. MEAD, SURVIVOR OF HIMSELF AND STANHOPE FLEMING v. WALDEN W. RAYMOND.

Variance—Action by plaintiff as survivor.

It is a fatal variance for one to sue in tort, as survivor of a partnership, upon a cause of action that did not arise until after the firm was dissolved by the death of the partner.

Error to Ingham. (Gridley, J.) Oct. 18.—Oct. 31.

CASE. Plaintiff brings error. Affirmed.

Quincy A. Smith for appellant.

M. M. Atwood and *Huntington & Henderson* for appellee.

GRAVES, C. J. This suit was instituted by the voluntary appearance of Mead and Raymond before a justice of the peace, pursuant to the statute. Comp. L. § 5258. [How. Stat. § 6823.] A formal declaration with two counts was immediately filed, to which the defendant pleaded the general issue. The cause of action was a false warranty, and the action was in tort. The declaration described the sale of a horse by defendant to the plaintiff, and averred that the defendant falsely warranted that the horse was sound. The form of action is familiar. *Carter v Glass* 44 Mich. 154, and cases; *Humiston v. Smith* 22 Conn. 19; *Cutler v. Cox* 2 Blackf. 178; *House v. Fort* 4 Blackf. 293; *Cooper v. Landon* 102 Mass. 58. The justice rendered judgment against the defendant, and he appealed.

On the occurrence of the trial in the circuit court, it appeared that prior to June 20, 1878, Mead and said Stanhope Fleming were in partnership, and that Fleming at that date died and the partnership consequently ceased; that the business of milling, in which the firm had been engaged, was kept up afterwards either by Mead alone or in conjunction with members of Fleming's family; and that, between three and four years subsequent to Fleming's death and the consequent dissolution of the firm, the transaction with the

defendant occurred which is the subject-matter of the suit.

It was objected by defendant's counsel that there was a fatal variance, and the court being of that opinion, and the plaintiff declining to submit to a nonsuit, a verdict was entered for the defendant.

The plaintiff's counsel argues that there was really no variance in point of law, or if there was, that it was not material, and that the terms denoting that Mead sued as survivor might be rejected as surplusage.

We concur with the circuit judge. According to its legal import, the declaration charged that defendant sold a horse to Mead & Fleming and made them a false warranty, whereby an action accrued in their favor, which had outlived Fleming and survived to Mead. The issue was mutually agreed on, and the counting on conduct of defendant as being an act of wrong actually perpetrated against Mead & Fleming, and which gave them a right of action, was material. Every part of it was required to be substantially proved. The case indicated by the evidence was very differently composed. It consisted of a sale to Mead, or to him and one or more of the members of the family of his deceased partner, and a false warranty on that occasion to such purchaser or purchasers, if to any one. The actual transaction was new and original, and not one antedating the death of Fleming and the dissolution of the firm; not a transaction originating with the old firm and vesting them with a cause of action which devolved to the plaintiff by operation of law. In short the actionable wrong to which the evidence pointed and which it tended to identify was not the tort counted on in the declaration, but another. The defendant was in court to answer the matter laid to his charge and nothing else. The plaintiff complained that he had committed a specific injury against Mead and Fleming, and the defendant was only bound to defend against that complaint. But instead of adducing evidence to establish the cause of action so specified, the plaintiff ignored it and proceeded to make out a different case. He met the defendant with evidence

to prove an injury committed three or four years after Fleming's death, and against Mead alone, or against him and one or more of Fleming's family. This was foreign to the issue, and it could avail nothing in favor of the plaintiff.

We have not deemed it necessary to allude in terms to the various phases of the argument of plaintiff's counsel. His reasoning involves an application of principles to which we are not prepared to assent.

The judgment should be affirmed with costs.

The other Justices concurred.

Township of Higgins v. Supervisors of Midland County.

Mandamus—Settlement of accounts between townships.

1. Mandamus was granted to compel a board of supervisors to provide for the payment of a balance credited upon the books of the county to a certain township which belonged, with another, to a county set off from the first, the credit having been made in pursuance of a mutual arrangement between the townships and the county indebted.
2. Local equities between newly organized townships set off from the same county should be speedily adjusted and with due respect to the deliberate settlements of the various local authorities.
3. Record issues should be set forth as they stand, in showing cause in cases involving a settlement of public accounts between townships and counties.

Mandamus. Submitted Oct. 18. Granted Oct. 31.

H. H. Woodruff and *Edget & Brooks* for relator.

James VanKleeck for respondent.

Campbell, J. Relators applied for a mandamus to compel respondents to provide for payment of a balance due on settlement of accounts arising in this way.

The county of Roscommon having formerly been attached to Midland, first as one township and afterwards as divided, became, on its separate county organization, entitled to a credit against Midland county, which was duly ascertained. By the usual settlement on the division of townships, the town of Higgins became entitled to a credit against the town of Roscommon, and by mutual arrangement the county of Midland transferred on its books to the township of Higgins a certain amount of the credits due Roscommon, and the township of Higgins accepted the transfer and credited Roscommon accordingly. This balance of credit on the books of Midland county to the township of Higgins was reduced by payment on the 12th of January, 1876, to $2616.75, for which this present application is brought.

The only defense savoring of merit that was put in arose out of a subsequent cancellation of tax sales by chancery decrees out of which it was claimed Midland county would suffer or had suffered reductions of its credits with the State, and would be entitled to contribution from Roscommon. But it appears that Midland has suffered nothing on this account. The same question was raised on a former controversy in this Court between Roscommon township and the respondents, reported in 49 Mich. 454.

Leaving this out, there is no showing whatever that in any degree impugns the correctness of the balance referred to; and this item of canceled taxes has been known to have no basis, for a long period, and for some years before this proceeding was commenced.

In showing cause in this class of cases all matters appearing of record ought to be frankly set forth as they stand. It turned out before this cause came to a hearing that the issues were all record issues and of such a nature that there was no good reason for contesting them. The delay in maturing the cause has been unreasonable and without good cause. The public interests require these local

equities to be dealt with speedily, and there should be respect paid to the deliberate settlement of the various local authorities. It appears that in arriving at a settlement of the matters in interest here, there was care taken, and results acquiesced in. It is much to be regretted that any coutroversy has been raised in the matter.

A peremptory mandamus will be allowed with costs.

The other Justices concurred.

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ROBERT CHAMBERS v. JOSEPH V. SHAW.

Wills—Construction—Interest of unborn child.

1. A will giving to the testator's wife all his real estate, lands, tenements, etc., together with all his chattels, personal moneys, credits, etc., that shall remain after discharging his legal debts; to have and hold the same in sole possession and to enjoy the sole use and benefit thereof during the term of the legatee's natural life; provided, that any heir afterwards born shall receive out of such property or out of its proceeds or annual income all needful and proper support, maintenance and education during minority, and shall at age receive half the property, or the whole, if the legatee named be dead, is *held*, (1) to dispose of the entire estate, real and personal, without leaving any portion to be dealt with under the Statute of Descents or of Distribution; (2) to bestow it absolutely upon the wife and expected children.
2. A child unborn at its parent's death is a competent legatee under the parent's will, and its interest under the will vests at the testator's death, possession only being postponed. How. St. §§ 5529, 5546.

Error to Genesee. (Newton, J.) Oct. 18.—Oct. 31.

EJECTMENT. Plaintiff brings error. Affirmed.

Howard & Thayer and *Wm. H. Wells* for appellant, the bequest of a life estate in personal property endows the recipient with possessory rights; *Proctor v. Robinson* 35 Mich. 288; *Patterson v. Stewart* 38 Mich. 402; and with

power to sell; *Jones v. Jones* 25 Mich. 401; *Sutphen v. Ellis* 35 Mich. 446; a bequest to a wife "to have and to hold the same in sole possession, and to enjoy the sole use and benefit thereof during the term of her natural life" does not give testamentary power; *Flanagan v. Flanagan* 8 Abb. N. C. 413; a gift of realty and personalty to a wife, for life, to be disposed of as she might think proper—if any thing remained over—did not give testamentary capacity: *Herring v. Barrow* L. R. 13 Ch. Div. 146: 14 Ch. Div. 263; the possibility of reverter of real property would not be such an expectant estate as would be descendible under the statute: *Nicoll v. N. Y. & E. R. R. Co.* 12 N. Y. 121.

Long & Gold for appellee, cited as to the vesting of legacies; 2 Redf. Wills 227, 232; *Hoxie v. Hoxie* 7 Paige 192; *Annable v. Patch* 3 Pick. 360; *Doe v. Provoost* 4 Johns. 61; *Hannan v. Osborn* 4 Paige 336; *Furness v. Fox* 1 Cush. 134; *Austin v. Bristol* 40 Conn. 120; *Burleigh v. Clough* 52 N. H. 267; *Blanchard v. Blanchard* 1 Allen 225; 4 Kent's Com. 202; *Roome v. Phillips* 24 N. Y. 463; *Bromfield v. Crowder* 1 New Rep. 313; *Freeborn v. Wagner* 49 Barb. 43; *White v. Howard* 52 Barb. 294; *A. B. Society v. Hebard* 51 Barb. 552; *Manice v. Manice* 43 N. Y. 368–380; *Gilman v. Reddington* 24 N. Y. 16; *Everitt v. Everitt* 29 N. Y. 75; *Toms v. Williams* 41 Mich. 552; *Post v. Hover* 33 N. Y. 593; *Oxley v. Lane* 35 N. Y. 340; *Livingston v. Greene* 52 N. Y. 118; *Embury v. Sheldon* 68 N. Y. 227.

GRAVES, C. J. Ejectment, and verdict for defendant by direction of the court.

September 17, 1860, Enoch N. Chambers died seized of the premises. He left a will, a copy of which is given below.[1] It is the same the Court had before it in *Shaw v.*

[1]Know all men by these presents that I, Enoch N. Chambers, of the town of Burton, county of Genesee and state of Michigan, being of sound

Chambers 48 Mich. 355. But there the inquiry was of a different nature, and the opinion was confined to the question. It is a misapprehension to suppose that it bears on the nature of the legal interests given to the devisees.

At the testator's death no issue had been born to him, but his wife, Mary E. Chambers, who survived him, was then pregnant, and the child, a son, was born on the twenty-third of December following. April 30, 1862, the child died, and in September of the next year Mrs. Chambers, who was childless, and remained unmarried, also died. She left a will by which she devised the premises in fee-simple absolute, and the defendant holds that title.

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mind and in the full possession of my faculties, but in feeble health of body, and knowing the uncertainty of the continuance of life, and being desirous of making a certain and specific disposition of my property, do hereby declare this my last will and testament.

I give and bequeath to my wife, Mary E. Chambers, all my real estate, lands, tenements, &c., together with all my chattels, personal moneys, credits, &c., that shall remain after discharging my legal debts; to have and hold the same in sole possession and to enjoy the sole use and benefit thereof during the term of her natural life: provided, that if any heir or heirs of my body shall hereafter be born to her, such heir or heirs shall receive out of such property above named or out of the proceeds or annual income thereof, all needful and proper support, maintenance and education during the minority of such heir or heirs, and until it or they shall have attained unto legal age.

I do hereby further direct that in case of the birth and arrival at legal age of any such heir or heirs above named, such of the above-described property or of the proceeds thereof as shall remain at that time unexpended shall be then divided and given, the one-half thereof to such heir or heirs and one-half thereof to its (their) mother, said Mary E. Chambers; provided, that if the said Mary E. Chambers shall be at that time deceased, then no division of said property shall be made, but the whole thereof shall be given into and remain in the possession of such heir or heirs. And I do hereby further direct that for the more efficient execution of the above provisions, and for the purpose of securing a larger income unto, and a better support for, the said Mary E. Chambers and the said heir or heirs (if any), that the above-described property, real and personal, shall be exchanged (sold) by the administrator of this instrument for money, or (and) for interest-bearing securities, bonds, mortgages, &c., at such times and in such manner as shall be in their discretion (judgment) advisable. And I do hereby appoint Harlow Whittlesey of the town, county and state aforesaid, as executor of the provisions of this instrument in conjunction with my wife, the said Mary E. Chambers.

In testimony whereof I have hereunto set my hand and seal this eighth day of September, A. D. 1860.

ENOCH N. CHAMBERS. [L. S.]

Duly witnessed by { H. WHITTLESEY, H. N. MCALLISTER.

The husband, Enoch N. Chambers, left brothers and sisters, and the plaintiff claims that the title now in question devolves to them and did not pass by the will, and he holds and asserts that title. His position is not entirely clear. It seems to be this: that the will operated merely as a gift of the property as personalty to Mrs. Chambers for life, subject to a charge for the support of the unborn child during its minority, and subject further to the condition that in case the child should reach majority, it should take one-half of the corpus; that the child having died during minority, and the life interest having determined, the residuary and possessory interests are in the brothers and sisters, or rather in the plaintiffs who holds their rights.

For the purpose of this case we have no occasion to review the will in all its aspects, or in reference to the contingencies which are possible.

We are not called on to define the boundary between the rights and interests of the mother and the child. We are to connect the provisions of the will with the events, and ascertain its effect on the legal title in issue. Turning to the will, the mind is immediately struck with two very significant indications, and, as there are no conflicting signs or repugnant implications, they become substantially conclusive.

First. The testator intended to dispose of all his estate, both real and personal. It was his purpose not to die intestate in respect to any property or any interest in any property. It was clearly not his intent to leave a remainder to be disposed of under the Statute of Descents or of Distribution. And in our opinion the provisions of the will were sufficient to carry out the intent.

Second. The wife and the expected child were the exclusive objects of his bounty. He referred to no one else. His mind was to give all, and to these two. That the child was competent to take is not questioned. The interest vested on the testator's death. Comp. L. §§ 4080, 4097;

[How. St. §§ 5529, 5546.] The possession only was postponed. The entire estate passed to the mother and child absolutely, and whether the quality or quantity which went to the one as against the other was either more or less, is not important. On the death of the child the whole centered in Mrs. Chambers, the mother, and it was subject to such disposition as she elected to make.

The result in the circuit court was therefore correct, and the judgment must be affirmed with costs The case must be remanded, however, to enable the plaintiff to exercise his statutory right in regard to another trial.

The other Justices concurred.

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GEORGE A. BAKER v. WILLIAM A. CLARK, MARY E. W. CLARK AND WILLIAM A. CLARK, JR.

Unwitnessed mortgages—Tax-title on mortgaged property.

1. An unwitnessed mortgage is good as between the parties to it.
2. Where a mortgagee has taken a tax-title for the purpose of protecting the mortgage, it is proper, in decreeing payment on foreclosure, to provide that on payment of the cost of the tax-title with suitable interest, the certificate of the tax-purchaser shall be assigned to defendant.

Appeal from Saginaw. (Gage, J.) Oct. 18—Oct. 31.

FORECLOSURE bill. Defendant Mary appeals. Affirmed.

Wood & Joslin for complainant.

William A. Clark, Jr., *William B. Sweet* and *William A. Clark* for defendant.

COOLEY, J. This is a foreclosure suit, and the appeal is from a decree for sale of the mortgaged premises. The

decree was in common form with the exception of the following paragraph:

"It is further ordered, adjudged and decreed that if at any time before the 5th day of February, A. D. 1883, said defendants shall, in addition to the sums hereinbefore decreed to be paid, pay to complainant the sum of thirty-eight and 97-100 dollars, with interest thereon at the rate of ten per cent., to be computed from the 4th day of October, A. D. 1880,—said sum of thirty-eight and 97-100 dollars being the amount paid by complainant at that time to purchase said lands for the delinquent taxes for the year 1879,—then in that case complainant shall make, execute and deliver to said defendants an assignment of the certificate of purchase for the taxes of said year 1879."

The land mortgaged appears to have been the homestead of the defendants William A. Clark and Mary, his wife, and the mortgage was signed by the wife. The defendants contended that when Mrs. Clark signed and acknowledged the mortgage she was by reason of temporary illness in a mental condition which rendered her irresponsible for her acts, and they took evidence in support of that contention. They failed, however, to take the evidence of her son, William A. Clark, Jr., who, as notary, took and certified the acknowledgment, and the other proofs are not very satisfactory. The burden upon this issue was upon the defendants, and has not been sustained.

Evidence was also given tending to show that one of the subscribing witnesses was not present when Mrs. Clark signed the mortgage, and that its execution was not acknowledged by her to him. In this case, also, the evidence is not conclusive, but it is not necessary to pass upon it, as the mortgage without witnesses would have been good between the parties.

The tax title referred to in the decree was acquired by complainant after the mortgage was given, and for the purpose of protecting it. Defendants raised various questions respecting it, and among others that the mortgage was merged in the tax purchase. There is nothing in this

which requires discussion. We think the court dealt with the tax title very properly.

We have considered various other questions raised by defendants, but do not deem it necessary to do more than to add that we find no error in the proceedings and the decree must be affirmed with costs.

The other Justices concurred.

The People v. Frank Adams.

Homicide—Conviction of less offence than is charged.

1. A statutory information for murder will not sustain a conviction for a mere assault, especially if it does not set out a murder by assault.
2. A criminal assault resulting in death is either murder or manslaughter in Michigan.
3. There can be no conviction of a lighter offense than is charged in the information unless it is one that is included in that which is charged.

Error to Wexford. (Fallass, J.) Oct. 19.—Oct. 31.

Murder. Respondent brings error. Reversed.

Attorney General *Jacob J. Van Riper* for the People.

Sawyer & Bishop for respondent. At common law the jury may acquit of the principal charge and find the prisoner guilty of an offense of lesser grade if contained within it (*People v. McDonald* 9 Mich. 153; *Hanna v. People* 19 Mich. 316) *i. e.* if it is a necessary element of the offense charged; and not otherwise: *Reynolds v. People* 83 Ill. 479: 25 Am. 410; *Beckwith v. People* 26 Ill. 500; assault and battery is not a necessary element of homicide: 2 Bishop Crim. Pr. §§ 512, 537, 553; *Wright v. State* 5 Ind. 527; where the information is for murder (*Regina v. Guttridges*

9 C. &P. 471) the assault and battery, if any, is merged in the felony, and the act is either murder, manslaughter or justifiable or excusable homicide: *Burns v. People* 1 Park. Cr. 182; *State v. Littlefield* 35 Am. 335; *Commonwealth v. Roby* 12 Pick. 504.

CAMPBELL, J. Respondent was charged with murder, and convicted of assault and battery, and sentenced. He brings error on several grounds, the principal one being the illegality of such a finding.

It is certainly a little singular that an assault which is followed by death as its result should be regarded as anything but homicide. If a crime at all it must have been murder or manslaughter, and a verdict clearing a party from that guilt is not in accordance with common sense. Whether it could stand in any case where murder is charged is not very important here, because no rule has ever allowed a less offense to be found unless included in the one charged, and the information before us, while it charges defendant with murder, is in the abbreviated statutory form and does not set out murder by assault, and an assault cannot be held as covered by it as an independent averment.

The judgment must be reversed and the prisoner discharged.

The other Justices concurred.

NICHOLAS G. HEYMES v. BENJAMIN F. CHAMPLIN ET AL.

Judgments—Sufficiency of declaration—Objections to testimony—Action on recognizance of special bail—Files of original case in evidence—Amendment of a sheriff's return.

1. A judgment will not generally be disturbed for technical defects in a declaration that is sufficient to sustain it and has not been demurred to.

2. The objection that testimony is "inadmissible under the pleadings" is too indefinite to aid an appellate court; the reasons for it should be clearly stated and the attention of the trial judge particularly directed thereto.

3. In an action upon a recognizance of special bail, the omission to allege in the declaration that a *fi. fa.* has been issued and returned unsatisfied, will not, *it seems*, defeat a judgment if the objection has not been seasonably interposed.

4. The files and record in a case are admissible in a suit upon a recognizance of special bail taken therein.

5. *It seems* to be within the discretion of a judge in trying an action upon a recognizance of special bail, to permit the sheriff to amend his return to a capias in the original suit, by adding the date.

Error to Jackson. (Gridley, J.) Oct. 23.—Oct. 31.

DEBT on bond. Defendants bring error. Affirmed.

Erastus Peck and *Gibson, Parkinson & Ashley* for appellants. Failure of a declaration to state a cause of action is not waived by pleading to the merits instead of demurring: *Stoflet v. Marker* 34 Mich. 313; the files and papers in another suit cannot be amended for the purposes of evidence, ex parte: *Johnson v. De Witt* 36 Mich. 97; *Haynes v. Knowles* id. 408.

A. & C. A. Blair for appellees. An officer's return cannot be amended at the trial: *Wilcox v. Sweet* 24 Mich. 356; *Montgomery v. Merrill* 36 Mich. 97; in a declaration for breach of the condition of a bond it is sufficient if the breach is assigned in the language of the recognizance: see Chitty's note "p" to the form used at page 473; also 1 Chit. Pl. 403, 473, note p; *Gillespie v. White* 16 Johns. 117; *Bensel v. Lynch* 44 N. Y. 164; *Hinman v. Brees* 13 Johns. 529; defendant is supposed to be in the custody of the bail and it is their duty to surrender him to exonerate themselves: *Koch v. Coots* 43 Mich. 30; *Scott v. Shaw* 13 Johns. 378; *Jones v. Cook* 1 Cow. 309.

SHERWOOD, J. The declaration in this case was upon a

recognizance of special bail, dated November 1st, 1878, in a case in which the present appellee, Heymes, was plaintiff, and one Patrick O'Grady was defendant, in an action on the case. Plea, general issue, with notice of death of defendant O'Grady. The case was tried by the court without a jury, and the plaintiff recovered a judgment for the amount of the penalty in the recognizance. The defendants bring error, and the case is before us on bill of exceptions.

There are no special findings in the case. The errors assigned, all except one, relate to the admissibility of the evidence received under the declaration; the objection being, substantially, that it does not state a cause of action [because there was no allegation that a *fi. fa.* had been issued and returned unsatisfied]. The defendants did not demur, but pleaded issuably, and went to trial on the issue before the court without a jury.

The declaration is sufficient to support the judgment, and in such case, where there has been no demurrer, the judgment will not usually be disturbed though technically defective.

The judgment in this case is a general finding upon the facts, and the objections taken are of the most general character, the only ground stated therefor being "inadmissible under the pleadings." This furnishes the Court with little or no assistance in determining the question raised by the objection. In this class of cases the reasons for the objection should be fully and clearly stated, and call the attention of the trial judge distinctly and particularly to the grounds on which it is made, to serve any useful purpose. *Turner v. People* 33 Mich. 382; *Baylis v. Stout* 49 Mich. 217; *Adams v. State* 25 Ohio St. 584.

The particular defects claimed in this Court, which it is thought made the testimony inadmissible, were not pointed out by counsel taking the objections. This should have been done.

The amendment of the return by the sheriff to the writ

in the proceedings offered in evidence, was permissible, and the objection thereto is not well taken.[1]

The files and record in the case of Heymes v. O'Grady, it being the case in which the recognizance sued on was taken, were properly received in evidence. They are not subject to the objections made.

We find no error in the record in this case.

The judgment must be affirmed with costs.

The other Justices concurred.

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CYRUS B. WOODMAN AND ELIHU B. WASHBURNE v. THE AUDITOR GENERAL, THE TREASURER OF MACKINAC COUNTY AND THE SUPERVISOR OF MORAN TOWNSHIP

SAME v. SAME, SUBSTITUTING SUPERVISOR OF NEWTON.

SAME v. SAME, SUBSTITUTING SUPERVISOR OF HENDRICKS.

Taxation—Review of assessments—Collection of taxes enjoined.

1. The listing of taxable property is clerical work; but the ascertainment of its value is judicial, and requires the supervisor's judgment under his official oath. How. St. § 1019.
2. Every tax payer was entitled under How. St. § 1020, to an opportunity to see how his property had been assessed and to show that the assessment was illegal or unjust.
3. Injunction lies to restrain the collection of taxes where the opportunity to ascertain the amount of the assessment, and to be heard as to its fairness, has been withheld.

Appeal from Mackinac. (Steere, J.) Oct. 24.—Oct. 31.

[1] The amendment was by adding the words "Dated October 19, 1881."

INJUNCTION bills to restrain sales for taxes. Complainants appeal. Reversed.

Thomas J. O'Brien for complainants.

Norris & Uhl for defendants.

SHERWOOD, J. Bill of complaint was filed in each of the above-mentioned causes on the 27th day of September, 1880, in the circuit court for the county of Mackinac, in chancery, for the purpose of enjoining the collection of certain taxes, amounting to about the sum of $1529, alleged to have been illegally assessed against the real estate of the complainants situate in the county of Mackinac and in the townships named in the several bills of complaint in these causes. The taxes complained of in the first case were those assessed and levied for the year 1878, and those in the other two cases for the taxes assessed and levied in the year 1879.

In the first of these cases complainants ask relief on the grounds—*First*, the assessment roll was not made in time for review, and complainants had no opportunity for review. *Second*, because complainants' lands were too highly valued in the assessment roll; that it showed complainants' lands valued higher than other lands of equal value; that no valuation or assessment was ever actually made by the supervisor; and that he had no knowledge of either the lands or their value in many instances. *Third*, that the neglect of the supervisor to inform himself, and his refusal to be informed, in regard to the lands of complainants and their value, and the intrusting the listing of complainants' lands and their valuation in the assessment roll to another, thereby largely increasing their assessed value above what it should have been, operated as a legal fraud upon the rights of complainants, and rendered the assessment void.

A careful inspection of the record shows, we think, that the facts stated by complainants' counsel, and relied upon to invalidate the tax complained of, are substantially true.

In the absence of the parties, or their neglect during the time the assessment roll is required by law to be made, the supervisor is required to examine the property, and is authorized to set down and assess the proper amount according to his best judgment. See Comp. L. § 985. [How. St. § 1019.]

The listing of the property is clerical, but the ascertaining and determining its value is judicial, requiring the judgment of the supervisor under his oath of office, and cannot be dispensed with in making a valid assessment roll. The evidence shows that no such roll was made in this case; that the supervisor never made such examination of the lands of complainants nor ascertained nor determined their value in the assessment roll.

By Comp. L. § 986 the supervisor is required to be present at his office on the third Monday in May and the next two days thereafter, for the purpose of reviewing his assessments; and any aggrieved party has the right to appear on either of those days before him and state his grievances; and the supervisor is authorized to make such alterations as may be shown to be just and proper. [How. St. § 1020.]

The record discloses the fact that the complainants sent their agent, at considerable expense, to the supervisor for the purpose of examining the assessment roll and showing him the true value of the complainants' lands assessed; that said agent, learning that no assessment roll had been prepared on the days fixed by the statute for review, subsequently went to Mackinac in the month of August, and there met the supervisor of Moran township, by whom he was informed that he had not yet completed his assessment roll, and had not yet seen or determined the value he should place upon complainants' lands therein, and that thereupon said agent proposed to be sworn as to the quality and value of said lands for the purpose of reducing the assessment below that of the previous year, claiming that such assessment was too high. The supervisor, in reply, told complain-

ants that it was too late; that he could not take the statement of complainants' agent under oath upon the subject; that he had no personal knowledge of the lands, but thought he should assess them higher than they had been the previous year.

It is very clear that the tax-payer under our statutes must be allowed, at some time before the assessment roll is fully completed, the opportunity of seeing what assessments have been made against his property, and the privilege of showing to the supervisor that the proposed assessment is for any cause illegal or unjust; and it seems quite apparent, from the record in this case, that no such opportunity, although desired, was afforded to the complainants. It further appears that complainants were at all times willing to pay whatever might be a proper and legal tax upon their property, and they claim that the taxes against which they ask relief are illegal, unequal, excessive and unjust.

We can see no principle of law or equity upon which the legality of the taxes in this case can be sustained. The other two cases rest upon substantially the same state of facts, and, by the agreement of counsel for the respective parties, were argued at the same time with the first, both at the circuit court and in this Court, and, it is conceded, must abide the decision made in the first case. Several other questions are discussed in the briefs of counsel, but as those mentioned are all that are necessary to a final disposition of these cases we forbear their consideration.

The circuit court dismissed the bills in all the cases and dissolved the several injunctions issued therein.

The decree of the circuit court in each of the cases must be reversed, and a new decree entered in each case in accordance with the prayer of the complainants' bill with costs of both courts, including, however, costs in this Court for but one hearing.

The other Justices concurred.

COOLEY, J. I concur in the opinion in these cases. The case of *Albany & Boston Mining Co. v. Auditor General* 37 Mich. 391, on which defendants rely, has little resemblance to this, and none at all in the principles which should govern. In that case the roll was not completed by the day fixed for a review, and in that particular the statute was not complied with; but there had been no attempt to obtain a hearing on the assessment, and there was neither showing nor plausible pretense of injury. In this case the disregard of law and the wrong to complainants are equally manifest.

MARY H. WOOD AND ORVIS D. WOOD v. TOWNSHIP OF NORWOOD.

One who votes to levy a tax cannot object to pay it.

One cannot maintain assumpsit to recover back the amount paid by him in satisfaction of a tax which, as a member of the board of supervisors, he voted to impose without presenting objections to its levy that he knew of at the time.

Error to Charlevoix. (Ramsdell, J.) Oct. 24.—Oct. 31.

ASSUMPSIT. Defendant brings error. Reversed.

E. H. Green and *N. A. Earle* for appellant. A supervisor who has voted to authorize a levy of taxes knowing all relevant facts, is estopped from questioning its legality: Herman on Estoppel § 574; *State v. Lehre* 7 Rich. 264; *Rex v. Trevenen* 3 B. & A. 339; *Warren v. Grand Haven* 30 Mich. 24.

Cruickshank & Grier for appellee.

CAMPBELL, J. This was an action of assumpsit for money had and received, begun in the circuit court for the county of Charlevoix, to recover back the amount of certain town-

ship taxes paid under protest, as illegal. The illegality urged on the trial consisted in raising money to refund to the town treasurer funds which it was alleged had been stolen. The whole amount of taxes paid under protest was $32.47, as set forth in the bill of particulars, and the portion of this for which the jury gave a verdict was $3.60. Upon this judgment was rendered for plaintiffs with costs of suit. No error was assigned on the allowance of costs. There was no reduction by set-off.

Several questions arose on the trial, but most of them become unimportant in the view we take of the case. We are inclined to think there was evidence enough to go to the jury. But it appeared from the testimony of Orvis D. Wood, who was the party taxed and who paid the tax, that he was a member of the board of supervisors, being supervisor of Charlevoix, and as such voted for imposing the whole tax in question, and he, according to his own statement, knew of the moneys stolen, and was familiar with the money matters of Norwood. The court refused to charge that if he, knowing the condition of the township funds, made no objection before the board of supervisors, but on the contrary voted for levying the tax, he should not recover.

The tax law expressly authorizes the board of supervisors to examine into the certificates of money to be raised in townships, and directs that "they shall hear and duly consider all objections made to raising any such moneys, by any tax-payer to be affected thereby." Acts of 1882, p. 15 § 24.

Under these circumstances the plaintiff can hardly be allowed to complain of his own act, and recover back taxes which probably would not have been laid if he had made timely objection. We think this objection should have been considered, and that there was error in ruling against it.

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

The other Justices concurred.

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FRANK R. TIMMERMAN v. ISAIAH DEVER.

Physicians—Agreement not to practice—"Vicinity."

An agreement between physicians that one would not practice in a specified city *and vicinity* was *construed* as excluding him from all territory within ten miles from the city limits.

Appeal from Barry. (Hooker, J.) Oct. 25.—Oct. 31.

INJUNCTION bill. Defendant appeals. Affirmed.

Clement Smith for complainant. A contract between two doctors binding one not to practice medicine in a specified locality is enforcible: 5 Wait's A. & D. 767; Story's Eq. § 722; *Stocker v. Brockelbank* 5 E. L. & E. 67; *Lumley v. Wagner* 1 De G., M. & G. 604; *Bunn v. Guy* 4 East 190; *Smalley v. Greene* 35 Amer. 267; *Cook v. Johnson* 36 Amer. 64; *Haldeman v. Simonton* 55 Ia. 144; *Warfield v. Booth* 33 Md. 63; *Atkyns v. Kinnier* 4 Exch. 776.

Knappen & VanArman for defendant. All the Michigan cases, where contracts in restraint of trade have been enforced specifically, have been cases where (1) the refraining from exercising the occupation or profession is to be immediate, and (2) where the contract by way of restraint is connected immediately with the sale of the business and the stock in trade thereof, and the restraining from practice is necessary to the beneficial enjoyment of the thing sold, and in which beneficial enjoyment the person seeking to impose the restraint has an especial and peculiar interest: *Beal v. Chase* 31 Mich. 490; *Doty v. Martin* 32 Mich. 463; *Hubbard v. Miller* 27 Mich. 15; where the terms of a contract are at all hard, and its specific performance will be attended with a degree of hardship to defendant out of proportion to and not demanded by the exigencies of complainant's position, specific performance should be refused: 5 Wait's A. & D. 787; 1 Story's Eq. Jur. § 766; *Keeler v. Taylor* 53 Penn. St. 467.

SHERWOOD, J. The parties in this case are both practicing physicians residing in the city of Hastings, and carrying on the business of their profession. On the fourth day of June, 1881, the defendant entered into the following contract with the complainant:

"In consideration of the sum of five hundred dollars, to me in hand paid this fourth day of June, A. D. 1881, by Frank R. Timmerman, M. D., the receipt whereof is hereby acknowledged and confessed, I agree as follows: To remain in the city of Hastings and vicinity, in the active practice of medicine with said Timmerman, for a period not exceeding six months from this date, and to divide equally the receipts from said practice with him. At the end of six months from this date I agree to relinquish and yield up to him my practice, and remove from said city and vicinity, and refrain from practicing medicine in said city and vicinity, after said six months, for at least the term of five years immediately succeeding said six months, and I reserve the right to remove from said city and give up said practice as aforesaid any time after this date and before said six months shall expire."

By agreement of the parties the time for defendant to quit practice and leave said city was extended until the first day of April, 1882.

Complainant's bill avers that the said defendant, instead of complying with his agreement to quit practice in the city of Hastings and vicinity thus made with the complainant, when said first day of April arrived absolutely refused so to do, and from that time to the present has continued to practice his profession in Hastings and vicinity, and avers his intention to continue his practice there.

The answer admits defendant's continuance in practice at Hastings, and avers his right to continue by reason of certain understandings and dealings between the parties had subsequent to the making of the contract. The case was heard at the Barry circuit on pleadings and proofs, and the circuit judge made a decree in accordance with the prayer of complainant's bill.

Upon an examination of the record we think the conclusion of the circuit judge was correct. It very clearly shows a failure of the defendant to comply with his written agree-

ment with the complainant, which non-compliance, according to the testimony of defendant himself, could scarcely fail to be an injury to complainant.

A discussion of the testimony is unnecessary, and could serve no useful purpose. It is sufficient to say the equity of the case is clearly shown to be with complainant, and but one thing requires further notice—the decree restrains the defendant from practicing his profession "*in the city of Hastings and vicinity.*" This clause of the decree is somewhat indefinite as to the extent of territory to which it applies, and may give rise to further misunderstanding between the parties. For the purpose of obviating any difficulty of this kind, the decree made by the circuit judge should be so modified as to make certain the limits of its operation. Of course, the extent of territory included in the term "vicinity of the city" must necessarily depend in a great measure upon the size of the city, its location and particular surroundings: and under all the circumstances as they appear upon this record I think the territory surrounding the city for the distance of ten miles from its corporate boundaries a reasonable limitation, and one which may be safely regarded as within the contemplation of the parties when they made their contract.

The decree at the circuit court should be modified accordingly and thus modified must be affirmed with costs.

CAMPBELL and COOLEY, JJ. concurred.

GRAVES, C. J. I agree with the court below that the case established by complainant entitled him to relief, and I also agree that the proper mode of relief is by injunction. But I think the decree ought to be more precise. It pursues the wording of the agreement, that defendant should forbear business in the city of Hastings and "vicinity," and fails to prescribe what territory the parties understood by this expression. They meant by it to identify the space from which the defendant was to be excluded, but they did not use it as amounting to a definite description.

The word itself is entirely indefinite as a term of descrip-

tion of the bounds of the territory, and it fails to fix in such manner as it should for the purpose of an injunction, the particular limits which the defendant is not to pass. The defendant is entitled to be informed, on the face of the injunction, where he is not to act under peril of attachment, and it ought not to be left as a matter of speculation or conjecture.

I am inclined to think that the sense of the parties is substantially answered by regarding the city limits and a space extending ten miles on all sides therefrom, as the area from which the defendant was to be excluded and I think the decree should be so varied as to correspond with this view, and in all other respects affirmed.

HENRY ABEEL v. JAMES E. HUBBELL AND IRA J. HUBBELL.

Proceedings to recover possession—Assignment of lessor's interest.

1. The statutory proceeding to recover possession of land from a tenant cannot be maintained by one of two independent grantees of the lessor under the provision in the lease that the lessor is to have the right of selling the land on certain conditions.
2. A lessee holding over after the termination of his lease is a tenant at sufferance.
3. The adjournment of an arbitration is within the power of the arbitrators, and where the continuance of a lease depends upon the result of the arbitration such an adjournment cannot deprive the tenants of their rights.

Error to St. Clair. (Harris, J.) Oct. 25.—Oct. 31.

PROCEEDINGS to recover possession of land. Complainant brings error. Affirmed.

Atkinson & Stevenson for appellant.

William T. Mitchell for appellee.

CAMPBELL, J. Abeel brought summary proceedings to

remove defendants from lands leased to them by his father, James Abeel. The claim of complainant was that they held over wrongfully after the lease was determined. He prevailed before the magistrate, but the circuit court of St. Clair county, on appeal, held he made out no case.

The lease was by its terms to run from April, 1879, to April, 1882. The rent for the whole term was $810, not payable at any fixed rate per year, but in fixed instalments, not all equal. The whole farm contained 142 acres, and some restrictions were made as to the parts of the land on which certain acts were to be done. The lease contained a clause providing that the lessor was to have the right of selling the farm, but in case he did so he was to pay the lessees one dollar and fifty cents per acre for plowing, and a reasonable sum for such damages as they should sustain, "to be left to two men, one chosen by each party. If they cannot agree, then they are to choose a third man." This, as here set forth, is all that the lease contained on the subject. On the 12th of January, 1880, the lessor conveyed one parcel of the farm to complainant, and the remainder to another son, William Abeel. Immediately after these conveyances the lessor gave notice to the lessees that he had sold and conveyed the land to the persons named, and that he had chosen Lewis A. Frost as arbitrator and required them to choose an arbitrator within fourteen days, and set the time for removing from the farm. No other notice to quit was given, and this was given after the conveyances. This proceeding was begun March 11, 1880.

Some testimony was given tending to show that each party named an arbitrator and that the arbitrators met on the 25th of February, 1880, and adjourned to some future day, and met again, but on what day is not shown, the only witness on the subject stating that he thought it was before this suit was commenced. It did not appear that the arbitrators had concluded their labors, or that anything definite had been arrived at. The whole testimony on this matter was too indefinite to be of any importance. It was not shown what claims either party set up, and it was not shown

that James Abeel made any offer or tender in money or that the Hubbells were in any way in default.

We can find no basis whatever for a recovery. Neither of these separate grantees could stand as assignees of the landlord's title, and they had no joint interest. Assuming that the Hubbells were bound to surrender the property on compliance by Abeel with the conditions referred to, it is very clear that until an arbitration was had and a tender made, they could not be required to leave the land, unless, possibly, by a proper tender on the part of Abeel after a fair effort on his part prevented by their fault, to get at their rights. Some things were fixed by the lease itself. There was an allowance for plowing which needed no arbitration to fix it. This was not tendered. And there was nothing whatever tending to show any failure for which they were responsible. The arbitrators' action in postponement was, whether wise or unwise, their own lawful act, and not to be regarded as depriving the Hubbells of any rights. But the latter were not shown to be in fault, and the case fails to show how the attempt to arbitrate ended, if it did end.

Beyond this it is also to be considered that even if the action of the parties was such as to terminate the interests of the Hubbells, they became thereafter tenants by sufferance, and possibly, if the whole estate had been sold to one purchaser, he might come in on the footing of their first landlord. But a grantee of a separate parcel of the reversion cannot claim as such assignee, and could not bring himself within the statute without some notice to quit or demand of possession. Whether he could do so at all we need not consider.

We might point out still further deficiencies in the testimony, but it would be of no special use. It seems that the Hubbells subsequently gave up possession. It does not appear whether they have been indemnified. The question has probably become one of costs entirely.

We think the action of the circuit court was correct, and it must be affirmed with costs.

The other Justices concurred.

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52	40
67	77
52	40
97	275
52	40
107	596
52	40
111	394
52	40
117	607
52	40
e150	1307

JOHN PIQUEGNO v. CHICAGO & GRAND TRUNK RAILWAY CO.

Railway negligence—Ice and snow alongside track.

1. A railroad company is not negligent in omitting to clear snow and ice from the ground alongside its track even in the neighborhood of depot platforms; and a brakeman who is injured in consequence of slipping on it has no remedy against the company.
2. A sudden call to supper, addressed by a conductor to a brakeman, is not such an improper or negligent command that the brakeman can recover for any injury sustained in hastily obeying it.
3. Whoever hires out for any service takes the risks of it.

Error to St. Clair. (Stevens, J.) Oct. 25.—Oct. 31.

CASE. Plaintiff brings error. Affirmed.

Atkinson & Stevenson for appellant. A railroad company must provide a reasonably safe place for its employees to work in or give them notice of defects: *Swoboda v. Ward* 40 Mich. 420; *Snow v. Housatonic R. R.* 8 Allen 441; *Plank v. N. Y. C. & H. R. R. Co.* 1 Thomp. & C. 319; *Lewis v. St. L. & I. M. R. R. Co.* 59 Mo. 495; *Batterson v. Chic. & G. T. Ry* 49 Mich. 184; *Coombs v. New Bedford Cordage Co.* 102 Mass. 572.

E. W. Meddaugh and *Wm. T. Mitchell* for appellee.

COOLEY, J. Action for injury to the person. The declaration alleges that on February 8, 1881, plaintiff was in the employ of defendant as a brakeman on a freight train running from Port Huron to Valparaiso, Indiana, through the city of Flint, and that defendant "did not carefully, skillfully and without negligence run its trains over said road, and did not keep such road and all its appurtenances in good, safe and proper condition, and did not keep its station grounds and platforms, at the city of Flint aforesaid, free from ice, snow and other matter dangerous to the safety of persons employed on said road,

and did not on the day aforesaid and at the place aforesaid provide its engine, then used in making up trains and moving the van which the plaintiff was at work upon, with a skillful and competent engineer, but in all the matters aforesaid neglected its duty in the premises and operated its engine by a fireman who had neither skill, experience nor capacity for such work, and suffered its station grounds, track and platform to become covered with slippery ice and snow, and the space from the track to the platform was obstructed with dangerous snow-heaps so that the whole track, platform and premises, at the place aforesaid were in an unsafe and dangerous condition through the negligence of the said defendant: By means whereof the plaintiff, while performing his duties as brakeman with all due care and diligence on his part, and in consequence of such negligence and default of the defendant, was thrown with great force and violence from the van upon which he was riding, onto the platform atoresaid, and by reason of the ice and snow thereon was carried and thrown from such platform over the ice and snow bank aforesaid against the defendant's track, on the line of its road, and by reason of the negligence and unskillfulness of the fireman aforesaid, while so lying near the track, was run upon by an engine of the defendant, and his left arm broken and mangled," etc.

On the trial the plaintiff showed that at the time and place named his arm was run upon and broken and mangled by an engine as alleged, but there was no evidence whatever that any negligence or unskillfulness in the fireman was in any manner concerned in the injury, and it was testified by himself that he voluntarily jumped from the van, and was not thrown from it as he had alleged. His account of the accident is in substance this: The train was manned by one Strickland as conductor and one Flynn and himself as brakemen. It was at Flint, where it had just arrived from Battle Creek. He set the brakes and stopped the train, and then went into the van to put away the flags and get ready for supper. Within four or five minutes the conductor came in and told them they had to go right back to Battle Creek, and they must hurry as quick as they could and get supper. In a minute or two they coupled on behind the caboose and turned away out on the switch, backing towards the west switch near Saginaw street. They then

started and went east towards the station. Plaintiff then had his clothes off, preparing for supper. The conductor hallooed to him to get off and get his supper, and Flynn said they had better go or they would get left, so he hurried on his clothes, and as he proceeds to say:

"I got off and run probably two or three steps, probably three or four—I don't know how much exactly—and I struck some ice that had been left there from where they had probably been cleaning, and I slipped towards the track and glanced off slanting towards the rail. When I struck the old ice and snow I laid on my back, and something struck my left shoulder; I couldn't say whether the box of the journal, or the cylinder of the engine, and shoved me probably eight feet forward, till my feet reached where it was a little low, and I couldn't hold myself any longer, and my back lay on a bank of snow slanting towards the track, and I slid down between the two, and laid in that shape to protect myself as well as I could. My left arm was run over. I got up after the engine passed, and looked on the ground, and I saw from where I first slipped that there was no ice—probably might have been a little ice—and saw where I slipped, probably a foot and a half or two feet, where there was some old snow left there, the cause of my slipping. This was on the platform. The size of the piece of old snow or ice on the platform was three or four feet wide, and maybe the length of eight feet. It was not where I first struck the platform. If I hadn't struck the old ice I would have been all right. As I ran ahead, not being able to stop short, I struck this piece of old ice and slipped off from the platform, slanting towards the track. The bank of old ice and snow piled up along the way, more or less, nearly level with the platform, slanting towards the track from the platform, caused me to slide down to the rail. This occurred a little after five o'clock: it wasn't dark, but cloudy."

This being the statement of the plaintiff himself we may assume was the strongest statement of negligence against the defendant that could truthfully have been made. The circuit judge was of opinion that it made out no cause of action and so instructed the jury. The only question before us is whether there was error in this conclusion.

The gravamen of the plaintiff's complaint is that the de-

fendant has been guilty of negligence to his injury. The only negligence which the evidence tends to establish consists in the failure to keep the ground along by its track, at the place where the injury occurred, free from snow and ice. This, it is said, it was the duty of the railroad company to do, and it should have been made by the company the duty of some of its servants to look after it and see that it was done. Whether provision was made for this does not appear. If it was, and the neglect of duty was that of the servant rather than that of the company, it is conceded that the plaintiff is not entitled to recover: *Davis v. Detroit & Milwaukee R. R. Co.* 20 Mich. 105; but the plaintiff contends that this duty, like the duty to provide suitable and safe machinery, is one the company cannot delegate, and it is responsible for any injurious consequences resulting from the neglect to perform it. It becomes necessary, therefore, to determine whether any such duty is made out.

It is to be observed that no complaint is made of the track being unsafe or out of order; what is said is, that alongside the track where the brakeman had occasion to alight, and where this plaintiff did alight, the footing was unsafe by reason of the snow and ice not having been removed from it. This place was in the vicinity of the station; but it might have been anywhere else on the line; for the occasions for a brakeman to leave his train are occurring constantly at considerable distances from the station on either side, as trains are loading, making up or passing each other, and also occasionally at places remote from stations; so that an accident like that which happened to this plaintiff might have occurred from a like cause at any point on the line. If therefore it is negligence in the defendant to fail to provide against the possibility of such an accident at one point on its line, it is negligence to fail in the like provision at any other point, though the degree of negligence will doubtless vary with the proximity to the station where the occasions for leaving the train will be most numerous. It seems to result that the defendant at its peril must keep the ground near its track free from snow and ice for its en-

tire length. It is also to be observed that these substances are not the only ones that might cause a similar accident. A stick, a stone, a piece of baggage or freight lying near the track might in like manner cause a brakeman to stumble and fall, and the company at its peril must provide against the likelihood of such a casualty. So stringent a rule has never been applied to railroad companies, nor could it be without making them insurers against a species of accident which could seldom occur without carelessness on the part of the person injured.

It was said on the argument that the plaintiff was "commanded" to jump from the car, and that this, under the circumstances, was an improper command and was the cause of the injury. The suggestion has no force. The plaintiff was called to his supper under circumstances implying haste; but there was no command to jump from the train, and the plaintiff determined for himself his action in that regard. If a farmer were to call to his hired man to drive mischievous cattle away, and in hastening to do so the man should stumble upon an obstruction and injure himself, it might with the same reason be said that the "command" caused the injury, as to say so in this instance. There was nothing in the call to supper that was either negligent or improper, or from which the conductor had any reason to anticipate injurious consequences. It was not necessary, therefore, to consider what would have been the rule had the plaintiff been acting in obedience to an improper command.

The question which the record presents is not whether this railroad company exercised the highest possible care; very few employers do that, whether they be railroad companies, or master mechanics, or manufacturers or farmers; and the law does not require it, and it may be added that nobody expects it. Whoever engages in any service takes upon himself the ordinary risks of the employment. This is familiar law, and there is nothing in this case to make it in any way exceptional so far as the application of the rule is concerned. The cases of *Fort Wayne &c. R. R. Co. v. Gilder-*

sleeve 33 Mich. 133; *Mich. Cent. R. R. Co. v. Smithson* 45 Mich. 219; *McGinnis v. Canada Southern Bridge Co.* 49 Mich. 466; and *Batterson v. Chicago & G. T. Ry. Co.* 49 Mich. 184 have covered this case so completely that nothing remains to be said by us upon it.

The fact that the planking or platform extended as far out as where the accident occurred, does not appear to be one of any importance in the case. The accident occurred from running along upon the icy ground near the cars; and the liability to be injured was neither increased nor diminished by the ice extending somewhat over the planking.

The judgment must be affirmed with costs.

The other Justices concurred.

GILBERT HARDY v. TITTABAWASSEE BOOM COMPANY.

Contract of employment—Wages.

1. The directors of a boom company passed a resolution that the laboring men signing contracts to remain through the season have a bonus of fifteen per cent. at the end of it. *Held*, that this did not restrict the power of the president and superintendent of the company to hire other persons than the class of laborers referred to, on the same terms, especially if the persons hired knew nothing of the resolution.
2. A letter from the superintendent of a boom company to its president, stating the terms upon which he had hired an employee, is admissible in evidence for the latter in a suit by him against the company for his wages, even though it was obtained by the defendant for its own information.

Error to Saginaw. (Gage, J.) Oct. 26.—Oct. 31.

ASSUMPSIT. Plaintiff brings error. Reversed.

Trask, Grout & Smith for appellant.

L. T. Durand for appellees. One who deals with an agent who acts by special and express authority, written or

verbal, is bound to know at his peril what the agents' power is, and to understand its legal effect; and if the agent exceeds his authority his act is void so far as it concerns his principal: Story on Agency §§ 165–172; *Batty v. Carswell* and *Rossiter v. Rossiter* 1 Am. L. Cas. 544; 1 Wait's A. & D. 226, 227; *Payne v. Potter* 9 Ia. 549; *Eq. Life A. Society v. Poe* 53 Md. 28; *Delafield v. Illinois* 26 Wend. 193; this is especially so of agents of corporations; *Alexander v. Cauldwell* 83 N.Y. 480; *Hartford Bank v. Hart* 3 Day 493; *Mt. Sterling &c. Co. v. Looney* 1 Met. (Ky.) 550; *McCullough v. Moss* 5 Den. 567; a corporation cannot be held to have contracted unless by such agents or officers as have express or implied authority: *Lockwood v. Thunder Bay River Boom Co.* 42 Mich 536; an agent authorized to buy for a stated price cannot bind his principal if he agrees to give more: Story on Agency § 172; *Booth v. Bierce* 38 N. Y. 463; *Bryant v. Moore* 26 Me. 84.

Sherwood, J. The plaintiff sued the defendant in assumpsit, declaring upon the common counts for work and labor performed by himself for the defendant in keeping and running one of its boom-houses on the Tittabawassee river, during the rafting season of 1882, and accompanied his declaration by a bill of the items of his demand. Plea, general issue, with special notice; no question arises upon the pleadings.

The plaintiff was sworn as a witness in his own behalf, and testified in substance that in the spring of 1882 he went to one Spaulding (who had been accustomed to hire men for the defendant) and applied for labor in defendant's business. Spaulding told him he had no authority to hire plaintiff, and referred him to the president of the company, R. H. Weideman, and a few days thereafter he called on the president upon the subject, and was informed by him that W. S. Malcom was the superintendent of the boom company and was the man for plaintiff to make his bargain with. Plaintiff soon thereafter called on Mr. Malcom, and was employed by him to run the defendant's boom-house

for one hundred dollars per month until the close of the season, at which time he was to have fifteen per cent. additional. The defendant paid the monthly instalment of one hundred dollars but at the close of the season refused to pay the fifteen per cent. and twenty dollars for cleaning the boom before his employment by the month, and for these two items suit was brought. The plaintiff had judgment for twenty-one dollars and thirty-four cents, and now brings error.

The defendant claims that Malcom had no authority to make the contract he did with the plaintiff for the fifteen per cent. additional, and this is the only question we deem it necessary to consider.

On the 4th of March, 1882, the defendant's board of directors passed a resolution "that the wages for laboring men employed by the boom company for the present season be started at two dollars per month higher than was started at last year, and that the men signing contracts to remain during the entire season have added, at the close of the season, fifteen per cent. to their wages."

It is claimed that this resolution restricts officers of the company from employing the plaintiff on the terms above stated; that the resolution refers to a certain class of laborers, and plaintiff does not belong to that class, and consequently he could not be employed and receive the fifteen per cent, additional, and that his contract made with the company by its superintendent is not binding on the company; that Malcom had no authority to make the same. And the circuit judge so held, and directed the jury to exclude the fifteen per cent., amounting, as claimed, to about one hundred and five dollars.

This ruling was erroneous. There is nothing in the resolution which prevents the employment by the company of any other persons than those intended or alluded to therein, in such numbers and upon such terms as it deems proper. It is in no sense a limitation upon the powers of defendant, by its officers, to make such terms with laborers or persons in their employment, in other cases, as they may think neces-

sary for the interest of the company. There is no pretense that plaintiff knew of any action of any kind by the defendant's board of directors.

It is conceded that Malcom was permitted to do much of the hiring of the help for defendant, and the president testifies he himself had authority to hire laborers for the defendant, and referred the plaintiff to Malcom as the person with whom to make his bargain. The company recognized the contract the superintendent made with the plaintiff, and paid him for his services in accordance with its terms, and only refused performance when the fifteen per cent. became due and was demanded.

If the president and superintendent of this company defendant cannot by contract hire the necessary laborers to carry on its business, it is difficult to recognize any persons who could legally perform that service. We think the record clearly shows Malcom had full authority to make, in behalf of the company, the contract he did in this case with the plaintiff, and justice and good faith alike require defendant should comply with its obligations therein contained.

Malcom's letter[1] to the president of the company, dated December 12, 1882, should have been admitted in evidence. It was obtained, at the instance of the defendant, for the purpose of ascertaining the terms of the contract its superintendent had made with the plaintiff and the extent of liability thereunder.

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

The other Justices concurred.

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[1]EAST SAGINAW, Dec. 12, 1882.

R. H. WEIDEMAN, ESQ.

DEAR SIR: I told Gilbert Hardy when I had the talk with him last spring, if he would stay through the whole season of rafting, till the boom closed in the fall, I would allow him the 15 per cent. I also told him if he would clean up the section house, and do a good job of it, I would see him paid for his work on the house. W. S. MALCOM.

MICHAEL DOVEY v. JAMES M. LANE.

Impeaching testimony—Motion to strike out testimony.

Error does not lie on the refusal to strike out impeaching testimony that does not infringe the rules of evidence. Its force is for the jury under proper instructions.

Error to Muskegon. (Russell, J.) Oct. 26.—Oct. 31.

CASE. Defendant brings error. Affirmed.

Campbell & Allen for appellant cited *Leonard v. Pope* 27 Mich. 146; *Hamilton v. People* 29 Mich. 185; *Keator v. People* 32 Mich. 485.

Smith, Nims, Hoyt & Erwin for appellee.

GRAVES, C. J. Lane caused Dovey to be arrested for larceny, and the latter sued him in this action for malicious prosecution. The defendant testified at the trial in his own behalf, and the plaintiff called one Ryan to impeach him, and Ryan swore that his reputation was bad. The mode of examination was not very technical, but the question and answer were not excepted to.

The defendant's counsel then plied the witness with a pretty sharp cross-examination, and drew out sufficient to entitle him to argue to the jury, if any argument was necessary, that his impeaching testimony was worthless. At this stage however, the defendant's counsel moved the court to strike out all that the witness had said, and the court refused. This ruling is now complained of on writ of error, and the case raises no other point.

The testimony was no infringement of the law of evidence. The difficulty with it consisted in its want of completeness and its lack of evidentiary force to satisfy the principles of legal reasoning, and the objection to it was

not to be applied by moving to strike it out but by explaining its imbecility to the jury and by getting proper instructions in regard to it.

The judgment is affirmed with costs.

The other Justices concurred.

GEORGE W. GORHAM, COMMISSIONER OF HIGHWAYS OF CASCADE TOWNSHIP v. JOHN H. WITHEY.

Encroachments on a highway differ from obstructions.

1. The statutory action of trespass for encroachments on a public highway (How. St. § 1372) does not lie where the notice to remove them shows that the alleged encroachment is caused by fences entirely obstructing the road.
2. A justice of the peace has no jurisdiction of an action involving the title to land.

Error to Kent. (Montgomery, J.) Oct. 26.—Oct. 31.

TRESPASS. Defendant brings error. Reversed. The action was brought under How. St. § 1372 to recover a penalty for maintaining certain alleged encroachments in a highway, the "encroachment" being in fact three rail fences running quite across the road. This fact appeared from the notice to remove them, served by the commissioner of highways upon the defendant. The latter offered to prove that he owned the land in fee; that the fences were portions of the enclosures of his fields, and that no highway had been laid out. He admitted however that he had not notified the commissioner that he should deny the existence of the highway, and his offer of proof was therefore excluded and judgment rendered for plaintiff.

Champlin & More for appellant. A justice of the peace cannot try actions involving land titles, and plea of title is

a defense: *Little v. Denn* 34 N. Y. 452 overruling *Parker v. VanHouten* 7 Wend. 145; see also *Heaton v. Ferris* 1 Johns. 146; *Striker v. Mott* 6 Wend. 465; *Whiting v. Dudley* 19 Wend. 373; *State v. Doane* 14 Wis. 484; *Roberts v. Highway Com'rs* 25 Mich. 23; *Campau v. Button* 33 Mich. 525; *Willson v. Gifford* 42 Mich. 454; *State v. Huck* 29 Wis. 202; *State v. Preston* 34 Wis. 675.

Fred. A. Maynard for appellee.

SHERWOOD, J. This was an action of trespass, brought before a justice of the peace under the provisions of chapter VI of Act No. 243 of the Session Laws of 1881, to recover the penalty named in the second section of that chapter for failure to remove certain fences alleged to be encroachments upon a highway.

This chapter provides for the recovery of the penalty in cases of encroachment only, and the case sought to be proved on the trial was one of obstruction, in which, under the facts stated upon this record, the justice had no jurisdiction.

The distinction here stated was recognized and enforced by this Court in a case which arose under the city ordinances of Grand Rapids as early as 1866, in which Mr. Justice Cooley, in delivering the opinion of the Court, said: "Our laws have always made a distinction between cumbering or obstructing a public way, and encroaching upon it. The former term has been applied to impediments to travel and passage placed in the open street, and tending to make its use difficult or dangerous; while the latter has embraced the actual enclosure of a portion of the street by fences or walks, or occupation by buildings. The mode of dealing with the two offences has almost always been different, and the penalties also." *City of Grand Rapids v. Hughes* 15 Mich. 54.

The penalty under the statute invoked in aid of the plaintiff's cause for obstructing the highway is twenty-five dollars for each offense, while that for encroachment is fifty cents per day.

We are all satisfied with the exposition of the law as given by Mr. Justice Cooley in the case cited, and the judgment must be reversed with costs.

The other Justices concurred.

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100 130

JAMES L. EDSON, GEORGE F. MOORE, RANSOM GILLIS AND CHARLES BUNCHER v. CHARLES CUMINGS.

Bill to set aside judgment—Jurisdiction—Depositions.

1. A bill will lie to set aside a judgment for having been obtained by fraud between the judgment debtor and defendant, even though it has already been made the foundation in another state, of a suit in which defendant has attached the judgment debtor's property there. And complainant need not himself have obtained a judgment against the debtor as a foundation for the suit to set the judgment aside.

2. Depositions to which valid objection has been made in a chancery suit will not be considered on appeal even though a motion to suppress them was not acted on.

Appeal from the Superior Court of Grand Rapids. (Parrish, J.) Oct. 2–3.—Dec. 20.

BILL to vacate judgment, etc. Defendants appeal. Affirmed.

Fletcher & Wanty; Griffin, Dickinson, Thurber & Hosmer and *Levi T. Griffin* for complainants. Equity has jurisdiction in cases of fraud, trust or contract wherever the person can be found: *Davis v. Morris* 14 Rep. 286; *Dickinson v. Hoomes's Adm'r* 8 Grat. 427; relief cannot be denied on the ground that the mode of consummating a fraud is not the same as charged: *Merrill v. Allen* 38 Mich. 486; *Ormsby v. Barr* 22 Mich. 80; *Tong v. Marvin* 15 Mich. 60; a judgment for the full amount of notes the consideration of which is less than their face is fraudulent and invalid for every purpose: *McKenty v. Gladwin* 10 Cal. 227; *Bowie v.*

Free 3 Rich. Eq. 403; *Dickinson v. Way* 3 Rich Eq. 412; *Peirce v. Partridge* 3 Met. 44; *Fairfield v. Baldwin* 12 Pick. 388.

Maher & Felker for defendant. The courts of one state ought not to entertain an injunction bill to restrain proceedings previously begun in the courts of another state: *Mead v. Merritt* 2 Paige 404; *Carroll v. Farmers' Bank* Har. Ch. 197; the laws of the latter are presumed to afford sufficient remedy: *Fox v. Willis* 1 Mich. 330; *Henriques v. Hone* 2 Edw. Ch. 120; an attaching creditor occupies no better position than one who sues by the ordinary process of the courts, and will not therefore be allowed to enjoin the disposal of the debtor's property on execution, even though the judgment under which the execution is issued were fraudulently confessed by the debtor: High on Injunctions 145; *Martin v. Michael* 23 Mo. 50; *Bentley v. Goodwin* 38 Barb. 633; *Brooks v. Stone* 19 How. Pr. 395; *McMinn v. Whelan* 27 Cal. 300; and courts will not enjoin a judgment recovered by one creditor for the benefit of another creditor of the same debtor, merely because of usurious interest having been included in the former's judgment: *Adams v. Robertson* 37 Ill. 45; *Phillips v. Walker* 48 Ga. 55; *Gatewood v. City Bank* 49 Ga. 45; High on Injunctions (2d ed) § 234; *Brigham v. Fawcett* 42 Mich. 542.

SHERWOOD, J. The bill in this case was filed on the 6th day of May, 1882, against the defendant and one John T. Manley. On the 28th day of October, 1882, on payment of all costs, the bill of complaint was dismissed as to John T. Manley. The complainants were a firm doing business in Detroit, and at the time the bill was filed were creditors of John T. Manley to the amount of $3872.89. The goods for which this credit was given were obtained by Manley between the 1st day of January and the 20th day of March, 1882. On the 24th day of January, 1882, Manley, to obtain the goods, made a statement to the complainants showing he had merchandise on hand worth about $7000, and other assets amounting in the aggregate to $23,628, and that

his liabilities were $3000. On the 4th day of April, 1882, the defendant Cumings obtained a judgment against John T. Manley by default, in the Superior Court of Grand Rapids, for the sum of $19,186.90, service having been obtained upon Manley in Grand Rapids a few days prior thereto. About the middle of April, 1882, the complainants sued out a writ of attachment in the court of common pleas in the county of Fulton, in the state of Ohio, and levied it upon the property of Manley in that county. This seizure however was confronted by a prior alleged attachment levied in a suit brought by Cumings upon the Grand Rapids judgment in the common pleas court in Fulton county aforesaid.

The bill in this case was filed to obtain a decree declaring the Grand Rapids judgment and the notes upon which it is based, fraudulent, and a writ to enjoin the defendant Cumings from taking any steps to enforce the judgment, and from taking any proceedings in any suit in this State for the recovery thereof, or making use of it in the court of common pleas in Ohio for the purpose of establishing priority of lien over that of complainants. The circuit judge by decree granted the relief prayed and defendant appeals.

No demurrer was interposed to the complainants' bill; neither was the benefit of one claimed in the answer. The answer denies all the fraud charged in the bill and admits the indebtedness to complainants, and Manley's insolvency as alleged. The property attached and the lien sought to be protected as against defendant's prior lien lies in the state of Ohio.

The courts of this State have no jurisdiction in or control over any of the proceedings of courts in the state of Ohio. Her courts then cannot be interfered with, as courts, in their action in enforcing and protecting the rights of suitors in property lying within their several jurisdictions. We do not understand the injunction in this case to go or intend to go to that extent. The Superior Court of Grand Rapids may entertain a suit in equity to vacate or amend a judgment obtained by imposition or fraud within its jurisdiction; but

it cannot restrain an action brought upon such judgment in a neighboring state, nor dictate the proceedings therein. But a neighboring state will respect the decision of the Grand Rapids court annulling a judgment, when an action is sought to be maintained upon such judgment within its jurisdiction. Under the facts as they appear without dispute in this case, we think the complainants may proceed in equity to protect their levy by showing the Grand Rapids judgment void, without having first obtained judgment against Manley. *Heyneman v. Dannenberg* 6 Cal. 376; *Tyler v. Peatt* 30 Mich. 63; *Hale v. Chandler* 3 Mich. 531; *Fearey v. Cummings* 41 Mich. 376; *Hinchman v. Town* 10 Mich 508; *Scales v. Scott* 13 Cal. 76; *Massie v. Watts* 6 Cranch 148; *Bank of Bellows Falls v. Rutland & Burlington R. R. Co.* 28 Vt. 470.

The record in this case upon the subject of conspiracy and fraud is very voluminous, and we think shows that the defendant and John T. Manley did conspire together for the purpose stated in the bill of complaint, and that the credit obtained from the complainants was for a fraudulent purpose, and that it was in pursuance of and a part of such fraudulent scheme of the defendant and the said Manley that suit was instituted in the Superior Court of Grand Rapids by the former against the latter, and a judgment obtained for the defendant in this case, which is now being prosecuted in Fayette county in the state of Ohio. We think it is impossible to come to any other reasonable conclusion on reading the testimony in the case. It is unnecessary to review in detail the evidence in giving our views. It could be of interest to no one except the parties, and they are already familiar with all its various features and phases.

A large portion of the testimony was objected to, and notice was given by defendant's counsel of a motion to suppress certain portions of complainants' depositions, but the record does not show that the motion was pressed or heard and no action appears to have been taken by the court in the matter. In arriving at our conclusions in the case we have not considered such portions of the testimony as were

objected to and which were improper under the objections made.

Several questions were presented upon the argument which we do not find it necessary to discuss in passing upon the case, the question upon which the decision of the case must rest being so largely one of fact. Neither can we overlook the superior advantages possessed by the court below in this case in determining the credit to be given to the testimony of the various witnesses.

We think the decree of the judge of the Superior Court of Grand Rapids, in chancery, should be affirmed and the complainants must recover their costs.

The other Justices concurred.

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JAMES MCALLISTER v. GEORGE S. ENGLE, WILBER T. DRURY AND EZRA A. ENGLE.

Omnibus exceptions—Withholding commissions—Duress.

1. A general exception "to the charge of the court as given and to each and every part thereof" is not definite enough; the errors objected to must be specifically brought to the attention of the trial judge before the verdict is rendered so that he can have an opportunity to correct them.

2. In an action by a borrower to recover from a loan agent the amount of commissions which the latter had withheld on delivering the money, the plaintiff was entitled to show how defendant obtained the receipt which he gave for the money, and that he gave it under protest.

3. A receipt or acknowledgment of payment is not conclusive evidence of the fact.

4. A borrower went to a loan agent of an insurance company for money but afterwards negotiated the loan himself, dealing with the company personally and by letter. The money went to him through the hands of the loan agent, who insisted on retaining part of it for his services, and compelled the borrower to give a receipt showing a settlement in full. *Held*, that in a suit by the borrower against the loan agent for the amount withheld, it was proper to introduce the letters and to show what passed between the parties when the receipt was extorted.

Error to Huron. (Wixson, J.) Oct. 4.—Dec. 20.

Assumpsit. Plaintiffs brings error. Affirmed.

Engle & Engle for appellants. Threats to do that which one has not the legal right to do cannot effect duress: *Skeate v. Beale* 11 Ad. & El. 983; *Preston v. Boston* 12 Pick. 14; *Hackley v. Headley* 45 Mich. 576; *Wilcox v. Howland* 23 Pick. 167; *Atlee v. Backhouse* 3 M. & W. 633; *Hall v. Shultz* 4 Johns. 240; *Silliman v. United States* 101 U. S. 465; such as withholding payment of a debt or refusing performance of a contract. *Miller v. Miller* 68 Penn. St. 486; or to deliver goods: *Hibbard v. Mills* 46 Vt. 243; or to withhold a man's property illegally; *Hazelrigg v. Donaldson* 2 Metc. (Ky.) 445; but see *Thurman v. Burt* 53 Ill. 129; one cannot avoid a receipt in full which he has given in order to obtain money due him of which he stood in great need: *Miller v. Coates* 4 Thomp. & C. (N.Y.) 429; colloquium or pourparler between parties in obtaining a receipt are inadmissible in impeaching the receipt: *Fitch v. Woodruff Iron Works* 29 Conn. 82; *Jungerman v. Bovee* 19 Cal. 354; *Howard v. Thomas* 12 Ohio St. 201; *Downie v. White* 12 Wis. 176; *Rennell v. Kimball* 5 Allen 356; *Forbes v. Waller* 25 N. Y. 430; *Oiler v. Bodkey* 17 Ind. 600; *Robinson v. Magarity* 28 Ill. 423; *Morrison v. Lovejoy* 6 Minn. 319; a recital in a receipt of a contract or agreement, or an acknowledgment, is not open to contradiction or explanation as in the case of a simple receipt: *Tisloe v. Graeter* 1 Blackf. 353; *Egleston v. Knickerbacker* 6 Barb. 458; *Smith v. Brown* 3 Hawks 580; *May v. Babcock* 4 Ohio 334; *Stone v. Vance* 6 Ham. (Ohio) 246; *Wood v. Perry* Wright (Ohio) 240; *Graves v. Harwood* 9 Barb. 477; *Wayland v. Mosley* 5 Ala. 430; *O'Brien v. Gilchrist* 34 Me. 554.

Winsor & Snover and *William T. Mitchell* for appellee. All the circumstances of giving a receipt are admissible where its force is in question: 7 Wait's A. & D. 445–448; *Mich. C. R. R. Co. v. Dunham* 30 Mich. 128; a receipt in

full for logs to date may be contradicted by parol: *Smith v. Schulenberg* 34 Wis. 41; so can a receipt for services: *Foster v. Newbaugh* 66 Barb. 645; *Smith v. Holland* 61 N. Y. 635; or a shipping receipt: *Dolan v. Freiburg* 4 W Va. 101; admissions contained in a receipt are not conclusive upon the party making them: *Nachtrieb v. Harmony Settlement* 3 Wall. Jr. 66; *Tierney v. N. Y. C. &c. R. R. Co.* 10 Hun 569.

SHERWOOD, J. The plaintiff brought his suit in assumpsit upon the common counts for two hundred and twenty-five dollars and interest thereon, and filed a bill of particulars. The defendants pleaded the general issue, and gave notice thereunder that the sum claimed by plaintiff was money belonging to them for services and expenses rendered and incurred by them in procuring a loan of $3000 for plaintiff from the Michigan Mutual Life Insurance Company, at Detroit, and that they held plaintiff's receipt for the money on a settlement made of the claim. No question is made upon the pleadings.

It appears from the record that the defendants were the attorneys for the company in Huron county and were authorized to negotiate loans for the company in that county and did what business was necessary to be done for the company in making papers, examining titles, making abstracts and perfecting securities. Some time previous to the month of September, 1880, the plaintiff desired to effect a loan, upon real estate securities, of $3000 and called at the office of defendants to learn their rates and was informed that they would be nine and one-half per cent. and plaintiff said he would take the money of the defendants if he could do no better. Plaintiff testified that at this time he did not know that the defendants were loaning money for the company or that such company was in existence.

The evidence tends further to show that sometime after this the plaintiff went to Detroit for the purpose of obtaining the money, and while there he mentioned the object of his visit to some party who was acquainted with said insur-

ance company, and he spoke to the cashier, who introduced the plaintiff to Mr. Liggett, secretary of the company. The plaintiff had with him an abstract of the property he wished to mortgage as security for the loan, and showed it to Mr. Liggett who informed him the company would let him have the money at eight per cent. interest payable semi-annually; that there were no commissions to pay, but the company would require an abstract certified to by defendant, for which the plaintiff would have to pay the usual professional fees. Liggett at the same time gave plaintiff a blank application for the loan, with an appraisal of the security attached. Plaintiff returned home, filled out the application and had the necessary appraisal made and an abstract by one of the defendants, and returned them to Mr. Liggett at Detroit. Plaintiff offered to pay Engle for signing the abstract but was informed by him that he charged nothing for that service.

When the application was perfected and the money ready Liggett placed the check for the money in Engle's hands at the company's office at Detroit, to be delivered to the plaintiff, and the mortgage to be recorded when signed. The next day after the plaintiff was informed of these facts, Mr. Drury, one of the defendants, went to the plaintiff's place and had the mortgage executed, and the check indorsed to George S. Engle, saying to plaintiff that it was the company's way of doing business, and appointed a day for plaintiff to go to Bad Axe, where the defendants had one of their offices, and receive his money. He took the notes and mortgage and the endorsed check away with him. On the day appointed plaintiff went to Bad Axe and called on defendants for his money. They then offered to him $2775 and claimed to retain the remaining $225 for their commissions in procuring the money.

The defendants further claimed that they made an agreement with the plaintiff by which he was to give them the $225 for negotiating the loan, and that they did obtain the money. The testimony of Mr. Liggett tended strongly to corroborate that of the plaintiff. Several letters passed

between the parties and the company relating to the loan, and these were introduced in evidence on the trial. On several of the most important questions the evidence of the parties was conflicting. The jury under the charge of the court gave verdict for the plaintiff. Defendants bring error.

The assignments of error from the fourteenth to the twenty-fifth, both inclusive, are not supported by any sufficient exception. The exception is as follows: "To which charge of the court as given, and each and every part thereof, the defendant then and there excepted." This Court has ruled in several cases that such an exception is too general, and we still adhere to that ruling. It is equally due to the circuit judge and the parties that errors claimed in the charge should be specifically called to the attention of the trial judge before the jury have rendered their verdict, that he may have the opportunity to correct such error if the exception is well taken. *Danielson v. Dyckman* 26 Mich. 169; *Mandigo v. Mandigo* 26 Mich. 351; *Tupper v. Kilduff* 26 Mich. 394; *McKay v. Evans* 48 Mich. 603; *Altman v. Wheeler* 18 Mich. 240; *Polhemus v. Ann Arbor Sav. Bank* 27 Mich. 44; *Baylis v. Stout* 49 Mich. 215.

The defendants claimed a settlement and receipt for the claim made by plaintiff as a full defense in the case. The manner of obtaining it and what was said by the parties was entirely proper, and the court committed no error in refusing to strike out the evidence of the protest under which it was given. The acknowledgment of payment was not conclusive.

We think that all the letters introduced in evidence by the plaintiff were properly received in connection with the other testimony. They tended to show to the jury that the plaintiff had his dealings for the money entirely with Mr. Liggett, the insurance company's secretary, and that defendants were acting for the company in what they did for the plaintiff; and they tended to show that by a species of duress the defendants sought to force or frighten the plain-

tiff into a settlement and the giving of the receipt relied upon by defendants as quite sufficient to defeat the plaintiff's action. These letters were a part of the res gestæ upon those points. They were competent testimony. And for the same reason the testimony excepted to under the defendants' third, fourth, fifth and sixth assignments of error was properly received. There was testimony in the case tending to show duress in the defendants' retaining the money and obtaining the receipt in the manner they did; and the court committed no error in refusing to give defendants' first, second, third, fourth, sixth and ninth requests to charge the jury. The charge of the court covered the entire ground of the defendants' fifth and ninth requests, and stated the law correctly.

The record in this case is very full. It shows a fair and impartial trial, and at the close of the testimony the case went to the jury under a clear, well-considered and correct charge by the circuit judge. The verdict was for the plaintiff. We are unable to discover any error in the proceedings, and

The judgment must be affirmed with costs.

The other Justices concurred.

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JULIA E. FAIRBANKS v. JOHN C. BENNETT.

Attachment—Defective service not cured by new writ.

1. Attachment proceedings before a justice of the peace are special and statutory, and will not support a lien unless all the provisions of the statute as to the levy and execution of the writ are strictly observed.
2. Facts cannot be considered established by the finding of a jury, if the finding was based on improper testimony and an erroneous charge.
3. After trespass has been brought for the seizure of goods under an attachment which was not properly served, the defect in service cannot be cured, for the purposes of the action in trespass, by taking out a new attachment.

Error to St. Joseph. (Pealer, J.) Oct. 5.—Dec. 20.

TRESPASS. Plaintiff brings error. Reversed.

D. E. Thomas for appellant.

C. W. W. Clark and *Wm. L. Stoughton* for appellee.

SHERWOOD, J. The action in this case is trespass for wrongfully taking and carrying away a quantity of goods claimed to be the property of the plaintiff, and for injuries consequent thereon. Plea, general issue, with notice that the goods were taken by defendant as an officer under attachment against the property of Charles N. Fairbanks, husband of plaintiff.

On the twenty-fourth day of February, 1883, suit was commenced before a justice of the peace by George W. Dubois & Co., by writ of attachment against Charles N. Fairbanks, for $250. The defendant was constable, and by virtue of the writ seized the goods of the plaintiff and made an inventory thereof. The defendant not being found, service was made by copy, which was too late. The writ was made returnable on the fifth day of March, and the writ was returned by the defendant the same day. The defective service is conceded by defendant. The goods were worth about $2000. At the time the defendant seized the stock of goods they were in possession of the plaintiff, and the testimony tended to show that she purchased them of her husband on the thirty-first day of January previous, and paid therefor $510 in cash, and released a claim she held against him, then amounting to $1266, secured by chattel mortgage on the goods. The goods were taken from the possession of the plaintiff and held by defendant until the fifth day of March, when the plaintiff commenced her suit therefor. On the fifth day of March, when the defective service was discovered by the defendant, the suit before the justice was discontinued, and a new attachment was taken out and levied upon the same property, and service of process was regularly made. The defendant seeks to

justify under the two writs. The case was tried by jury, and under the testimony and the charge of the circuit judge the jury rendered a verdict for the defendant, and the case is now before us for review on bill of exceptions containing all the testimony given in the case.

The possession of the property by the plaintiff and her ownership as against her husband are conceded. It is also conceded that no legal service was made of the first writ of attachment. Still the property was taken from the plaintiff, as it is claimed, by virtue of such writ. The proceedings before the magistrate were special and statutory, and every requirement of the statute must be strictly observed; and the rule applies to the officer as well as to the parties. If any of the provisions of the statute are not complied with by the officer in levying or executing his writ, the lien obtained is lost. *Greenvault v. Farmers' & Mechanics' Bank* 2 Doug. (Mich.) 502; *Buckley v. Lowry* 2 Mich. 420; *Roelofson v. Hatch* 3 Mich. 277; *Millar v. Babcock* 29 Mich. 526; *Adams v. Abram* 38 Mich 302.

Under the conceded facts in this case it was incumbent upon the defendant to show not only that the transfer of the goods was fraudulent as to creditors of Charles N. Fairbanks, but that defendant acted under a valid writ against him and executed it in a legal manner. *Decker v. Bryant* 7 Barb. 182; *Pemberton v. Smith* 3 Head 18. A judgment in the first attachment suit upon the claims sought to be recovered not having been obtained, there was no evidence that the plaintiff in that attachment was a creditor. *School-district v. Macloon* 4 Wis. 88; *Cook v. Miller* 11 Ill. 610. No legal service of the writ of attachment in the first suit, of any kind, is shown or claimed. In order to be protected by process of this kind, the officer must proceed with his writ as the law directs. *Russ v. Butterfield* 6 Cush. 242; *Whitney v. Jenkinson* 3 Wis. 407; Cooley on Torts 461; *Michels v. Stork* 44 Mich. 2.

It is claimed by defendants' counsel that because a second suit was commenced as soon as it was ascertained the proceedings in the first were worthless, the commencement of

the second in some measure excused the illegal proceedings in the first. We know of no rule of law giving the commencement of a suit any such operation. The defendant clearly lost the protection of his writ by the defective manner of serving it. He took and held the plaintiff's property without right, and is liable to her for any necessary and legitimate damage she has sustained thereby. The proceedings in the magistrate's court, in both cases, were irrelevant and immaterial, and should not have been given to the jury.

Much is claimed by defendant's counsel for the decision of the jury under the general finding on the question of a fraudulent transfer of the property to plaintiff. But the finding of the jury is of no consequence so long as it is based upon improper testimony and an erroneous charge. It is further claimed by defendant's counsel that the verdict showed plaintiff had no interest in the goods as against the defendant's execution when he made his levy; but this position is subject to the same infirmity. The verdict itself was erroneous, because based upon improper evidence.

The plaintiff's second request was proper and should have been given. It is as follows: "The fact that plaintiff paid full value for the goods, if such was the case; that there was an immediate change of possession; that the plaintiff was a creditor of her husband in a large sum; and that he is not shown to have been legally indebted; or that the plaintiff knew of any fraudulent intent on his part, are all circumstances to show the transaction a fair one."

It is also difficult to see why the plaintiff's first request might not have been properly given.

These views dispose substantially of all the questions raised in the case, and further discussion is unnecessary.

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

CAMPBELL, J. concurred.

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

COOLEY, J. There were in this case two attachments

against the goods of the plaintiff's husband, under the first of which the defendant, as officer, seized the goods in the hands of the plaintiff. There was a failure to make legal service of that writ, and before the second writ was sued out the plaintiff brought this suit. The defense is that plaintiff holds the goods fraudulently, and that they still belong to plaintiff's husband for all purposes of enforcing the claims of creditors.

I agree that under the circumstances the defendant was liable in trespass for seizing the goods on a writ which failed; but I am not prepared to say that the proceedings in the attachment suits were immaterial and not proper evidence in the trespass suit. Whether the defendant might not prove them, and thereby show that the plaintiff had sustained no real damages, and had only a technical right of action, is a question on which I reserve opinion.

ISAAC P. STEVENS, LAFAYETTE STEVENS AND FREDERICK J. HENIKA, EXECUTOR v. AMELIA A. HOPE ET AL.

Wills—Probate proceedings—Evidence of motive—Revocation.

1. A probate proceeding to establish a will and adjudicate the status of an estate, belongs to the class of actions in rem; and all who are concerned or interested are parties.

2. Where the existence of a later will is in question, in proceedings to prove an earlier one, the facts as to a motive and opportunity for its destruction cannot be ignored, and it is proper to show that if the will had ever existed it would have fallen under the control of persons who were beneficiaries in the other will.

3. The non-production of an alleged revoking will is immaterial in contesting a proceeding to prove a former one, if there is sufficient evidence that it ever existed.

4. Such facts in regard to a testator's fortune and the circumstances and relations of his family, within his knowledge, as would naturally influence him in his testamentary dispositions, are admissible on proceedings to prove his will.

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5. Mere general objections to evidence need not be noticed unless the true point of the objection is plain.

6. When a will has once been expressly revoked by a later one, nothing can ever be claimed under it, even though the later will has been lost or destroyed.

Error to Kalamazoo. (Mills, J.) Oct. 5–9.—Dec. 20.

APPEAL from probate. Contestants bring error. Reversed.

Edwards & Stewart for appellants.

O. W. Powers for proponent appellees. When a will has been shown to be last seen in the testator's possession, and cannot be found upon full search, the law presumes it to have been destroyed by the testator, for the purpose of revoking it: Cheever's Probate Practice 45; *Lawyer v. Smith* 8 Mich. 411; 1 Redf. on Wills 328, 330.

GRAVES, C. J. Several terms since we had occasion to review this cause, and we sent it back for another trial. It will be found in 48 Mich. 518, entitled "*In the Matter of Amelia A. Hope et al.*" It now reappears on various exceptions taken by contestants on the second trial. But a large portion of them are, in our view, so plainly unimportant as to require no comment. We have only to pay attention to what the inquiry is, and what it concerns, and mark the bearings of the actual contention, to obtain a solution of all the points propounded in the record.

The cause is not an ordinary action at law where one specified party is seeking to recover damages or property from another. It is a case of probate, and it belongs to the class of actions in rem. The object is to establish a will, to have the status of an estate adjudicated, and all who are concerned or interested are parties. *Allison v. Smith* 16 Mich. 405. The course of evidence is determined by the nature of the inquiry and the substance of the issue.

Isaac Stevens, the supposed testator and an old man, died at his home in Kalamazoo on the 13th of December, 1879. His estate was estimated at about $15,000. He left three

sons, Jackson, Isaac P. and Lafayette Stevens, and six daughters. The will offered for probate was made seventeen years prior to his death, being dated April 23, 1862. At the time it was made he was living with his wife Betsey, and a liberal provision was inserted for her benefit. But she died sometime afterwards. In 1874 the son Lafayette married and came to reside with the testator, and in 1877 the latter intermarried with the mother of Lafayette's wife, and the four resided together up to the testator's death. The other children lived by themselves. Jackson, the eldest of the brothers, and Isaac P. resided on small farms near by.

The dispositions made by the will of 1862 appear from its terms. A copy is given below.[1] The formalities of this

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[1] *In the name of God, amen.* I, Isaac Stevens, of the township and county of Kalamazoo, and state of Michigan, being of sound mind and memory and understanding, do make and declare this to be my last will and testament.

First. I desire my just debts, funeral and testamentary expenses, to be fully paid and satisfied.

Second. I give, devise, and bequeath unto my wife, Betsey Stevens, the use and benefit of all real and personal estate I may die seized of, and all rents, interest, and profits arising therefrom, during the term of her natural life, and so to be used by her for her own use and benefit.

Third. After the decease of my said wife, I give, devise and bequeath unto my sons Isaac P. Stevens and Lafayette Stevens all and singular whatsoever real and personal estate I may die seized of, and of whatever name or nature, and wheresoever situate, subject, however, to the use of all rents, interest and profits arising therefrom to my said wife, Betsey, during her life; and further subject to the payment by said sons Isaac P. and Lafayette Stevens within one year after the decease of my wife, or before if they elect, of the following legacies, to-wit:

I direct that within one year after the decease of my said wife my sons aforesaid shall pay to Martha Eastland, widow of Joseph Eastland, the sum of ten dollars.

To Amelia Hope, wife of Edward Hope, the sum of one hundred dollars.

To Helen, the wife of Charles Dodson, the sum of two hundred dollars.

To Eliza Henika, the wife of Frederick Henika, the sum of one hundred and fifty dollars.

And to my other daughter, Ann Stevens, the sum of one hundred dollars.

To Jackson Stevens (my son) the sum of five dollars.

And I do hereby charge my real and personal estate with the payment thereof, and upon such payment being so made to them, their several receipts shall be taken therefor.

Hereby revoking all other or former will or wills by me at any time made, I do declare this to be my last will and testament, and do appoint my son-in-law, Frederick Henika, executor thereof.

In testimony whereof I have hereunto set my hand and affixed my seal this twenty-third day of April, one thousand eight hundred and sixty-two.

ISAAC STEVENS. [Seal.]

instrument have not been questioned. The broad issue arises on proponent's allegation that it is decedent's last will. The contestants deny that it is so. They contend that he revoked it, and they specify the manner. They aver that in 1879, and a short time prior to his death, he executed another will containing express words of revocation, and which was drawn by Rollin Wood and witnessed by him and one Arnold Van Lockem. This will is not produced. But the claim of contestants that the decedent actually executed such a will has much testimony in its favor. The proponents make use of its non-production as an argument that no such will was ever made, notwithstanding the independent indications to the contrary, and in this connection they cite the doctrine to which prominence is subsequently given in the charge, that where it is shown that a will was once in existence, and was in the testator's possession when last heard of, the circumstance that it is not found at his death raises a presumption of the fact that he destroyed it with intent to cancel it. *Idley v. Bowen* 11 Wend. 227; *Betts v. Jackson* 6 Wend. 173; *Bulkley v. Redmond* 2 Bradf. Sur. 281; *Foster's Appeal* 87 Penn. St. 67; *Newell v. Homer* 120 Mass. 277; *Mercer v. Mackin* 14 Bush 434; *Brown v. Brown* 8 El. & Bl. 884. The aptness and force of this citation will be noticed further on.

The contestants assume to meet this argument against the existence of the second will attempted to be drawn from its non-production, by contending that the widow, together with Lafayette and Isaac P., the chief beneficiaries under the will of 1862, fraudulently suppressed it, and this theory is not destitute of evidence. Moreover, the record contains grounds for argument that the papers of the testator, including the second will, in case there was one, fell under the control of the widow and the proponents at his death. This is a consideration which could not be overlooked in a discussion turning on the influence of presumptions. *Schultz v. Schultz* 36 N. Y. 653. The presence of motive and opportunity could not be wholly disregarded. But it is needful to return to the vital issue.

The final question is not whether the supposed will of 1879 was revoked by the testator, or whether it was in existence at his death, or whether the widow and the two sons suppressed it. The present proceeding is not to establish that will. The purpose is to decide whether the will of 1862 shall be established or not, and that is made to depend on whether the testator did or did not execute the alleged second will. If he did not, then no objections appear to the establishment of the will of 1862. On the contrary, if he did, then it is immaterial what became of it, or whether an intestacy would arise; it put an end to the will of 1862. That no will of 1879 is produced is no doubt a circumstance which may be considered, along with others, on the question whether such a will ever in fact existed. Were it produced it would demonstrate its own existence and foreclose the issue. But if the facts and inferences are sufficient, notwithstanding its absence, to satisfy the mind that it once existed, its non-production is wholly immaterial on the present issue. *Wallis v. Wallis* 114 Mass. 510.

We have come again to the point where the proponents cite the presumption that the testator destroyed it. By this they antagonize their own position, because the proposition necessarily admits that the revoking will was once in existence, and if that be conceded it decides the case adversely to the will of 1862.

The case was tried on principles not in harmony with this opinion, and the record contains rulings which cannot be sustained. They were evidently prejudicial. We shall not dwell on details. In view of the explanation given it is not reasonable to suppose that former difficulties will be renewed.

In most instances the contestants in objecting to evidence merely stated the general principles on which they asked to have the favorable ruling of the court, and neglected to mention any specific ground. Objections made in this form are not entitled to notice unless it happens that the true point of objection is too palpable to call for anything more definite.

Such facts, in regard to the testator's fortune and the circumstances and relations of his family within his knowledge as would naturally influence him in respect to his testamentary dispositions, were proper to be considered. Whart. Ev. ch. 2. We find several rulings at variance with this view.

We think the charge was misleading. It did not confine the attention of the jury to the true issues, and it led them to look at immaterial matters as important if not controlling. Certain requests were accepted as accurate expressions of the law, and we find among them the statement that the revoking will, whether destroyed or not, would do away with the prior one. But the point was not allowed to rest on these requests. The judge took up the matter in his original observations, and laid it down expressly that the second will would only operate to revoke the prior one in case it remained in force at the testator's death. In this respect the direct instruction was an absolute contradiction of the statements read from the requests, and was, moreover, as we have seen, an erroneous explanation of the law. It is quite impossible to admit that the jury ignored this instruction.

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

COOLEY and CAMPBELL, JJ. concurred.

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JEROME P. KROLL v. THOMAS NESTER.

Log-driving—Compensation for services in breaking jams.

The statutory right of action for services in breaking jams caused by another's logs, and for driving the logs themselves, where it becomes necessary to do so to enable the plaintiff to get his own logs down a stream that is obstructed by the other's, does not arise when the stream is not naturally in a navigable condition, and the plaintiff

has had to resort to artificial means, such as flooding, to create any floatage whatever.

Error to Saginaw. (Gage, J.) Oct. 9.—Dec. 20.

ASSUMPSIT. Plaintiff brings error. Affirmed.

Tarsney & Weadock and *C. S. Draper*, for appellant. A riparian has a right, in using the stream, to diminish, retard or accelerate its natural current to some extent: *Parker v. Hotchkiss* 25 Conn. 321; *Davis v. Getchell* 50 Me. 602; and to detain the water in dams in order to use it in flooding, in working mills: *Hayes v. Waldron* 44 N. H. 580; what is a reasonable use must depend on the conditions: *Honsee v. Hammond* 39 Barb. 89; *Gillett v. Johnson* 30 Conn. 180; *Tourtellet v. Phelps* 4 Gray 370; and is a question for the jury: *Miller v. Miller* 9 Penn. St. 74; *Snow v. Parsons* 28 Vt. 459; and if the detention of the water is necessary to the reasonable enjoyment of the stream a proprietor below is remediless: *Davis v. Winslow* 51 Me. 290; *Chandler v. Howland* 7 Gray 348; *Hartzall v. Sill* 12 Penn. St. 248; *Dumont v. Kellogg* 29 Mich. 420; *Buchanan v. Grand River Log Co.* 48 Mich. 365.

L. T. Durand and *Hanchett & Stark* for appellee. The public easement in a stream is restricted to its capability for use in the ordinary and natural condition of the water course: *Thunder Bay River Booming Co. v. Speechly* 31 Mich. 336; *Morgan v. King* 35 N. Y. 459; *Treat v. Lord* 42 Me. 552; *Am. River Water Co. v. Amsden* 6 Cal. 443; *Holden v. Robinson* 65 Me. 218; *Buffalo Pipe Line Co. v. N. Y. & L. E. & W. R. R. Co.* 10 Abb. N. C. 107; *Olson v. Merrill* 42 Wis. 212; Wood on Nuisances § 587; Angell on Watercourses § 537; *McLaren v. Caldwell* 19 Can. L. J. 49; a stream which can only be made floatable by artificial means is not a public highway: *Moore v. Sanborn* 2 Mich. 519; *Brown v. Chadbourne* 31 Me. 9; a dam unauthorized by law is an unlawful structure: Const., Art. xviii, § 4; Cooley on Torts 584; *Powers v. Irish* 23

Mich. 429; *Clay v. Pennoyer Creek Imp. Co.* 34 Mich. 208; the right to charge toll for the use of a lock or for passage over a highway is a franchise which the sovereign only can confer: *Boykin v. Shaffer* 13 La. Ann. 129; *Sellers v. Union L. Co.* 39 Wis. 525; *Weatherby v. Meiklejohn* 56 Wis. 78; *Tewksbury v. Schulenberg* 41 Wis. 593; *Volk v. Eldred* 23 Wis. 410; and the right can be conferred only in accordance with the provisions of the act relating to the improvement of streams: *Benjamin v. Manistee River Improvement Co.* 42 Mich. 628; *Lansing v. Smith* 4 Wend. 9; *Black River Flooding Ass'n v. Ketchum* 54 Wis. 314; the statute authorizing one to collect for his services in breaking jams (Comp. L. § 1660) as amended by Act 85 of 1879, can only be applied to navigable streams or such as can be used in the natural stage of the water in them for floating; other streams are private property: *Marsh v. Colby* 39 Mich. 626; *Wadsworth v. Smith* 11 Me. 281; *Treat v. Lord* 42 Me. 564; *Munson v. Hungerford* 6 Barb. 265; *People v. Platt* 17 Johns. 209.

Cooley, J. Much of what was involved in this case in the circuit court was disposed of by the verdict of the jury, and will be the subject of no discussion here. What remains to be considered is, whether the trial judge was correct in his instruction whereby the jury were required to reject a portion of the plaintiff's claim.

The action was brought to recover for labor and expenses in running and driving logs for the defendant on the Tittabawassee river during the season of 1881. The plaintiff claimed to recover, not upon any express employment by the defendant, or any express undertaking to compensate him for either labor or expenses, but upon an implied contract springing from the statute and the facts in proof. The statute relied upon is the act of 1861. Laws 1861 p. 557 as amended in 1863—Comp. L. § 1660—and again in 1879 (Public Act 85). This statute, as it read when the supposed cause of action arose, was as follows:

"That if any person or persons shall put or cause to be

put into any lake, river, creek or stream of this State, any logs, timber or lumber for the purpose of floating the same to the place of manufacture or market, and shall not make adequate provisions and put on sufficient force for breaking jams of such logs, timber or lumber in or upon such lake, river, creek or stream, or for running or clearing the same from the banks or shores thereof, or for running or driving the same, and shall thereby hinder the removal of any logs from the banks or shores thereof, or shall thereby obstruct the floating or navigation of such lake, river, creek, or stream, it shall be lawful for any other person, company, or corporation engaged in floating or running logs, timber, or lumber in such lake, river, creek or stream so obstructed, to cause such jams to be broken, and such logs, timber, or lumber to be run, driven and cleared from the banks of such lake, river, creek or stream at the cost and expense of the person or persons owning such logs, timber or lumber; and such owner shall be liable to such person, company or corporation for such cost and expense, and such company, person, or corporation so causing such jams to be broken, or such logs, timber or lumber to be run, driven or cleared, may have a lien on such logs, timber, or lumber for his or their reasonable charges and expenses for breaking jams and running, driving and clearing the same, and shall be entitled to take and retain possession of such logs, timber or lumber wherever the same may be found, or so much thereof as may be necessary to satisfy the amount of such charges and expenses and all costs thereon until the same shall be determined, satisfied and paid in the manner hereinafter prescribed."

Another section authorized an action of assumpsit to recover the amount of the claim, and plaintiff brought such a suit instead of attempting the enforcement of a statutory lien.

There was evidence which warranted the jury in finding that defendant, in the season of 1881, put a large quantity of logs into the Tittabawassee river for the purpose of floating the same to a place of manufacture or market; that he failed to make adequate provision for breaking jams, or for running or driving the same; that the navigation of the river was, in consequence, obstructed; and that the plaintiff, who was running logs in the river behind those of the defendant, in order to move forward his own logs, was

compelled to and did expend labor and money upon the logs of the defendant, and that the expenditures were continued until about the 15th day of May, when it became necessary to resort to artificial means to produce sufficient current for further floatage. For the labor expended and the expense incurred up to the day named, the court permitted a recovery, and the question now to be decided concerns what was done afterwards.

The artificial means resorted to for the purpose of producing a sufficient current were—*first*, the narrowing of the stream at one point by a dam extending a part of the way across it; and *second*, the bringing down of floods from reservoirs created by dams on the tributaries of the river. All these dams were constructed for this express purpose, and they were either under the control of the plaintiff or he was permitted to make use of them to create floatage in the dry season. By means of them he was enabled to flood and run the logs of the defendant, and also his own logs, within the booms of the Tittabawassee Boom Company before the fall floods set in.

The defendant insists that he had a right to cast his logs in the river, and leave them there to be floated at such times as the river was navigable in its natural state, and that he could not be held responsible for any money or labor expended in creating artificial navigation, in the absence of contract on his part to pay for it. Of this opinion was the circuit judge, and under his instructions the jury rejected the claim.

Much of the language of the circuit judge in submitting the case to the jury was so general that it would be applicable to cases that in their circumstances might be so far different as to make other considerations important, and to leave room for argument whether a different conclusion ought not to be reached. But, restricting the application of his charge, as the jury were required to do, to the exact case in proof, we are compelled to agree with the circuit judge that notwithstanding the apparent hardship of the case the plaintiff has no redress.

No claim is made on the part of the plaintiff that he is entitled to recover except under and upon the provisions of the statute, and he went to the jury upon the statute and upon what he claimed to have done in reliance upon its provisions. We have therefore only to see whether he brings himself within the statute.

Previous to the amendment of 1879 the statute in terms applied only to "navigable" rivers, creeks and streams; but by that amendment lakes were included, and the word "navigable" was dropped out. Much reliance is placed upon this change by the plaintiff; and it is contended that the purpose was to extend the statutory remedy to non-navigable waters, and so permit parties to recover where they had performed valuable service on such waters, and also where, in the dry seasons, they had kept up the floatage in the streams commonly navigable, as the Tittabawassee is, by means of reservoirs and other artificial means. On the other hand, the defendant contends that the statute applies only to natural highways, and while they are such in their natural condition; and that it does not assume to give a right to create an artificial navigation, and to charge for floating the logs of non-assenting parties by means of it.

Without stopping to consider how extensive were the changes which were introduced by the amendment of 1879, or whether a stream of the magnitude and public importance of the Tittabawassee is to be regarded as a public highway at all times, notwithstanding there may be seasons when there is no valuable floatage upon it in its natural condition, we are of opinion that it is only when the actual "floating or navigation," or the labor preparatory thereto, is hindered or obstructed, does the statute assume to give any right of action against non-assenting parties; and that the floating or navigation intended is that which exists in its natural state, and not that which parties may make by means of dams, locks, sluices or in any other manner, when there is none without the artificial aids. We take the statute as we find it, and it is plainly restricted as above indicated, and has for its purpose the protection and full

enjoyment of existing rights of floatage and navigation, and not of rights which may artificially be brought into existence. Nothing in the language of the statutes gives any indication that artificial floatage was within the legislative contemplation in enacting it.

If it had appeared in the case that there was valuable floatage to a limited extent in the natural condition of the stream during the whole season, and that it was rendered unavailable because of the vast quantity of logs cast into the stream by the defendant and others, so that it became necessary to resort to artificial means to make an actual navigation available, the case thus presented would differ from the one which the judge covered by his instructions in this case. It may be that on the evidence it might have been claimed that such was the case during the season of 1881; but as the plaintiff did not ask to go to the jury upon any such theory, the record does not call for any opinion from us upon it. Neither, it may be added, does the record raise the question of the right of any one to make the bed of the river a storage ground for logs during the dry season to the prejudice of those who, by means of flooding or otherwise, might desire to float their own logs to a place of manufacture or market.

The judgment must be affirmed with costs.

The other Justices concurred.

CHARLES L. ORTMANN v. JAMES H. PLUMMER, GEORGE H. VAN ETTEN, GEORGE CAMPBELL, ORLANDO M. BARNES, THE JACKSON, LANSING & SAGINAW RAILROAD COMPANY ET AL.

Escrow, bailment or agency—Lien on equitable title.

1. Delivery of an assignment of a land contract into the custody of one of the partners in a firm to which it is assigned can hardly be con-

sidered a delivery in escrow, to operate until the assignee shall execute a mortgage back, in a case where both the assignment and the contract have first to be delivered to the other party to the contract in order to obtain from him a deed on which to base the mortgage. If such a delivery be accompanied by a parol agreement as to the terms of the transfer, it cannot, under the Statute of Frauds, be regarded as a trust, but is rather a bailment or agency.

2. A vendor's right to a lien it not, *it seems*, confined to the sale of a legal title or of a title in fee, but extends to equitable titles subject to the risk that bona fide purchasers from the legal holder may intervene and break it.

3. Where the purchase price of one parcel of land is so blended, in a mortgage, with that of another, that it cannot be separated, no lien beyond the mortgage itself can properly be enforced.

4. Whether a lien may not continue, if so agreed, where other collaterals are taken—*Q.*

5. O. had 2000 acres of pine land and held a contract from a railroad company for about 5000 more. A certain firm which had contracted for the smaller parcel agreed also to take the contract for the larger, subject to certain sums thereafter to fall due. O. was to give the firm a deed of the smaller parcel and have a lien on the larger for what they owed him on both. The firm were to get a deed of the larger parcel from the railroad company, and mortgage it, first to the company for what was left unpaid, and next to O. to secure their debt to him. This arrangement was oral. The company, however, refused to give a deed until the larger parcel was all paid for, and this refusal prevented the fulfillment of the arrangement in its terms. The firm changed, and its successor, after paying the company a sum which the latter insisted on applying in part upon other contracts, became bankrupt, and P., having obtained so much of its assets as concerned the property in the railroad lands, asked the company for a new contract for the larger parcel. The company refused, but agreed to consolidate all contracts in one, which P. took, and under which he made large sales. Everybody had notice of O.'s rights. *Held*, that as the company had denied O.'s lien and tried to destroy it, and by compelling the consolidation of the contracts had made it impossible to separate the payments, and by such consolidation had obtained for the larger parcel enough more than the contract price to render it liable for the money due to O., it must pay him that amount.

Appeal from Bay. (Green, J.) Oct. 11.—Dec. 20.

BILL to enforce lien. Complainant appeals. Reversed.

A. McDonell and *Isaac Marston* for complainant.

Hatch & Cooley and *Hanchett & Stark* for defendants.

CAMPBELL, J. The bill in this case was filed to enforce rights growing out of a lien claimed for unpaid purchase money of a tract of timbered land. In 1874 a firm which had become interested, under the name of Van Etten, Campbell & Co., in the assets of a previous firm, were holders of a contract for 2209 acres, partly paid for, which had belonged to complainant and others, and then were practically complainant's. At the same time complainant and one Boeing held a contract for 4892.86 acres, originally made by the Jackson, Lansing & Saginaw Railroad Company to Dexter A. Ballou, on which some payments had been made, and future payments were also to mature, $8673.68 and back interest, due April 1, 1874, and about $26,000 in three payments annually thereafter.

In February, 1875, an agreement was made to sell this contract to Van Etten, Campbell & Co. subject to the sum of $26,000, which they were to assume, complainant agreeing to take care of the rest. They were to pay complainant for his interest $25,675. None of this purchase price was to be paid down, but the arrangement was as follows: This sum, added to what was unpaid on the 2209 acres, made up $42,000. This was to be divided up into seven notes, payable as follows: One for $8000 due August 1, 1876; one for $8000 due November 1, 1876; one for $4000 due June 1, 1877; one for $4000 due August 1, 1877; one for $6000 due November 1, 1877; one for $6000 due June 1, 1878; and one for $6000 due August 1, 1878, all on interest. A deed for the 2209 acres was to be delivered, and a mortgage given to complainant for $22,000, including the last four notes. Complainant was to have a lien on the 4892.86 acres for the whole $42,000. He was to pay the amount not assumed by Van Etten, Campbell & Co., who were to make the remaining payments, and who were, as soon as possible, to get a deed from the Railroad Company and give back a mortgage for what remained unpaid to the railroad, and then execute a second mortgage on the tract

to secure the $42,000. Complainant paid what he had agreed to, but the Railroad Company, which had previously been in the habit, after receiving certain preliminary payments, of giving deeds and taking back mortgages for the remainder, declined, under its new commissioner, Mr. Barnes, to continue that custom, and refused to give a deed before full payment. This made it impossible to carry out the terms of the purchase literally. These had been left in parole. The deed and mortgage were executed on the smaller tract, and the notes given. The Railroad Company are shown, in our opinion, to have had full notice of the complainant's claim. It was expected and understood that Van Etten should hold all the papers until the agreement was properly carried out.

Van Etten, Campbell & Co. became in the year 1876, by transfer from the other partners, changed into Campbell & Campbell, who in that same year made a payment to the Railroad Company of $15,000. The company, however, claim this payment was not made on the Ballou contract, but upon a consolidation of that with three certain other contracts made with the predecessors of Van Etten, Campbell & Co. on other lands, and in default. The lands covered by these other contracts had ceased to be valuable, and were not worth nearly the sum unpaid on them.

The facts are disputed concerning this consolidation. It is claimed on the one hand that Van Etten agreed that they might all be put together, and left the Ballou contract with the company in that view. But it also appears that it was not regarded as surrendered for any supposed forfeiture, and that it was not agreed by Campbell & Campbell that it should be regarded as extinguished. Complainant was not consulted, and did not agree to it. And in November 1876, Campbell & Campbell received the original contract, with a written assignment from Van Etten, Campbell & Co. These papers subsequently got into the hands of the Railroad Company in some way, but we do not think they were treated as forfeited, and it is not, in our opinion, true that Campbell & Campbell regarded the contract as ended in

any way. Complainant was not a party to any such arrangement. Whatever talk there may have been about consolidating the contracts, it was never done in fact, and it could not have been done without operating as a legal fraud on complainant, if he had any claim on the Ballou contract. That was the only one having substantial value.

Of the notes not covered by the mortgage on the smaller tract, two of $6000 each were paid. The $4000 note was not paid. That mortgage was foreclosed, and but a small sum was realized, leaving the bulk of it unpaid, amounting with interest to nearly $28,000 when this bill was filed.

Sometime in 1877 Campbell & Campbell became bankrupt, and their property was subsequently transferred by the assignee for the benefit of the Canadian Bank of Commerce. Defendant Plummer in 1878 acquired so much of these assets as relate to the property in any of the railroad lands. Plummer afterwards desired to get from the Railroad Company a new contract for the lands in question. The company refused to do this, and Mr. Barnes insisted on putting all of the contracts before referred to in one new contract for the whole amount due on them. A compromise was made on the amounts by a reduction of $2000, and Plummer took out a new contract to himself and Alexander Faulkner for a consideration of $42,000, paying down $12,000. He afterwards acquired Faulkner's interest, and made sales of parts of the lands for considerably more than the whole purchase money.

Included in the purchase of Campbell & Campbell's assets was a large amount of sawed and unsawed lumber, of which about two million had been certainly cut and then remained on the lands in controversy, and the balance is claimed to have been so cut in whole or in part. This cutting was not authorized by the contract from the Railroad Company, and the title legally remained in the company. It was however allowed to pass to Plummer & Faulkner and they disposed of it.

Before the contract was taken out by Plummer & Faulkner, a bill was filed and injunction issued in favor of Ort-

mann, setting up the same facts involved in this cause, and they had full notice of them. It does not clearly appear why that suit was dropped, unless from the necessity of some supplemental or amendatory allegations.

Inasmuch as the chief defendants are all affected by sufficient notice of such equities as Ortmann possessed, without reference to the doctrine of priority among equities, the important question is whether he has such equities as can be enforced.

There would be some difficulty in holding the delivery of the assignment from Ortmann and Boeing to the custody of Van Etten as an escrow. Apart from the question of his personal interest in the assignment, on which we need not pass, the arrangement contemplated that the contract should be exchanged for a deed to be issued by the company before the return mortgage to complainant could be executed. To obtain this the assignment would have to be delivered up with the contract to the railroad company. This would be inconsistent with such a delivery in escrow as would extend until the execution of the mortgage. That theory, therefore, cannot prevail.

The Statute of Frauds stands in the way of any trust in Van Etten. And if he held the papers, as we think it was meant he should hold them, it was rather a bailment or agency than a trust, although involving similar duties. But we do not think that the testimony shows any denial by Van Etten, Campbell & Co. of the rights of Ortmann. All parties knew of them, but not being put in writing they cannot be enforced specifically, just as was intended. The form of the contract did not require the Railroad Company to convey before payment, and the understanding between Ortmann and his assignees, being based on the expectation of a deed, made no provision for any new security but a mortgage of the fee.

It still remains to be seen how far he is protected by his lien as vendor, for unpaid purchase money.

The right of a vendor to a lien does not seem to be confined to the sale of a legal title or title in fee. The leading

case of *Mackreth v. Symmons* 15 Ves. 329 (1 Leading Cases in Equity 194 and notes) was one relating to what was treated as an equitable title. The doctrine has been applied to copy-holds, and appears to be received as to all recognized titles. See Adams' Eq. (7th ed.) 128, and notes; *Winter v. Lord Anson* 3 Russ. 488. The lien on an equitable title may no doubt be more uncertain, by reason of the danger that bona fide purchasers from the legal holder may intervene and destroy it. But subject to that risk (which is not confined to equitable estates) it may be upheld. In the present case the legal title is still in the railway company, having knowledge of the equities, and defendants are not bona fide purchasers. We see no difficulty in the nature of the title.

Another question, not so simple, arises from the alleged waiver of any lien, if it ever existed. It will be seen that the price of the smaller tract of land was less than the mortgage put upon that land by $5680, so that this latter amount of the purchase money of the larger parcel was included in that mortgage. It was not kept separate, but was included in the sum of $22,000 in four notes expressly secured. Upon the settled principles applicable to mortgages, all unpaid notes stood secured ratably and not in order of time. While the authorities are not clear that a lien may not continue, if agreed, even where separate collaterals are taken, yet when the purchase money of one parcel is so blended with that of another in a mortgage as to prevent their separation, we think there would be too much confusion created in the enforcement of a lien beyond the mortgage itself, to justify the attempt.

But we see no difficulty in sustaining the lien for the unsecured notes. It is shown distinctly that the lien was positively agreed on, so that there was no waiver, and no security but a personal liability of the vendees. Two of these unsecured notes are paid, but a third, of $4000, is unpaid, and should in our opinion stand secured by the land.

The question then arises, how is it to be provided for?

Plummer bought the land subject to this lien, but as between him and the Railroad Company he is entitled to a clear title. The Railroad Company has put itself in the position of denying the lien and doing what it could to destroy it. The timber cut and transferred to Plummer would probably have paid the amount of this note, but whether it would or not, there is no doubt that the amount exacted of Plummer by compelling him to put all the contract lands together, has not only made it impossible to separate his payments, but has also obtained for the Ballou lands a price exceeding the contract price very largely. In our opinion the Railroad Company has been paid and secured enough to render it liable to complainant for the amount of the $4000 note and interest, and should be decreed to pay it with costs of both courts to complainant. The other defendants to pay their own costs. Had the lien been enforced for the rest of the purchase money a further reference would have been proper to settle the equities. But we have no doubt that the company should pay the note in question, and no reference is needed.

The decree must be reversed with costs as above mentioned, and a decree for complainant entered accordingly, with a lien on the land unless paid, to be enforced by sale, if necessary, free of incumbrance.

GRAVES, C. J. and SHERWOOD, J. concurred. COOLEY, J. did not sit in this case.

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CHARLES F. CONRAD v. WILLIAM G. LA RUE.

Trover for shares of stock.

One of several stockholders cannot back out of an agreement which all have entered into to contribute a number of shares each, to be sold for the benefit of the corporation, after the rest, in reliance upon the agreement, have contributed their proportion. And if his shares have been taken and used accordingly, he cannot bring trover for them.

Error to Marquette. (Grant, J.) Oct. 16.—Dec. 20.

Case. Plaintiff brings error. Affirmed.

F. O. Clark for appellant.

Cooley, J. Trover for the conversion by defendant of two hundred shares in the Conrad Iron Mining Company. Defendant was secretary and treasurer of the company, and it is not disputed that he had the shares and disposed of them. The question is whether he was warranted in what he did.

The evidence for the defense tended to show the following state of facts: The Conrad Iron Mining Company is a corporation, and in October, 1880, it had ten stockholders, each of whom owned two thousand shares. The company was in need of money, and an informal meeting of the stockholders was held at which it was agreed that each of them should put two hundred shares of his stock in the hands of defendant to be disposed of by him for the company at two dollars a share. This agreement was carried out so far as the other shareholders were concerned, but not by the plaintiff. Defendant, however, had possession of the certificates for all the plaintiff's shares, and in December, 1880, when plaintiff called upon the defendant for his certificates, those representing eighteen hundred shares were delivered over to him, and the rest retained and canceled. For those canceled, new certificates were subsequently issued and disposed of by defendant, who relied, in disposing of them, upon the October agreement. Plaintiff denied that he agreed to put the two hundred shares into defendant's hands as was claimed by defendant, and he gave evidence which he contended showed that he paid to or for the company, in money, all that could be justly claimed from him. He also produced evidence to show that the proceeds of the shares put into defendant's hands and sold had been misappropriated.

In submitting the case to the jury the circuit judge instructed them as follows:

"It appears, gentlemen, from the evidence in the case that a corporation known as the Conrad Iron Mining Company was organized and incorporated with ten stockholders of which the plaintiff was one and the defendant La Rue was another. The amount of stock was twenty thousand shares. Each was entitled to two thousand shares of stock. It seems the certificates of stock were duly filled out and signed by the president and the secretary, and that a certificate of two hundred shares belonging to the plaintiff in this case was left with the secretary; or, in other words, it was never delivered by the secretary of the company to the plaintiff in this case. The plaintiff claims that he was entitled absolutely to that stock, and that the defendant having taken and used it, or disposed of it without his authority, converted it. It will depend, gentlemen, upon the arrangement made between these parties. The defendant claims that sometime in October, 1880, the stockholders of the company got together for the purpose of ascertaining what should be done. It is claimed that the stockholders then and there agreed that each should place in the hands of the secretary and treasurer of the company two hundred shares of the stock of the corporation, to be sold by him at not less than two dollars a share, but at the best attainable price, the proceeds of which were to go into the treasury of the company, to be used in carrying on and paying the necessary expenses in carrying on the mine. If you find it was agreed between the plaintiff and the other stockholders then and there that they should so place two hundred shares of stock for that purpose, and that the plaintiff did leave that stock in the hands of the defendant La Rue, who was then the treasurer as well as the secretary of the company, to be used for that purpose, I charge you as a matter of law that that would entitle and authorize the defendant La Rue to sign and execute the necessary papers to transfer that stock to a bona fide purchaser. It wouldn't be necessary, in order to entitle him to transfer the stock, that the plaintiff in the case should have made an assignment in writing, or sign the assignment which is usually in blank upon the backs of the certificates. If he placed it in his hands for that purpose, he said substantially to Mr. La Rue, you may do any act which I might do necessary to transfer a good title to that stock. This would authorize La Rue either to cancel the stock and issue a new certificate to the purchaser or to make an assignment in the plaintiff's name and then transfer it.

Much had been said to you in regard to the misappropriation of these funds by the defendant La Rue after the stock was sold. I charge you, gentlemen, as a matter of law, that you have nothing whatever to do with that. If this stock was sold pursuant to that agreement and the money placed into the hands of the treasurer, no misappropriation of the funds by La Rue, no payment of extravagant bills, would be evidence tending to show that he had converted the stock as claimed in this case. He would be liable in another action, but not in an action of this kind by the plaintiff."

The plaintiff insists that this charge was erroneous; that if the evidence for the defense was believed, the October understanding amounted only to a promise by each of the stockholders that he would make a gift to the company, and that this promise, so far as plaintiff was concerned, was recalled when he demanded his stock, and defendant had no right to act upon it afterwards. This is plausible, but we do not think it is the correct view to take of the case.

The ten stockholders were all concerned in a joint undertaking in which they severally had equal interests. Their promise to put two hundred shares each in the hands of defendant for the benefit of the undertaking was a promise to each other as well as to the company, and was in no sense a mere gift. Each promise gave support to the others, and this plaintiff was not at liberty to withdraw after others, in reliance upon his promise, had performed theirs. *Underwood v. Waldron* 12 Mich. 73; *Comstock v. Howd* 15 Mich. 237; *Baker v. Johnston* 21 Mich. 319; *Stevens v. Corbitt* 33 Mich. 458; *Michigan &c. R.R. Co. v. Bacon* 33 Mich. 466; *Tower v. Detroit &c. R. R. Co.* 34 Mich. 328. And the judge was quite right in holding that the question of misappropriation could not be tried in this suit. If there was a misappropriation it was of corporate property; not of property belonging to this plaintiff.

The judgment must be affirmed with costs.

The other Justices concurred.

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FREDERICK E. RICE AND HEMAN N. MOORE v. THE PENINSULAR CLUB OF GRAND RAPIDS.

Agency of member of corporation.

1. One who assumes to deal with a corporation, through one of its members, and though himself a member, must satisfy himself at his peril that the member through whom he deals has authority to act as agent for the corporation and is acting within the scope of his authority.
2. One who deals with another, supposing him to be an agent, is not protected by the other's assumption of authority to act.
3. A principal is bound by the act of an agent who has only exceeded his authority or has violated special instructions, unless the party with whom he dealt had notice of the want of authority in the particular case.
4. A corporator is not charged with constructive notice of corporate acts and may deal with the corporation as a stranger may, if his personal connection with corporate action is not such as to notify him of reasons to the contrary.

Error to Superior Court of Grand Rapids. (Parrish, J.) Oct. 17.—Dec. 20.

ASSUMPSIT. Defendant brings error. Reversed.

Taggart & Wolcott for appellant. An individual director of a corporation has no authority to bind the club by contract: *Lockwood v. Thunder Bay Lumber Co.* 42 Mich. 536; *Ridgway v. Farmer's Bank* 12 S. & R. 256; *Stoystown etc. Co. v. Craven* 45 Penn. St. 386; *Life and Fire Ins. Co. v. Mech. Ins. Co.* 7 Wend. 33; *Hoyt v. Thompson* 5 N. Y. 320; *National Bank v. Norton* 1 Hill 572; Ang. & Am. on Corp. 294, 304; *Alexander v. Cauldwell* 83 N. Y. 480.

Taggart & Earle for appellees. A member of a corporation is not presumed to know the contents of a director's report or the record of a meeting of the corporation:

American Bank v. Baker 4 Met. 164; *Hill v. Manchester Water Works Co.* 5 B. & Ad. 866; a member of an incorporated company entering into a contract with the company must be deemed, in respect to that contract, a stranger: *Merrick v. Peru Coal Co.* 61 Ill. 477; Ang. & Am. on Corp. (7th ed.) § 233; the representations, declarations and admissions of the agent of a corporation stand on the same footing with those of the agent of an individual: *Henderson v. R. R. Co.* 17 Tex. 560; the agent of a corporation clothed with certain powers by the charter or by the corporation may use those powers for an unauthorized or a prohibited purpose in his dealings with innocent parties, and the corporation be liable for his acts: *Railroad Company v. Savings Society* 24 Ind. 457; promises are implied against corporations in the same cases as against natural persons: *Gassett v. Andover* 21 Vt. 343.

Cooley, J. Assumpsit to recover the value of a bill of groceries and table supplies. The defendant is a corporation formed for social purposes, and owning and occupying a club-house, in which it has been customary to supply meals and other refreshments to the members. The corporation has a board of directors consisting of ten members, from which five are chosen as an executive committee, and this committee, it is provided by the articles of association, shall make all purchases and regulate the prices to be charged for articles sold by the club. The executive committee, however, is subdivided into others, one of which is a supply committee composed of two members, who are to purchase the supplies. The club holds monthly meetings for business purposes, and weekly meetings for social purposes. In a conspicuous place in the club-house a bulletin is placed on which are posted all notices required by the constitution and by-laws to be posted. All these are matters which are provided for by the articles of association.

The dining-room or restaurant is not kept by the club itself, but by a steward, who is hired by the club for the purpose, but who furnishes all supplies at his own expense,

and has all the profits. The directors have a supervision in respect to the quality of the supplies and also in respect to the charges to be made for meals. Other refreshments than those at the table are furnished by the club itself, but they are sold for the club by the steward. The steward also has general charge and supervision of the club-house and of the servants employed therein.

In November, 1881, one Morris was employed by the board of directors as steward. The plaintiffs were then grocers in Grand Rapids, and Mr. Moore, one of the plaintiffs, was a member of the club. He seems, however, not to have been familiar with the manner in which the business of the club was managed, and was not aware that the steward furnished at his own cost and for his own profit the tables. One of the directors, who was also a member of the supply committee, introduced Morris to the plaintiffs as the steward of the club, and Morris immediately began purchasing table supplies of them. The supplies were sold to him and charged to the club, on the supposition on the part of the plaintiffs, that the steward was agent for the club in making the purchases, and that the table was supplied by the club for its own benefit. It is testified on behalf of the plaintiffs that the director who introduced Morris to them said: "This is the steward of the Peninsular Club; let him have what he wants; it is for the club and I will see it paid for. At the end of the month send the bill in and I will see it cared for." This is disputed in defendant's evidence, and it is shown that while Morris was making the bill sued upon with the plaintiffs, there was a notice posted on the bulletin board of the club which showed the terms on which the steward held his place and furnished meals.

On the evidence of which the foregoing is an abstract the trial court submitted the case to the jury, who returned a verdict for the plaintiffs. One of the questions made in this Court is whether there was any evidence to go to the jury, as tending to make out a case against the defendant. We are of opinion there was no such evidence.

It appears without contradiction that the club did not furnish the supplies for the table, and had no responsibility for them whatever. Its committee on supplies had authority to inspect what were received, in order that it might be known that they were suitable, but this they did by way of supervising the steward's performance of his contract with the club, and not because the club, as principal, could have anything to do with the purchases. The club had never given the board of directors authority to buy supplies for the table, and the board had never assumed to give such authority to the supply committee or to any of its members. If, therefore, one of the members told the plaintiffs Morris's purchases were for the club, the statement was without authority, and as he could not, as agent, make these purchases on the credit of the club, neither could he in this indirect manner make the club liable. A party dealing with the agent of a corporation must at his peril ascertain what authority the agent possesses, and is not at liberty to charge the corporation by relying upon the agent's assumption of authority, which may prove, as it did in this case, to be entirely unfounded.

If the case were such that a director had apparent authority, under the general regulations of the club, to make purchases for the club, and had merely been guilty of excess or of violation of special instructions, the defendant should be held responsible unless the plaintiffs were notified of the want of authority in the particular case. But the keeping of the restaurant was a business by itself, as has been already stated, and therefore what is said to have been done by a director is not to be regarded as the act of an agent within the scope of his authority though in disregard of restrictions, but as the assumption on his part of a power never delegated. We attach no importance to the notice posted on the bulletin board and which it is not shown that Mr. Moore ever saw. We agree with the plaintiffs that a corporator is not charged with constructive notice of corporate acts, and may deal with the corporation as a stranger may, where his personal connection with corporate action is

not such as to notify him of reasons to the contrary. *Hill v. Water Works Co.* 5 B. & Ad. 866. But the principle has no importance in this case.

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

The other Justices concurred.

SCOTT WALDO v. LONA M. WALDO.

Res judicata—Parties impleaded concluded by decree.

If one who is in privity with a complainant, and has precisely the same rights, does not join as complainant, it is proper to implead him as defendant; and if the case is one in which all rights can be adjudicated without a cross-bill, he is concluded by the decree, and cannot begin another suit in his own behalf.

Appeal from Ingham. (Gridley, J.) Oct. 7.—Dec. 20.

BILL to clear title. Complainant appeals. Affirmed.

Huntington & Henderson for complainant.

M. V. & R. A. Montgomery for defendant. The final judgment in a court of competent jurisdiction is binding and conclusive upon parties and privies: 1 Greenl. Ev. §§ 522–532; Herm. on Estop. §§ 32, 37, 41, 42, 148–154; *Outram v. Morewood* 3 East 346; *Embury v. Connor* 3 N.Y. 522; *Doty v. Brown* 4 N. Y. 71–73; *White v. Coatsworth* 6 N. Y. 137; *Davis v. Tallcot* 12 N. Y. 188; *Demarest v. Darg* 32 N. Y. 290; *Miller v. Manice* 6 Hill 125; *Bouchaud v. Dias* 3 Den. 243; *Danaher v. Prentiss* 22 Wis. 317; *Wales v. Lyon* 2 Mich. 276: *Prentiss v. Holbrook* 2 Mich. 375; *Tucker v. Rohrback* 13 Mich. 74; *Barker v. Cleveland* 19 Mich. 230; *Hazen v. Reed* 30 Mich. 334; *Fifield v. Edwards* 39 Mich. 264–266; *Baxter v. Aubrey* 41 Mich. 17; *Jacobson v. Miller* 41 Mich. 90–93, and Cooley's Const. Lim.

47–57; as well in equity as at law; and a decree of dismissal is as binding and conclusive as any other: Herm. on Estop. §§ 151–3; 2 Dan. Ch. Pr. (3d ed.) 1000; *Holmes v. Remsen* 7 Johns. Ch. 286–290; Cowen & Hill's Notes 915–923; Note 639, p. 358 Phill. Ev.; *Adams v. Cameron* 40 Mich. 509.

SHERWOOD, J. There is no dispute about the facts in this case so far as it is necessary to consider them in disposing of the questions raised. Jerome B. Waldo, late of Ingham county, died on the 18th day of May, 1880. His two children and only heirs at law, the complainant and Mary Allen, claim that at the time of his death he was owner in fee of a large amount of real estate in Ingham county. The defendant (claiming to be his widow) holds the legal title of record to the real estate in question, through two deeds made to her by Jerome B. Waldo before his death. But the heirs claim that she deeded it back to him before he died, and that he held the deed (which was unrecorded) when he died. The defendant admits that the unrecorded deed existed, but claims that it was never delivered, and never was intended to be if she outlived her husband, Jerome B. Waldo.

The purpose and object of the bill of complaint in this case is to obtain a decree establishing the title in fee to the lands therein mentioned, in complainant and Mary Allen as children and heirs at law of deceased.

It appears from the record that Mary Allen, in May, 1881, filed her bill of complaint, making the parties to this suit defendants therein, for the purpose of accomplishing the same object sought by the bill in this case; that the case was finally heard on appeal in this Court on the merits, and the complainant's bill dismissed. See *Allen v. Waldo* 47 Mich. 516.

From the facts as they now appear before us, the complainant should have joined with his sister as a party complainant in the first suit, but failing to do so, he was properly made a party defendant therein, and as such, is subject to all the legal

consequences necessarily resulting therefrom. The complainant was not only a party to that suit and the adjudication therein, but privy in blood and estate with the complainant in the same. Both were alike interested in the subject-matter of the litigation; both claimed under the same conveyance and as heirs at law of the same ancestor. They each claimed, not separate and distinct moieties, but equal, undivided interests in the entire property; and we think that if one is concluded by the final decision made in this Court in the former case, then equally so is the other. *Prentiss v. Holbrook* 2 Mich. 376; *Hale v. Chandler* 3 Mich. 535; Cooley's Const. Lim. 47–51, and cases cited; 1 Greenl. Ev. §§ 180, 322, 323, 535, 536; Herm. on Estoppel §§ 46–49, 59.

The right now claimed by complainant could have been as fully asserted and maintained in the former suit as in this. It was competent for the court in that case, upon the pleadings and such proofs as were proper in the case, to make a decree determining and establishing the rights and interests of each of the parties without the necessity of a cross-bill or other proceeding for affirmative relief. 1 Barb. Ch. Pr. 339; *Thurston v. Prentiss* 1 Mich. 194; *Elliott v. Pell* 1 Paige 262; *Jones v. Grant* 10 Paige 348. The complainant was a necessary party in the first suit—see Story's Eq. Plead. (6th ed.) §§ 72, 150 and cases there cited—and being such party he was a party to every issue joined and litigated in it that could in any way affect his interests or his rights, and must be concluded by the decree upon those issues, and if he did not maintain his rights the decree is no less binding so long as he had the opportunity and neglected to do so.

We think the first suit and decree are clearly a bar to the present action, and that the decree of the circuit judge sustaining defendant's plea and dismissing complainant's bill was right and must be affirmed with costs.

The other Justices concurred.

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LONA M. WALDO v. SCOTT WALDO IMPLEADED WITH JOSEPH L. WILLIAMS AND BENJAMIN F. PLOTTS.

Trespass de bonis—Special notice attached to plea—Administrator's power to take property—Validity of extra-territorial divorce—Jurisdiction.

1. In a declaration in trespass quare clausum allegations of trespass to the person and of conversion, may be inserted as matters of aggravation.
2. Where a special notice is attached to the plea of the general issue, and the proof offered thereunder is insufficient to establish a defense, the defendant is limited to such matters as may be introduced under the plea itself.
3. An administrator has no power as such to invade at pleasure the premises of a person in peaceable possession of the property of the estate and take it therefrom without process.
4. The exclusion of a question cannot be treated as error if the information sought is afterwards admitted by the introduction of record evidence.
5. In an action of trespass for the improper seizure of property belonging to an estate but at the time in the peaceable possession of plaintiff, a question as to whether the plaintiff had not converted property belonging to the estate after the owner's death, was immaterial.
6. An Indiana divorce cannot be impeached in a purely collateral civil action in Michigan by seeking to show that the residence of the complainant in the divorce suit was not such as to give the Indiana court jurisdiction
7. In a collateral proceeding depending upon a divorce procured in another state, the court which granted it must be presumed to have had jurisdiction, and to have proceeded on the merits in accordance with the local laws.

Error to Ingham. (Gridley J.) Oct. 18.—Dec. 20.

TRESPASS. Defendant brings error. Affirmed.

Quincy A. Smith and *S. L. Kilbourne* for appellant. Trover and trespass to the person can not be joined: 1 Chit. Pl. 200; Tidd's Pr. 11; *Cooper v. Bissell* 16 Johns. 146; *Smith v. Rutherford* 2 S. & R. 358; an administrator

is a public officer who represents the only legal title to the personalty and has a right of possession: *Cullen v. O'Hara* 4 Mich. 132; until distribution an heir or next of kin of an intestate can not maintain an action in respect to his personal property unless founded on actual possession and against a mere wrong doer: *Muir v. Trustees of the Orphan House* 3 Barb. Ch. 477; *Morton v. Preston* 18 Mich. 71; *Gilkey v. Hamilton* 22 Mich. 286.

M. V. & R. A. Montgomery for appellee.

GRAVES C. J. It is not going far to say that this litigation has been made a pretext for discussions which do not belong to it. The subject may be best sifted and explained by referring—*first*, to certain illustrating facts which are not disputed; and *secondly*, to the effect due to the pleadings. By such means we may see what were the questions to be tried and what matters were irrelevant and how the points now agitated by the defense ought to be considered.

In August, 1864, the plaintiff resided in the state of Indiana, and then and there intermarried with one Henry Carey. In January, 1871, she instituted proceedings in the court of common pleas of Steuben county, in the same state, against said Carey for a divorce from the bonds of matrimony. The record of those proceedings is made a part of the bill of exceptions, and it appears therefrom that Carey, the husband, appeared and submitted to the jurisdiction. He answered to the merits and joined issue on the allegations of the complaint. It also appears that evidence was taken on the points in issue and that Jerome B. Waldo gave evidence tending to show that the plaintiff had been a resident of Indiana since 1869. At the January term for 1872, as the record further represents, the court considered the cause on the pleadings and evidence and made a final decree upon the merits of law and fact and thereby adjudged a dissolution of the marriage.

July 25, 1872, at Williamston in Ingham county, in this State, she intermarried with the said Jerome B. Waldo and

they thence lived together at that place as husband and wife until May, 1880, at which time he died intestate. They were occupying a suite of rooms in her building known as the National Hotel. The rooms constituted their habitation. The furnishing was by themselves. She continued to occupy after his death and the place was her dwelling. She claimed the goods and furniture as her sole property, alleging that a portion was bought with her individual means and that the rest was given to her by Waldo some time prior to his death.

The defendant Scott Waldo is a son of decedent Jerome B. Waldo, and in April, 1881, he procured letters of administration on his father's estate from the probate court of Ingham county. Two days later he called at plaintiff's apartments and asked to be admitted, and he swears that he told her his business was to make an inventory and appraisal of his father's estate. She refused to admit him and locked the door against him. He then went to one of the appraisers who was a justice of the peace, and in character of administrator procured a writ of replevin against the plaintiff for a couch which he alleged belonged to the estate. The writ was handed to defendant Plotts, who was a constable, and he, together with defendant Waldo and the justice, who was also appraiser, proceeded with some others to the plaintiff's rooms and demanded admittance. She refused to let them enter. Upon this they immediately broke in the door and entered the apartments and seized the goods and furniture there being and carried them away. She then brought this action. It was subsequently discontinued as to defendant Smith, and under the judge's charge, the defendants Plotts and Williams were acquitted. The defendant Scott Waldo was held for $650. It follows that the sole consideration here is whether the proceedings are open to any valid complaint on his account.

He censures the declaration. It is offered as an argument that incompatible grounds of action are actually combined. Trespass de bonis, trespass to the person and trover we are told are jumbled together in the same count. There

was no demurrer, and were it true that the declaration is chargeable with duplicity, we should not be inclined to listen to the objection now. But the criticism offered is refuted by the most familiar rules of pleading. The declaration is in trespass quare clausum, with allegations of personal trespass and conversion by way of aggravation. The right to sue for breaking and entering the apartments of the plaintiff is unquestionable. *Swain v. Mizner* 8 Gray 182; *Lane v. Dixon* 3 C. B. 776; Com. Dig. "Trespass" B 1–2. That a battery may be laid in aggravation has been recognized time out of mind,—*Russel v. Corn* 6 Mod. 127; *Read v. Marshall* 8 Mod. 26; Buller's N. P. 89; 1 Chit. Pl. (7th Eng. and 16th Am. ed.) 412, 413,—and it is well settled that conversion may be charged in the same way. *Pratt v. Pratt* 6 D. & L. 20; 17 L. J. Exch. 299.

To this declaration the defendant Waldo pleaded the general issue and such plea entitled him to give evidence of any matters going to show that he never did the acts complained of. But it authorized no defence which would admit that he was prima facie a trespasser. He could introduce no evidence under it to show a justification, or license or excuse. In order to adduce evidence for either of those purposes a special notice was indispensable. *Osburn v. Lovell* 36 Mich. 246–250; 2 Saund. Pl. & Ev. 856: Gould's Pl., ch. 6 §§ 38, 58. Acting on this principle he appended a special notice to his plea, to the effect that as to the breaking and entry and the seizure and conversion of the goods as charged, he would show his appointment as administrator of the estate of Jerome B. Waldo; that the goods in question belonged to that estate; and that he entered peaceably, as he lawfully might, to take said goods into his possession and have them inventoried. The notice was confined to this matter. The proceedings by replevin were not mentioned, and unless what he set up was in law sufficient to justify or excuse his entry, he was defenseless on such grounds, and that it was not sufficient seems obvious. The plaintiff was in peaceable possession and claiming to be the owner, and his appoint-

ment as administrator did not commission him to invade her apartments at his own pleasure and carry off the property, whatever the claim he chose to set up to it. The proposition is too clear for argument. *Anthony v. Haneys* 8 Bing. 186; *Hutchinson v. Audsley* 56 Law Times (folio) 91; *Blades v. Higgs* 30 L. J. (N. S.) 347 C. P.; *Dixon v. Clow* 24 Wend. 188; *Newkirk v. Sabler* 9 Barb. 652; *Bailey v. Wright* 39 Mich. 96; *McLeod v. Jones* 105 Mass. 403; *Huppert v. Morrison* 27 Wis. 365; *Daniels v. Brown* 34 N. H. 454; *Sampson v. Henry* 11 Pick. 379; *Wales v. Newbould* 9 Mich. 45–87; *Public Administrator v. Ward* 3 Bradf. Sur. 244. It consequently appears that in respect to defendant Waldo the case was to be tried and decided under the general issue. There was no foundation for evidence of justification or excuse and all questions depending on the opposite theory were immaterial.

The exclusion of the question to the plaintiff on cross-examination if she did not make a complaint in Indiana against Carey for a divorce in the form shown by the record produced was probably warranted. But if otherwise it worked no prejudice. The record was afterwards introduced.

The inquiry addressed to Waldo whether the plaintiff had not to his knowledge converted certain property of the estate after his father's death was properly ruled out as immaterial.

The exception on which chief reliance is placed relates to the divorce from Carey. It is claimed, as I gather from the case, that as touching the extent of defendant's liability for converting the goods in controversy, it was a material question whether the plaintiff was the widow of Jerome B. Waldo, so as to be entitled in that character to the whole or a portion of the converted articles, and that it depended, as to how this was, on the validity of the divorce from Carey, and that this again depended on the state of her residence at the date of the divorce proceedings. On this foundation it is contended that it was competent to go into that question in this action and submit original evidence, and require

the opinion of the jury upon it. Accordingly the defendant requested to give evidence and have a finding by the jury that the plaintiff at the time in question was not a resident of Indiana, but of this State. The court refused the offer. No evidence was given or offered of the law of Indiana.

We must intend that the court in Indiana had jurisdiction of the subject of divorce; that the parties submitted to have their case there heard and on the merits and that the mode of proceeding was in accordance with the laws of the state. And it is a necessary implication that the court, on the suit being brought in it, had the power to ascertain and decide whether it was rightly brought there. And the further implication is here equally imperative that such court did consider that question and did decide in favor of the jurisdiction. It heard the altercations and considered the evidence. It investigated and decided on the merits. Whether the plaintiff was a resident of Indiana was one of the matters to be settled on the law and evidence, and the judgment necessarily imports that the court decided on it and determined that she was a resident. It may have erred and there may have been false testimony, but neither of these, if admitted, would cause the judgment to be ipso facto void. This State has never complained of that judgment, and neither party has objected to it. The defendant's intestate affirmed it in the strongest manner. The attempt to impeach it is by circuity and indirection, and in a civil case professedly in the interest of the estate of the very person on whose testimony it was substantially if not wholly based and who subsequently became a party to the marriage thus attacked as illegal.

The position taken is that it was competent in this private and collateral action to submit original evidence in regard to the plaintiff's residence during the suit for divorce and get a new finding on it and in case of its being repugnant to the ruling which the first tribunal, in adjudicating on the evidence before it, was led to make on the same point, to thereupon claim and insist that such opposite determina-

tion was sufficient to annul the judgment for divorce so far as concerns this case. Under the principle thus contended for the fate of the prior judgment might depend on the slightest circumstantial difference between the evidence originally given and the evidence produced on such collateral inquiry. The whole might hinge on divergencies of opinion in regard to matters of inference concerning the plaintiff's actual intent. Indeed the event might turn on considerations still further removed from reliable criteria. The final result with all its important consequences, might come at last to depend on the idiosyncrasies or the acquired peculiarities of the triers. Such risks ought not to be taken where policy concurs with safety and utility in requiring the door to be closed against them. I agree with the circuit judge that the Indiana decree is prima facie valid, and is not to be found inoperative at one time and operative at another, as juries or judges, acting on original facts in collateral litigations about property, may differ from each other or from the first tribunal, on the mixed question of law and fact whether the plaintiff was an actual resident of Indiana when she sued for the divorce. I am therefore of opinion that no error was committed in this portion of the case.

There are matters in the charge in which I should not be willing to concur, but they are in favor of the defense.

I find no rulings of which defendant Waldo is entitled to complain and

The judgment should be affirmed with costs.

The other Justices concurred.

JAMES B. LEAL JR. v. MARY J. TERBUSH.

Rescission of deed for mistake as to title.

One who purchases under a warranty deed, containing covenants of seizin and quiet possession, cannot rescind the bargain on the ground of a mistake as to the vendor's title if the mistake does not go to the entire consideration; as where he supposed the vendor had title in fee-simple, instead of a mere life estate.

Error to Oakland. (Stickney J.) Oct. 18.—Dec. 20.

ASSUMPSIT. Plaintiff brings error. Affirmed.

E. H. Sellers and *Atkinson & Atkinson* for appellant. Mutual mistake in regard to title is ground for relief: *Smith v. Robertson* 23 Ala. 312; *Hynes v. Campbell* 6 Mon. 286; *Bowlin v. Pollock* 7 Mon. 26; and money voluntarily paid under mistake of fact is recoverable at law or in equity unless all inquiry has been waived: *Scott v. Warner* 2 Lans. 49; *Boon v. Miller* 16 Mo. 457; *Kelly v. Solari* 9 M. & W. 54; *Townsend v. Crowdy* 8 C. B. (N. S.) 476; an action for money had and received will lie whenever defendant has in his possession money which in equity and good conscience belongs to plaintiff: *Lillibridge v. Tregent* 30 Mich. 114; *Beardslee v. Horton* 3 Mich 560; *Spencer v. Towles* 18 Mich. 9; *Moore v. Mandelbaum* 8 Mich. 433; *Ela v. Am. Merch. Union Exp. Co.* 29 Wis. 611; *Woodward v. Hill* 6 Wis. 143; *Maxwell v. Longenecker* 82 Ill. 308; *Bradford v. Chicago* 25 Ill. 411.

Augustus C. Baldwin for appellee.

COOLEY, J. The argument in this case was mainly upon the construction of a devise and whether parol evidence was admissible to aid in the construction. It appears that in March, 1873, Joel Craft, who was then husband to the defendant, made his last will which contains the following clause:

"After the payment of my just debts and funeral expenses I give, devise and bequeath to my beloved wife, Mary Jane Craft, all my real estate, and all my personal property of whatever nature or kind; also all moneys and credits I give and bequeath to my beloved wife; and in case of her death, then all my real and personal estate shall be divided equally among my children."

The testator died soon after, leaving children who still survive, and the will was duly probated.

In March, 1882, plaintiff purchased of defendant a parcel of land which had belonged to her husband and to which

she had no title except under the will. A deed was given to consummate the purchase. A copy of the deed is not given in the printed record, but it is stated to be a common warranty deed, short form, and it may therefore be assumed that it contained covenants of seizin and of quiet possession.

It does not distinctly appear whether plaintiff took possession under his deed, but in the month following its date he tendered to defendant a quitclaim deed of the premises duly executed by himself and demanded back the sum of five hundred dollars which he had paid as the purchase price. Repayment was refused, and this suit was then instituted. The declaration contains only the common money counts, and the bill of particulars specifies as the cause of action, "money paid by said plaintiff to said defendant as the purchase money of a certain piece or parcel of land [describing it] and the sale of which property was subsequently rescinded by the plaintiff because of the fraud of the said defendant, and the mutual mistake of the parties as to the title of the defendant."

The discussion upon the construction of the will has been very elaborate and thorough, and it may be matter of regret that in the view we take of the case we are not at liberty to follow it with a view to an expression of opinion upon the interesting question discussed. The circuit judge was of opinion that on any view which might be taken of the will the plaintiff had no case; and we discover no ground on which the correctness of this opinion can be questioned.

The plaintiff made no attempt to show that defendant had been guilty of any fraud, and we must therefore assume that defendant made the sale and received the consideration money in good faith. The case for the plaintiff must therefore stand upon the ground that he bought the land under the mistaken belief that defendant had title in fee when her actual estate was for life only. Upon this ground he claims a right to rescind his purchase and reclaim his money, upon the principle that a contract entered into under a mistake of facts is void, and money paid upon it may be treated as money paid without consideration.

It is to be observed, however, that the only mistake which is pretended in this case is one which goes to the construction and legal effect of the will of Joel Craft. This will was matter of record when the purchase was made, and the question arising upon it and in respect to which the mistake is alleged, was purely a question of law. It may be doubtful, therefore, if the principle the plaintiff invokes is applicable to the case; for while mistake of fact may be alleged in avoidance of a contract, mistake of law, as a rule, is not available for that purpose.

But whether the mistake in this case is considered as one of law or one of fact the plaintiff's case must fail, because it does not go to the whole consideration of the contract, but is partial only. He bought, as he alleges, under the belief that defendant owned the land in fee, and he finds on investigation that she owns for life only. But as tenant for life her deed conveyed to him the present freehold, and no one can disturb him in the enjoyment so long as she is living. Moreover, he appears to have provided against the contingencies of her title falling short of the complete fee by requiring of her covenants for his protection; and though these, as we have said, are not set forth in the record, we must suppose they give a right of action for the very defect in the title which the plaintiff claims to have discovered. But whether that is so or not it is certain that the parties took into consideration possible defects in the title and bargained in respect to them. If they were not expressly mentioned in the course of their negotiations, it is immaterial; for their contract, which we must suppose was deliberately made, covers them.

We have, then, a case in which a party bargaining for land has received a conveyance which gives him present seizin, and covenants which assume to protect him in the enjoyment of the land. The conveyance purports to be in fee, and the assurances we must suppose are to him, his heirs and assigns. The plaintiff has therefore received value for the money paid; and if not to the full extent of the payment, the deficiency is uncertain and dependent on

contingencies, and does not go to the entire consideration. If this contract can be rescinded on the ground of mistake of fact, then every purchase of land the title to which proves in any respect defective must be subject to rescission also, unless the parties have expressly bargained with mutual knowledge that defects existed. If this were the law, covenants would be of little importance.

The plaintiff has directed our attention to no authorities which can support this action, and we know of none. The general rule is that the action of assumpsit will not lie to try the title to land. *Hogsett v. Ellis* 17 Mich. 351; *Codman v. Jenkins* 14 Mass. 93; *Boston v. Binney* 11 Pick. 1; *Baker v. Howell* 6 S. & R. 481; *King v. Mason* 42 Ill. 225; *Marshall v. Hopkins* 15 East 309; *Newsome v. Graham* 10 B. & C. 234. If the supposed conveyance had been altogether void by reason of there having been no such land (*D' Utricht v. Melchor* 1 Dall. 428) or because the instrument itself was a mere nullity (*Tollenson v. Gunderson* 1 Wis. 113) or because the deed was given to carry into effect an execution sale which was void (*Putnam v. Westcott* 19 Johns. 73) or if the trade had been brought about by fraud, and the vendee had rescinded it on that ground, as he lawfully might (*Early v. Garrett* 9 B. & C. 928; *Vining v. Leeman* 45 Ill. 246; *Warren v. Tyler* 81 Ill. 15; *Masson v. Bovet* 1 Den. 69) the right to reclaim the money in this form of action might be admitted. But in this case there is no ground for claiming that the conveyance was void either because ineffectual in itself or because of the vendee having been induced by fraud to accept it. The deed unquestionably conveyed something, and it contained covenants which were designed to protect all it assumed to convey. The mistake of the parties, if there was any, did not go to the entire consideration of the purchase. The purchaser is not therefore at liberty to rescind because of it. *Buckles v. Northern Bank of Kentucky* 63 Ill. 268; *Templeton v. Jackson* 13 Mo. 78.

The judgment must be affirmed with costs.

The other Justices concurred.

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The People v. Edward M. Adams.

Assault and battery.

Conviction for assault and battery was set aside where the evidence tended to show that the act complained of was the forcible ejection of a tortious intruder by employees of the respondent who was an agent in charge of the premises.

Error to Kent. (Montgomery, J.) Oct. 19.—Dec. 20.

Assault and battery. Reversed and prisoner discharged. Adams was convicted of assault and battery on a Mrs. Taylor. The record showed that as agent for his mother who owned a building which formerly belonged to the Taylors, but which they had lost on foreclosure, he caused Mrs. Taylor to be removed from it by some employees of his. The Taylors had already been thrice ejected by writ of assistance, but had again entered clandestinely with a little furniture and had refused to leave on being ordered to do so by Adams. He allowed Mrs. Taylor to remain all night and in the morning he again ordered her to leave, and on her refusal to do so one of Adams' employees broke in the door of her room. As she was in an apparently unconscious condition, Adams directed his assistants to carry her out and take her to a neighboring hotel which they did. She claimed to be injured in the transit and complained of Adams who was convicted in the Police Court of Grand Rapids and afterwards, on appeal, in the Circuit Court.

Attorney General *Jacob J. Van Riper* for the people.

Edward M. Adams, in person, and *Taggart & Wolcott* for respondent. Force employed in defence of one's possession of realty is allowable: 1 Bish. Cr. Law § 977; 2 id. § 58; 1 Russell on Crimes (1st Am. ed.) *862; *Newton v. Doyle* 38 Mich. 645; *Hoag v. Pierce* 28 Cal. 187; *Voll v.*

Butler 49 Cal. 74; *Bowers v. Cherokee Bob* 45 Cal. 498; *McCarty v. Fremont* 23 Cal. 197; *Browne v. Dawson* 12 Ad. & El. 624; even though an intruder enters clandestinely: Cooley on Torts 168, 324; *Harrington v. People* 6 Barb. 607; *Com. v. Clark* 2 Met. 23; *Ayres v. Birtch* 35 Mich. 502; *Pond v. People* 8 Mich. 150; *Sterling v. Warden* 51 N. H. 218; *Blades v. Higgs* 10 C. B. (N. S.) 713; *Com. v. Kennard* 8 Pick. 132; *Harrison v. Harrison* 43 Vt. 417; *Stearns v. Sampson* 59 Me. 570.

Per Curiam. The record tends to show that Mrs. Taylor was not in bona fide possession but was a mere tortious intruder.

But assuming it to be otherwise, there is no evidence that the defendant committed an assault and battery upon her.

[The judgment is reversed.]

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Calvin C. Burt v. Joseph Lathrop et al.

Associations not for partnership.

An association in which the conditions of membership are the payment of an entry fee and of *pro rata* assessments, but which does no business involving profit or loss, is not a partnership; and the members are not personally liable on contracts made by its officers.

Error to Wayne. (Speed, J.) Oct. 23.—Dec. 20.

Assumpsit. Plaintiff brings error. Affirmed.

C. C. Burt, in person, for appellant.

Julian G. Dickinson and *C. A. Kent* for appellees.

Campbell, J. Plaintiff sued a large number of defendants as jointly liable to him for his services as attorney in defending some patent suits concerning the right to use certain hard-rubber material in dentistry. He declared spe-

cially and with the common counts for these services, and also set up two judgments rendered in Jackson county for the same causes of action. Upon trial the court below ordered a verdict for defendants.

The counts which describe the judgments do not set them out in such a way as to make out any legal liability under them against all these defendants, and the proofs are not any more definite. It appears affirmatively that no jurisdiction existed to bind more than a part of them, and there can be nothing claimed for them under the issue as presented. They may, therefore, be laid aside.

The ground for asserting a claim against the defendants jointly is that they are claimed to have become members of an association combined for the purpose of legal resistance to the claims of a patentee, and that plaintiff was employed by their officers.

There is no testimony tending to show any immediate personal employment of plaintiff by the defendants, jointly or individually, so as to justify this joint action. But it was claimed that they stood on the footing of partners bound by the action of their designated managing members.

The testimony indicates that several of the defendants, at various times, became members of an association which, so far as pertinent to this inquiry, required them to pay five dollars each into the treasury and to pay such assessments as should be levied pro rata, on pain of being left out of the association and its privileges. The officers were to employ counsel, and money was to be paid on the order of the president and secretary.

We can find in this arrangement nothing analogous to a partnership. There was no common business and nothing involving profit and loss in a business sense. No one was empowered to make contracts binding on the subscribers personally, and no one was to be liable except for assessments nor even for those except as he saw fit to pay them to keep his membership. It was nothing more than a combination which may have made the parties in some respects responsible to each other, but which did not, we think,

authorize any contract with third persons which should bind any member personally beyond his assessments. As plaintiff was not only aware of the articles but showed that he acted under them and in furtherance of them in various ways, no question arises in the nature of an equitable estoppel.

We are not concerned on this record to consider whether plaintiff has any other adequate means of securing compensation. The only question now is whether these defendants are his joint debtors. We think they are not.

The judgment must be affirmed with costs.

The other Justices concurred.

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WILLIAM MALTBY v. THE CHICAGO & WEST MICHIGAN RAILWAY COMPANY.

Railway crossings.

1. A railroad company crossing a public highway is bound to keep the approaches to the crossing in safe condition for travelers on the highway.

2. The right to use a public highway, even if it be in a dangerous condition, cannot be abridged by the act of putting it in such condition, or by neglect to repair it.

Error to Muskegon. (Russell, J.) Oct. 23.—Dec. 20.

CASE. Plaintiff brings error. Reversed.

Campbell & Allen for appellant. A railroad company is liable to a traveler injured in consequence of its permitting its road-bed to become unsafe: *Oakland Ry. Co. v. Fielding* 48 Penn. St. 320; Shearm. & Redf. Neg. § 357; a company having undertaken to lay its track along a public road is bound to lay it properly and keep it in proper condition: *Fash v. Third Ave. R. R. Co.* 1 Daly 148; see *McDowell v. N. Y. Cent. &c. R. R.* 37 Barb. 195; *Phœnix-*

ville v. Phœnix Iron Co. 45 Penn St. 135; *Kelly v. Southern Minn. Ry. Co.* 28 Minn. 99; an open and traveled street comes within the meaning of the law: *Whittaker v. B. & M. R. R.* 7 Gray 98; a town is not liable for a defect in a bridge whereby a highway crosses a railroad, if the company is bound by law to keep the bridge in repair: *Sawyer v. Northfield* 7 Cush. 490; the failure of the town to repair does not excuse the company: *Gillett v. W. Railroad Corporation* 8 Allen 560; a railroad company that so constructs its track in a highway as to render the highway dangerous or inconvenient to travelers is liable for consequent injury to the traveler, even though he has a remedy against the city that is bound to keep the highway in repair: *Snow v. H. Railroad Co.* 8 Allen 441.

Smith, Nims, Hoyt & Erwin for appellee. In Ohio, the duty of restoring a highway diverted in the construction of a railroad "to such condition as not to impair its former usefulness" rests in the company, but when it has been fully restored the corporation is not obliged to keep it in repair: *Pittsburgh, Ft. Wayne & Chicago Ry Co. v. Maurer* 21 Ohio St. 430; in Missouri railroad companies crossing a highway must restore to its former state, but need not keep the highway in repair: *Missouri &c. R. R. Co. v. Long* 6 Am. & Eng. R. R. Cas. 254.

GRAVES, C. J. On the 29th of September, 1881, the plaintiff was on his way to the city of Muskegon by the public road known as the Allegan, Muskegon & Traverse Bay State road, with a load of hay, and on passing over the defendant's track where it crosses said road near the city, his load upset and he received injury. He attributed the occurrence to the unsafe condition of the south approach contiguous to the rail, and sued the company in this action for his damages. The circuit judge instructed the jury to find in favor of the company. The grounds on which the ruling is defended will be briefly noticed.

First. It is made a point that no testimony was offered

tending to support the averment in the declaration that the highway "was laid out, established and constructed by proper legal authority." The point is not borne out by the record. There was evidence tending to show that the State laid out the road and caused it to be constructed, and evidence tending to show further that the defendant treated it as a legal public thoroughfare established and constructed by competent authority.

Second. It is next contended that the railway company was not subject to any duty to keep the approaches to its track in order at the crossings of public roads. The requirement of law, we are told, goes no further as respects the company than to exact a restoration of the road, when the crossing is made, to its former state as near as may be, leaving it as a duty of the public to keep up and preserve the proper conditions thereafter, and to do whatever else the public safety or convenience may dictate.

This is not a correct view. If the Legislature had kept silent, the common law would have applied, and the company, on cutting through the highway, would have been bound to construct and maintain the crossing in such plight as to make it reasonably safe. *People v. Chicago & A. R. R. Co.* 67 Ill. 118; *Oliver v. Northeastern Ry. Co.* L. R. 9 Q. B. 409; *Paducah & Elizabethtown R. R. Co. v. Commonwealth* (Ky.) 10 Am. & Eng. R. R. Cas. 318; *Manley v. St. Helen's C. & Ry. Co.* 2 H. & N. 840. And it could not have been the purpose of the Legislature to abridge this duty. No reason for such a design can be imagined. The intent would rather be to explain and emphasize if not to expand it.

The statute declares that the company must restore the highway to its former state as near as may be, and construct suitable road crossings for the passage of teams, by putting down plank between and on each side of the rails of such road, the top of which shall be at least as high as the top of the rails of such road. Act 177 of the Session of 1877, sec. 9, subd. 5 [How. Stat. § 3323]. The same reason would exist for perpetuating these conditions as for having

them established originally, and it is a necessary assumption that their continuance was contemplated, and when we recall how very important it is to the public safety, and how necessary to enable the company to fulfill its acknowledged obligations, and how essential to prevent confusion where the consequences might be disastrous, that it should have the track and its immediate adjuncts under the supervision of its own servants, selected and trusted on account of their special fitness, the construction which counsel now urge in its behalf is wholly unsatisfactory. The statutory regulations abroad are far from uniform, but the general course of decision is in favor of the view we take. *People v. Chicago & A. R. R. Co.* supra; *Eyler v. County Com'rs of Allegany County* 49 Md. 257; *Chicago, R. I. & P. R. R. v. Moffitt* 75 Ill. 524; *Cooke v. Boston & L. R. R.* 133 Mass. 185: *Masterton v. N. Y. C. & H. R. R. Co.* 84 N. Y. 247; *Wooley v. Grand S. & N. T. R. R. Co.* 83 N. Y. 121; *Payne v. Troy & B. R. R. Co.* id. 572; *Cott v. Lewiston R. R. Co.* 36 N. Y. 214; *People v. N. Y. C. & H. R. R. Co.* 74 N. Y. 302; *Wellcome v. Leeds* 51 Me. 313; *White v. Inhabitants of Quincy* 97 Mass. 430.

Third. Whether the duty to prevent the defects complained of extended to the city of Muskegon there is no occasion to decide. It is quite sufficient that on the theory of fact affirmed by the plaintiff, the suit is well brought against the defendant. If any duty lay upon the city to preserve the approach and crossing in a reasonably safe condition,—a point which is not considered,—it was not exclusive. It had no effect to derogate from the duty, or mitigate the responsibility of the defendant, and it could make no difference with the question of liability as between the latter and the plaintiff. Under the state of facts on which the plaintiff relies, the defendant would certainly be liable whether the city would be or not. The principle is well settled. *Masterton v. Railroad Co.* supra; *McKenna v. Metropolitan R. R. Co.* 112 Mass. 55; *Judson v. N. Y. & N. H. R. R. Co.* 29 Conn. 434.

There is no force in the suggestion, to which the circuit judge seems to have given assent, that plaintiff was negligent in driving over the road which he knew was out of repair. He had an undoubted right to drive over the road and nobody could deprive him of the right by putting the road out of repair, or by any neglect of duty in repairing.

No reference has been made to the late provision in the highway law, which took effect about three weeks prior to the injury for which the plaintiff sues. Public Act 243 of the Session of 1881, section 27. [How. St. § 1322]. The application of that provision is not certain and there can be no asumption that an individual would have any remedy in virtue of it. Further remark is uncalled for.

The ruling cannot be defended on the reasons urged in its favor and the judgment must be reversed with costs and a new trial granted.

The other Justices concurred.

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In the Matter of the Estate of Franklin Moore. Appeal of James S. P. Hatheway.

Estates of decedents—Partner's liability for special deposit.

1. The estate of a deceased partner is not liable for the amount of bonds left without his knowledge in the hands of other members of the firm as a special deposit, when it was no part of the firm's business to receive such deposits.

2. The issue upon presentation of a claim before probate commissioners continues the same on appeal to the circuit court and is governed by such evidences of the claim as were filed with the commissioners.

3. Statements made by persons who have been partners but after the firm has dissolved and its debts have been assumed by another member, are immaterial in seeking to show the liability of a non-consenting partner for bonds specially deposited, the firm not having been organized to receive such deposits and getting no profit from them.

4. Where a claim against an estate is for a special deposit of a quantity of government and state bonds with a firm of which decedent was a

member, testimony is fatally defective, which, while tending to show the deposit of bonds, does not identify their character.

5. The fact that a business firm, not organized for banking purposes, was in the habit of receiving an individual's money and allowing him interest on it does not tend to show that it was his depositary of securities.

Error to Wayne. (Full Court.) Oct. 23–26.—Dec. 20.

Appeal from rejection of claim by probate commissioners. Claimant appeals. Affirmed.

Norris & Uhl for appellant.

Cutcheon, Crane & Stellwagen and *G. V. N. Lothrop* for appellee. No recovery can be had against the estate of a partner for the amount of a special deposit left with the firm unless there is evidence that the firm, as such, received the deposit and lost it by negligence: *Foster v. Essex Bank* (1821) 17 Mass. 479; *Exp. Eyre* (1842) 1 Phil. Ch. 27; *Giblin v. McMullen* (1868) L. R. 2 P. C. 317; *Smith v. Westfield Bank* 99 Mass. 605; *Pitlock v. Wells* (1872) 109 Mass. 452; *Scott v. Chester Valley Bank* 72 Penn. St. 471; *Dudley v. Camden Ferry Co.* 42 N. J. L. 25; *Comp v. Carlisle Deposit Bank* 94 Penn. St. 409; and if bonds deposited were fraudulently abstracted by members of the firm the partner's knowledge of that fact must be shown: *Goodman v. White* (1852) 25 Miss. 163; *Taylor v. Jones* (1860) 42 N. H. 25; *Graham v. Meyer* (1868) 4 Blatch. 129; and that he assented: *Mercein v. Mack* (1833) 10 Wend. 463; *Wilson v. Williams* (1835) 14 Wend. 146; *Barnard v. Lapeer* (1859) 6 Mich. 274; *Heffron v. Hanaford* (1879) 40 Mich. 305; admissions of his co-partners in regard to matters not belonging to firm business can not bind him: *Hotchin v. Kent* 8 Mich. 526.

CAMPBELL, J. Hatheway, as executor and residuary legatee of Gilbert Hatheway deceased, presented a claim against the late firm of Moore, Foote & Co., before the commissioners on Moore's estate, under § 4438 of the Compiled

Laws of 1871, [How. St. § 5906] authorizing proof of liabilities under joint contracts to be made against the estates of deceased joint contractors. The claim was rejected by the commissioners, and also on appeal, the circuit judge ruling that no case was made out. Error is now brought on the rulings at the circuit.

The case stands on the same footing with an action on joint contract, and the principal questions on the trial related to such a controversy. Moore, Foote & Co., consisting of Franklin Moore, George Foote and George Frederick Bagley, did business from 1864 to 1874, having been associated originally under written articles for the purpose of becoming wholesale dealers in groceries and provisions, Bagley being the financial manager, Foote the general business manager, and Moore, the largest contributor, being exempt from personal management as far as he chose.

Gilbert Hatheway had dealings with the firm, and was in the habit of leaving considerable money balances in their hands, subject to his order, and drawing interest. He had also had at different times packages of bonds deposited specially in Detroit banks, which claimant relies on as indicating dealings with Moore, Foote & Co., under which they were liable as bailees. The present contest arises out of a claim that one or more packages of bonds were held by Moore, Foote & Co. for Gilbert Hatheway when he died, and have not been returned to his estate.

As the issue in the circuit is necessarily the same as before the commissioners, and was here, in fact, precisely the same without framing new allegations, the document filed with the commissioners, will determine the basis of the action. It was as follows:

"To one or more packages of U. S. and Michigan State coupon bonds, deposited in the life-time of said Gilbert by him with the late firm of Moore, Foote & Co., and remaining in the custody of said firm at the date of his death, Oct. '71, not delivered to his executor nor to his order, nor to any one authorized to receive them. Value estimated $50,000."

This claim is for a bailment by deposit of specific securi-

ties to be returned in the same shape as deposited. It is a simple and single form of liability as stated. And the only question presented is whether the firm as a firm ever received such a deposit to be re-delivered, and became legally in the wrong for non-delivery. The obligation relied upon is not a separate one of the decedent, but one which bound him, if at all, as a liability of the partnership on a partnership contract.

As the court below held there was no testimony in support of the claim, some dates may become material. Gilbert Hatheway died in October, 1871, and appellant became his representative in December of that year. Moore, Foote & Co. dissolved partnership in 1874. Both Moore and Bagley died in January, 1877. Foote is living.

There was no testimony tending to prove that Moore had any personal share in receiving or dealing with the bonds referred to, or that he had knowledge of their reception. If bound it must be because the transaction came within the implied powers of the various partners as representing the firm.

There was no testimony showing that the books of the firm contained reference to such a transaction, and no receipt or voucher was produced. Neither was any evidence produced in any shape from the documents of Gilbert Hatheway's estate which tended to show the deposit of such securities as in Moore, Foote & Co.'s hands at his death. Claimant's testimony consisted chiefly of facts connected with the money dealings and special deposits of Gilbert Hatheway, and of statements of Bagley and Foote after his death.

It was shown that after Gilbert Hatheway's death claimant had conversations with Bagley and one or more with Foote in which it was said that there were then bonds to a large amount in the hands of the firm. Nothing was said concerning the character of these bonds as government or State bonds, and if all the conversations are taken together it might be inferred that they referred to supposed deposits in some bank or banks in Detroit. But if these conversa-

tions were enough to create a liability such as is claimed, it would have been for the jury to pass upon the testimony. There was some evidence of conversations in 1875 with Bagley which, taken together, do not indicate anything more than a supposition of special deposits in bank; but these would not be material because made after dissolution and when Moore had assumed all the debts.

It cannot be claimed that these conversations, alone or together, could make out a liability such as was urged before the commissioners. The partnership was not organized for or used for banking or deposit purposes, and the reception of special deposits of securities for safe-keeping could not be of any profit or service to the firm. No partner not consenting to such arrangements could be bound by them. But this testimony is also fatally defective standing alone, because it does not identify any kind of bonds, while the claim filed is for government and State bonds.

We do not think the testimony of the previous dealings helps it out. The fact that the firm received money for Hatheway and kept it subject to his order, and allowed him interest on it, had no tendency to show that it was his depositary of securities. The correspondence introduced by claimant tends rather in the other direction as showing dealings under specific instructions with bonds not in the hands of the firm, and credit in each instance given for money or its equivalent received, but in no case referring to disposals of bonds or other securities dealt with except under orders.

The testimony concerning the packages of bonds which were from time to time deposited in banks is undisputed to the effect that they were all deposited as Hatheway's bonds, which he could himself control. This is not consistent with any theory of a bailment or deposit with the firm, but shows that any action by them or by any of them which was had, or which could have been lawfully had, was merely that of having them taken back and forth for Hatheway's convenience to and from the bank where they were kept. It cannot be seriously claimed that this was firm business

or that it made the firm Hatheway's depositary. And Moore is not shown by any testimony in the case, and could not have been shown by any testimony excluded, to have had any knowledge of or concern in these accommodation arrangements.

In our opinion nothing in the case, and nothing which the excluded testimony might have brought into it, tended to show that Moore, Foote & Co., in the course of business ever received on deposit the bonds claimed or any bonds.

And we think the case was properly taken from the jury and that the action of the circuit should be affirmed with costs, and the conclusion certified accordingly.

The other Justices concurred.

ANN REED v. PETER W. REED. | 52 117 | 122 155

Constitutional law—Credit to extra-territorial judicial proceedings—Indiana divorce—Residence—Laches.

1. The judicial proceedings to which full faith and credit must be given in every State besides that in which they are taken are those only in which the court was competent to act; and a prima facie showing of their regularity does not save them from impeachment by proper evidence.

2. One who leaves Michigan temporarily to avoid legal process and stays in Indiana a year for the purpose of getting a divorce meanwhile, does not thereby acquire a residence which will give the Indiana courts jurisdiction of his divorce proceedings. And notice of such proceedings, served on the wife in Michigan, need not be heeded.

3. Eighteen years' delay in suing a husband for support where the wife is living apart from him is fatal to the suit, even if the wife originally left him for cause.

Appeal from St. Clair. (Stevens, J.) Oct. 24.—Dec 20.

BILL for support. Defendant appeals. Reversed.

E. G. Stevenson, *John Atkinson* and *Isaac Marston* for

complainant. A Legislature cannot determine the status of non-residents in respect to marriage: *People v. Dowell* 25 Mich. 247; *Hood v. State* 56 Ind. 263; *Hoffman v. Hoffman* 46 N. Y. 30; *Adams v. Adams* 51 N. H. 388; *Sewall v. Sewall* 122 Mass. 156; *Pennywit v. Foote* 27 Ohio St. 600; *Tolen v. Tolen* 2 Blackf. 411; *Kerr v. Kerr* 41 N. Y. 272; *Ditson v. Ditson* 4 R. I. 87; *Smith v. Smith* 13 Gray 209; *Harteau v. Harteau* 14 Pick. 181; *Willman v. Willman* 57 Ind. 500; Schouler's H. & W. 571; *Lyon v. Lyon* 2 Gray 368; *Edson v. Edson* 108 Mass. 596; Cooley's Const. Lim. 400; *Holt v. Alloway* 2 Blackf. 110; divorces are invalid that are based on a residence not acquired in good faith: *Hunt v. Hunt* 72 N. Y. 217; *Gettys v. Gettys* 3 Lea 260; *Prosser v. Warner* 47 Vt. 667; *Litowitch v. Litowitch* 19 Kan. 451; *Cox v. Cox* 19 Ohio St. 502; see also *Hall v. Hall* 25 Wis. 600; *Harbaugh v. Cicotte* 33 Mich. 241; but an extra-territorial divorce granted to the husband cannot bar the right to support of a wife who has not been within the jurisdiction of the court which granted it: *Wright v. Wright* 24 Mich. 180.

Frank Whipple, *Harris & Vance* and *C. A. Kent* for defendant.

Cooley, J. Suit in equity to compel the defendant to furnish support to the complainant, who claims to be his wife. It is instituted under the Act of 1873, which authorizes such a suit when the husband, without good and sufficient cause, shall desert his wife, or, being of sufficient ability to support her, shall refuse or neglect to properly provide for and suitably maintain her. 1 Sess. L., 1873, p. 203. [How. St. § 6291.]

Most of the material facts in the case are not in dispute. The parties were married in Canada in the year 1850. The defendant was by trade a currier, and neither he nor his wife had property. He worked at his trade three or four years, and then began privately to read medical books. In 1857 he went to Terre Haute, Indiana, where he held him-

self out as a physician for about a year, but meeting with little success, went back to Canada, locating at a place called Madoc. In 1861 he moved to Port Huron in this State, and there the parties lived together as husband and wife until December, 1861, when complainant separated from her husband, and they have not lived together since. Three children, two boys and a girl, had been born to the parties, and the mother took the girl when she left. The father provided for the separate board of the boys for a time, but in the course of the next year they went to their mother, and remained with her until they came of age. The daughter has always lived with her mother, and for more than ten years has been blind and helpless. One of the sons is dead; the other is married and has a family. Defendant contributed to the support of his wife and children for three or four years after separation, but the parties disagree as to the extent of the aid furnished. In the fall of 1865 defendant went to Cincinnati where he took a course of medical lectures.

The immediate occasion for complainant leaving defendant was a charge she brought against him of adultery with one Mrs. Woodcock. In the summer of 1864 she filed a bill for a divorce on this ground, and proceedings were had in the case for two years or so, but it never was brought to a hearing. In January, 1867, defendant filed a bill against his wife for a divorce on the ground of desertion. Meantime complainant had another ground of complaint against him, for alleged improper intimacy with a Mrs. Jones. When he filed his bill for divorce, complainant immediately took steps to have him arrested for failure to support his family, and this coming to his knowledge, he secretly left Port Huron, going first to Canada, then to Toledo and from there to Terre Haute, where he again offered his services to the public as a physician.

It appears by the testimony on both sides that defendant had had no thought of changing his residence up to the time of his leaving Port Huron, and that when he left the sole purpose was to avoid the service of process. He took

pains that a knowledge of his whereabouts should not come to his wife, and he had goods which were sent to him from Port Huron billed to Toledo and from there reshipped that the direction at Port Huron might not disclose his place of stay. After reaching Terre Haute he was advised that if he would stay there a year he could get a divorce, and he therefore remained until the year was up and then filed his bill. In the mean time, however, he had had a friend approach his wife to ascertain if their controversies could be settled so that he could go back in peace, but his overtures were unsuccessful.

The cause assigned for divorce in the Indiana bill was desertion. Summons upon this bill was issued February 25, 1868, and returned non est the same day. Two weeks later a notice was filed with the clerk of the Indiana court that the plaintiff in that cause would take the testimony of witnesses at a law office specified in Port Huron on April 2, 1868, between the hours of eight in the morning and six in the afternoon. Pursuant to this notice, which it is manifest it was not intended the party concerned would ever see, the testimony of the plaintiff's legal adviser at Port Huron was taken, and this so completely made out the plaintiff's case that, as he ingenuously informs us, his Terre Haute counsel told him it was strong enough "to divorce half the women in Indiana." Probably by this was meant that by a like secret process a case could be made out against half the married couples in any community; and very likely that would be true. On filing this testimony and proving in open court that he had his residence in Terre Haute, the plaintiff was awarded his divorce. The proof of residence was made by some woman he had seen at a boarding-house, but with whom he professed to have only a casual acquaintance. The decree purporting to grant a divorce bears date April 28, 1868. The wife had no notice or knowledge of the Indiana proceedings until after their conclusion, and the only public notice which was given was published in a Terre Haute newspaper for three weeks, commencing February 26, 1868.

In a little over two months from the time he procured his Indiana divorce this defendant was practicing medicine as a resident of Port Huron again, and nineteen days after his arrival in that city he had gone through the ceremony of marriage with Mrs. Jones, though if his evidence is true no communication whatever had passed between him and her from the time of his clandestine departure from Port Huron until his return. After returning he gave no aid to complainant or to their blind and helpless daughter. The present suit was begun November 29, 1881, and the decree made in it awards to complainant an annual allowance of three hundred and sixty-five dollars. The sum named is sufficiently moderate if under the circumstances any sum at all should be awarded.

The defendant appeals, and relies for a reversal of the decree upon the proposition that at the time the suit was instituted the complainant was not his wife; the marriage bonds between them having been dissolved by the Indiana divorce. "Full faith and credit," it is said, is required to be given to the record of this divorce by the express provision of the Federal Constitution [Art. iv. § 1]; and it is not competent in a collateral proceeding to assail it.

It is true that the Constitution of the United States requires full faith and credit to be given in every state to the records and judicial proceedings of other states; but this requirement does not extend to the giving validity to those proceedings which in themselves are mere nullities. It is implied in judicial proceedings that the court assuming to act and to render judgment should have had competent authority to do so in the particular case; and when this authority is wanting, whatever is done is not judicial. It cannot, therefore, be within the protection of the Federal Constitution. And if the record by its recitals makes a prima facie case of jurisdiction, no one in another state or country is concluded thereby, but he may show what the real fact was, and thus disprove the authority for making such a record. *Thompson v. Whitman* 18 Wall. 457; *Knowles v.*

Gas-light Co. 19 Wall. 58; *Bartlet v. Knight* 1 Mass. 401; s. c. 2 Am. Dec. 36; *Shumway v. Stillman* 4 Cow. 292; s. c. 15 Am. Dec. 374; *Thompson v. Emmert* 15 Ill. 416; *Marx v. Fore* 51 Mo. 69; s. c. 11 Am. Rep. 432; *People v. Dawell* 25 Mich. 247; s. c. 12 Am. Rep. 260; *Reel v. Elder* 62 Penn. St. 308; s. c. 1 Am. Rep. 414; *Pennywit v. Foote* 27 Ohio St. 600; s. c. 22 Am. Rep. 340; *Gilman v. Gilman* 126 Mass 26; s. c. 30 Am. Rep. 646; *Bowler v. Huston* 30 Grat. 266; s. c. 32 Am. Rep. 673; *Eaton v. Hasty* 6 Neb. 419; s. c. 29 Am. Rep. 365.

It may be assumed that the record of the Indiana court imported a case of jurisdiction; but this was because the defendant in this case imposed upon the court by a false assertion of residence, and induced it by that assertion to make orders and finally to enter a decree which it would not have made or entered had the facts been known. That court could have no authority to dissolve the bonds of matrimony between citizens of Michigan; for the subject is one to which the laws of Indiana could not possibly extend, and do not assume to extend. The laws of that state authorize certain of its courts to grant divorces for specified causes on the application of actual residents of the state; but a person is not such a resident who is in the state merely for the purposes of the divorce, as it is manifest that this defendant was during his last sojourn in Terre Haute. He left Port Huron not because of any purpose to abandon his residence there, but to avoid the service of process, and he remained in Terre Haute after reaching there because he was told that after a year's stay he might obtain a divorce. The proceedings in the Indiana court we need not comment upon further than to remark that when it is known that knowledge of them was kept from this complainant, though the pretense of giving notice was publicly made, and that the evidence was secretly taken in Port Huron where it was known complainant had remained, it becomes at once apparent that the decree which the court was deceived into making, was a mere travesty of justice. Had notice of the suit been given to the wife in Michigan, she would have been

under no obligation to give heed to it: *Scott v. Noble* 72 Penn. St. 115; *Pennoyer v. Neff* 95 U. S. 714; but the notice might have been some indication of a willingness to allow her to defend her rights; while the course actually taken conclusively shows that it was never intended she should have the day in court which belongs to every one of common right, and which every civilized state assures to its people.

A more difficult objection for the complainant to overcome is that which arises upon the long delay to make claim to support. The Indiana divorce, it is seen, was obtained in 1868; this suit was instituted in 1881. Here is delay and apparent acquiescence in the fraudulent proceedings for thirteen years, and the bill assigns no reason for this whatever. But even this does not fully present the laches with which complainant is chargeable. It appeared from the charges and counter-charges that she withdrew from her husband in 1863, eighteen years before this bill was filed, and that her remaining apart from him after that time was against his will and in disregard of his repeated requests that she would return to him. A suit for support under such circumstances necessarily brings in question the justification for the original separation, and would require an investigation into the facts attending it. It could not be expected that an investigation after such a lapse of time could be anything else than imperfect, uncertain and unsatisfactory, and the laches has been so gross that the court may well refuse to enter upon it. What is said in *Compo v. Iron Mining Co.* 50 Mich. 578, 595, is entirely applicable to this case; and the following cases, in which relief was refused for long delay in cases of matrimonial offenses, may be considered even more directly in point: *Guest v. Shipley* 2 Hagg. 321; *Matthews v. Matthews* 1 Sw. & Trist. 500; *Same v. Same* 3 Sw. & Trist. 161; *Williamson v. Williamson* 1 Johns. Ch. 488; *Valleau v. Valleau* 6 Paige 207; *Fellows v. Fellows* 8 N. H. 160; *Whittington v. Whittington* 2 Dev. & Bat. 64; *Rawdon v. Rawdon* 28 Ala. 565; *Castleden v. Castleden* 9 H. L. Cas. 186; *Peipho v. Peipho* 88 Ill. 438.

The conclusion must be that the decree must be reversed and the bill dismissed.

GRAVES, C. J. and SHERWOOD, J. concurred.

CAMPBELL, J. I concur in so much of the opinion as reverses for laches.

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AARON J. LASHBROOKS v. JAMES S. P. HATHEWAY.

JAMES S. P. HATHEWAY v. AARON J. LASHBROOKS AND CATHERINE LASHBROOKS.

Mortgage—Statute of limitations—Omnibus clause.

1. A mortgage will not keep alive the personal obligation to pay a debt after the time when it would otherwise be outlawed.
2. A mortgage which is so drawn as to cover any demands which the mortgagee may hold against the mortgager cannot authorize the mortgagee to buy up claims against the mortgager and enforce them unless the provision that he may do so is very clearly expressed. The provision can ordinarily cover only such demands as arise directly out of the dealings between the mortgager and mortgagee.
3. Where one seeks, as assignee, to foreclose a mortgage securing a non-negotiable note, but gives no evidence of title to the debt beyond the mere possession of the note and of an assignment of certain interests which are not shown to include the debt secured, his bill must be dismissed.
4. The rule that on foreclosure the defendant has the burden of showing that the debt has been paid ought not to be stringently enforced where the debtor has confided in the creditor and placed himself in his hands, and for ten years neither debtor nor creditor has taken any notice of the debt, and the evidence relating to it has become uncertain and conflicting.
5. A printed omnibus clause in a mortgage extending it to debts not covered by the amount specifically stated *seems* to be to some extent counterbalanced by the presumption arising from the fact that the stamp on the mortgage corresponds to the specified sum.

Appeal from St. Clair. (Stevens, J.) Oct. 24.—Dec. 20.

BILL to redeem and CROSS-BILL to foreclose. All parties appeal. Sale enjoined and cross-bill dismissed.

O'Brien J. Atkinson, *John Atkinson* and *Isaac Marston* for the Lashbrooks.

Norris & Uhl for Hatheway.

COOLEY, J. On March 12, 1866, Aaron J. Lashbrooks and Catherine, his wife, gave a real estate mortgage to John K. Hatheway to secure the sum of two thousand dollars represented by a note bearing ten per centum interest, and payable in installments, the last of which fell due March 1, 1872. In drawing the mortgage a very unusual printed form appears to have been made use of, one clause of which purported to bind the mortgagors to pay "all such further or other sum and sums of money and other indebtedness" that might be due or owing from the mortgagors or either of them when the mortgage should become due and payable or whenever foreclosed, and to authorize the mortgagee in case of foreclosure to retain the amount of such other indebtedness from the moneys realized. The residence of John K. Hatheway was in Massachusetts, and the mortgage was in the hands of Gilbert Hatheway at New Baltimore, Michigan, from the time it was made for several years. Gilbert Hatheway seems to have had charge of other interests of John K. Hatheway during this time, and Aaron J. Lashbrooks had dealings with him in his capacity of agent, in the course of which other securities were given and payments were made. It does not appear that there were any dealings in respect to the real estate mortgage after 1871, or that the mortgagors were ever called upon to make payment of either interest or principal.

In March, 1881, James S. P. Hatheway, claiming to be assignee of the mortgage, without first calling for payment, published in the county of St. Clair where the lands were situated a notice of foreclosure under the power of sale, the day of sale being fixed for June 16, 1881. When this publication first came to the knowledge of Aaron J. Lashbrooks

he filed a bill to enjoin the sale and to redeem from the mortgage. Hatheway claimed in his notice that $10,757.16 was due on the mortgage, but Lashbrooks denied any such indebtedness, asked for an accounting, and offered to pay any sum that should be found owing. He also averred that the clause in the mortgage which purported to extend it to other indebtedness than the mortgage note was not in the mortgage with his assent, and was a fraud upon him.

Hatheway answered the bill, and also filed a cross-bill against Lashbrooks and his wife, the purpose of which was to foreclose the mortgage. He alleged, in general terms, that he was assignee of the mortgage, but did not show how he became such. Besides the mortgage note he claimed to foreclose for the amount of several obligations, the most of which were given to either John K. Hatheway or Gilbert Hatheway. An answer was filed to the cross-bill, and issue having been formed, voluminous evidence was taken which was directed mainly to the question whether anything remained unpaid by Aaron J. Lashbrooks on the dealings between himself and John K. Hatheway. The court of chancery adjudged $5500 to be due and owing on the mortgage, being the $2000 and interest, and decreed a sale of the mortgaged premises to satisfy that amount, with the costs. All parties appealed.

Objection is made on behalf of the Lashbrooks that Hatheway fails to show title to the mortgage, and we are constrained to say that the objection is well taken. In his bill, as has been said, he avers in general terms that he is assignee, and he attempts to prove the allegation by producing a deed from John K. Hatheway and wife, which bears date February 26, 1872, and purports to "bargain, sell, remise, release and forever quitclaim unto the said party of the second part and to his heirs and assigns forever, all of our and each of our rights, titles and interests in and to any and all real estate and personal estate and property of whatever name or nature, situate in the counties of Macomb and St. Clair in the State of Michigan or else-

where in the United States, which has in any way arisen or grown out of the stave business (so-called transactions) as conducted by Gilbert Hatheway as attorney in fact for John K. Hatheway, including all notes, mortgages, accounts, dues, demands, choses in action and all evidences of indebtedness whatever that may arise or grow out of any or all bargains, agreements, transactions and dealings of Gilbert Hatheway, as attorney in fact for John K. Hatheway in conducting all the aforesaid referred to so-called stave business in all and every part of the United States of America." This, with possession of the mortgage note which was not negotiable, constituted the sole evidence of title in complainant. But this could not have the effect to pass the title to these securities unless it should be made to appear that in some manner they had their origin in or were in some manner connected with the stave business; and on that point we have from Hatheway neither allegation nor proof. A casual statement by Aaron J. Lashbrooks was pointed out on the argument as tending to make such proofs, but it was a vague and indefinite statement, and neither went far enough nor was sufficiently specific to establish the fact. It was conceded that the mortgage was given to secure the payment of the purchase price of land described in it, and its connection with the stave business, if any existed, must have been somewhat remote and circuitous. Hatheway, therefore, failed to establish a necessary fact on which his right to enforce the mortgage depended, and his bill must for that reason be dismissed.

Under ordinary circumstances we should go no further in the case; but as there has been a vigorous contest on the merits, and there is reason to believe that no one representing John K. Hatheway, who is now deceased, disputes the right of James S. P. Hatheway to the mortgage, and it is probable that the expression of an opinion may prevent further litigation, it seems proper to say that we have not been impressed by the evidence that any sum remains unpaid which is secured by the mortgage.

In taking the proofs, and on the argument, it has been

assumed on the part of Hatheway that the burden was upon the Lashbrooks to show payment of the mortgage debt; and the general rule is undoubtedly in accord with this assumption. The mortgagors have taken upon themselves this burden, and endeavored to make this proof, and counsel for Hatheway insist that their showing is vague, inconclusive, unsatisfactory and in some particulars inconsistent with itself and with some of the allegations in the original bill. There is foundation for the criticisms made, and they have not been overlooked by us in coming to our conclusions. But, on the other hand, we cannot overlook some circumstances which not only bear strongly against the claim set up under the mortgage, but tend to excuse the defects in the showing made against it, or at least to entitle it to be viewed with more than ordinary liberality. After ten years' delay, during which it does not appear that any claim was being made under the mortgage, or, on the other hand, that the mortgagors were recognizing it as an existing security, we find it suddenly, without warning, put in process of foreclosure, and a sum claimed under it which is not only more than five times the amount of the original debt, but is large enough, apparently, to require the sale of all the land to satisfy it. In the mean time John K. Hatheway and Gilbert Hatheway have both deceased, and any light which either of them might throw upon their dealings with the Lashbrooks has become impossible of attainment. Among the papers of Gilbert Hatheway were the various securities he had taken from Aaron J. Lashbrooks besides the mortgage in the suit, and there was a memorandum in his handwriting indicating that some of these were to be delivered up to Lashbrooks, but it was impossible to determine clearly what ones were intended. It is very plain that the Lashbrooks had confided in Gilbert Hatheway, and placed themselves to a considerable extent in his hands; and it would be both unjust and illogical to require of them, under the circumstances, the same full and complete showing of their equities that would be expected if the transactions were recent, and if the parties had apparently dealt with each

other on a footing of equality and without special trust. If there were no mortgage all remedy on these demands would have been lost by lapse of time, and the mortgage does not keep alive the personal obligation, which was barred some years ago. *Mich. Ins. Co. v. Brown* 11 Mich. 265; *Appeal of Goodrich* 18 Mich. 110; *Powell v. Smith* 30 Mich. 452. It is, of course, possible for an entirely just claim to be suffered to lie along in this manner without the notice of either creditor or debtor, but it is so unusual that the circumstance is not to be overlooked in a case standing upon uncertain or conflicting evidence.

The evidence in this case is both uncertain and conflicting, but there is testimony from impartial witnesses which, if believed, makes out a prima facie case of complete payment of the mortgage note. We are of opinion that it has not been overthrown by any evidence given on behalf of Hatheway, and that it must be accepted as conclusive.

The next question is whether the mortgage can be held to cover any other demand. We have seen that by its terms it purported to secure any claims the mortgagee might have against the mortgagors either before or at the time of foreclosure; and it seems to be thought that the mortgagee might buy up demands at discretion and thereby extend the mortgage indefinitely. But this would be so extraordinary an arrangement that the intent to provide for it ought to be too clear for doubt before a court could be justified in enforcing it. We do not think it is to be found in this mortgage. The farthest this stipulation can be understood to go is to cover demands directly arising out of the dealings between the mortgagors and the mortgagee, and its terms will be fully answered if they are limited to such demands.

But, as has been said, this mortgage was written upon a blank form, and this very unusual clause was contained in the printed part, and might very naturally have been overlooked in filling out or in signing it. There is some reason to believe that such was the case here. The mortgage was given while the federal laws requiring securities to be stamped in proportion to their amount were in force, and

it was stamped for two thousand dollars only. This raises a strong presumption that it was not understood to be operative further as a security; and it is manifest that it could not have been, while the stamp laws remained in force, without further stamping. But it is not necessary to consider this clause further than to determine that it does not extend beyond the dealings between the mortgagee and the mortgagors. Upon those dealings we are not satisfied by the evidence that anything now remains unpaid.

The conclusion is that the cross-bill must be dismissed with costs of both courts. As James S. P. Hatheway insists upon his ownership of the mortgage in suit, complainant in the original suit may have as against him a perpetual injunction to restrain foreclosure, and will recover costs.

The other Justices concurred.

After the foregoing opinion was filed attention was called by counsel to the fact that in the deed from John K. Hatheway and wife to James S. P. Hatheway a clause subsequent to the one recited in the opinion purports to "convey and deed unto the said James S. P. Hatheway all other real and personal estate and property of whatever name or nature that they or either of them have any right, title or interest in and to, situate in the aforesaid Macomb and St. Clair counties, or elsewhere in the State of Michigan." At the time of giving this deed the grantors resided in Massachusetts. Whether a debt due to one of them is to be deemed "situate" in the State of Michigan because secured upon property there, is a question upon which an opinion seems not to be called for, in view of what is above said on the merits. C.

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JOHN O'BRIEN v. OHIO INSURANCE COMPANY.

Insurance—Statement of incumbrances—Proofs of loss.

1. Where an insurance agent himself fills out a policy upon a mere oral application for insurance, and the applicant is not asked the amount of incumbrances, and does not know that it should be stated, his omission to state it is no defense to the payment of a loss, unless in cases involving unusual risk not likely to be contemplated by the insurer.
2. An insured person who is notified by an agent of the insurance company that the company absolutely refuses to pay a loss, is excused from furnishing proof of the loss or demanding payment before bringing suit on the policy, especially if an agent of the company has made investigation.
3. The stipulation in an insurance policy that any application, survey, plan or description of the property referred to therein shall be considered part of the policy, does not apply where the application &c. is not in writing.
4. An insurer who has absolutely denied liability for a loss is estopped from objecting to the want or sufficiency of the preliminary proof thereof; and a court will not presume reasons to support his refusal to receive such proof if seasonably offered.
5. The restrictions in policies of insurance upon the power of agents to deviate from their express terms generally apply only to those parts of the transaction which relate to the the formation and continuance of the contract, and not to those which prescribe the condition of suit on the policy, such as notice, delivery of proofs or submission to examination.

Error to Muskegon. (Russell, J.) Oct. 25.—Dec. 20.

ASSUMPSIT. Defendant brings error. Affirmed.

Norris & Uhl for appellant.

Campbell & Allen for appellee. Where a policy is issued on verbal application without any representation, all information as to the risk is waived unless the risk is unusual: Wood on Ins. § 162; *Com. v. Hide & L. Ins Co.* 112 Mass. 136; *Bahringer v. Empire &c. Ins. Co.* 2 Thomp.

& C. 610; *Kernochan v. N. Y. &c. Ins. Co.* 17 N. Y. 428; *Emery v. P. &c. Ins. Co.* 52 Me. 322; and this is so when the policy is issued on the agent's knowledge: Wood on Ins. §§ 203–205; *Bartholomew v. Merchants' Ins. Co.* 25 Ia. 507; see *N. A. Ins. Co. v. Throop* 22 Mich. 146; *Peoria Ins. Co. v. Hall* 12 Mich 202; *Mich. State Ins. Co. v. Lewis* 30 Mich. 41; *Aurora Ins. Co. v. Kranich* 36 Mich. 289; *Am. Ins. Co. v. Gilbert* 27 Mich. 430; *Lorillard Ins. Co. v. McCulloch* 21 Ohio St. 176; a policy is not avoided even if oral statements made are false, if they were made honestly: *Alexander v. Germ. &c. Ins. Co.* 5 Thomp. & C. 208; *Plumb v. Cattaraugus County Ins. Co.* 18 N. Y. 392; in cases of fire insurance the insured may be silent as to all matters open to observation if the insurer makes examination for himself: Wood on Ins. § 81 n. 6; *Green v. Merch. Ins. Co.* 10 Pick. 402; *Fish v. Cottenet* 44 N. Y. 538; and when the insurer makes no inquiry it is presumable that no information is desired: *Clark v. Manuf's Ins. Co.* 8 How. 249; see generally *Norwich & N. Y. Transp. Co. v. W. Mass. Ins. Co.* 34 Conn. 561; *N. & N. Y. Trans. Co. v. How. Fire Ins. Co.* 12 Wall. 194; *Tayloe v. M. &c. Co.* 9 How. 396; *Noyes v. W. &c. Ins. Co.* 30 Vt. 659; *Martin v. F. Ins. Co.* 20 Pick. 389; *Security Ins. Co. v. Fay* 22 Mich. 467; *Hibernia Ins. Co. v. O'Connor* 29 Mich. 241; *Merc. Ins. Co. v. Holthaus* 43 Mich. 423; *Kernochan v. N. Y. &c. Ins. Co.* 17 N. Y. 428.

GRAVES, C. J. The plaintiff recovered on one of defendant's policies and error is alleged.

First. We think the declaration was sufficient under the rule of court, [Circuit Court Rule 104] and that the contract of insurance was properly admitted. The objection of variance was not tenable.[1]

Second. At the date of this policy and down to the occurrence of the fire an incumbrance by mortgage of from three

[1]Circuit Court Rule 104 provides that in declaring upon printed policies of insurance it shall not be necessary to set forth specifically any more than the date and amount of the policy; the premium paid or to be paid; the property or risk insured; and the loss.

to five hundred dollars rested on the property. The argument by the plaintiff that there was a lack of evidence on this subject is not warranted. Among other items of proof the record contains an offer by the plaintiff to swear to the fact himself. Moreover, it appears by the charge that it was not disputed. The property was in Muskegon, and the policy was there issued and delivered through Haines & Chamberlain, the defendant's local agents. The transaction of the business was confined to Haines and O'Brien. There was no written application. O'Brien called on Haines to effect an insurance and told him where the property was; and Haines observed that he knew the property, and at

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The declaration was as follows:

MUSKEGON COUNTY—SS.

John O'Brien, of the city of Muskegon, plaintiff in this suit, by Campbell & Allen, his attorneys, complains of Ohio Insurance Company, defendant herein in a plea of trespass on the case upon promises, filing this his amended declaration, in pursuance of the statute in such case made and provided and of the leave and order of said court.

For that the said defendant, which is a corporation duly organized and existing under and by virtue of the laws of the State of Ohio, and authorized thereunder to do the business of fire insurance, and which is duly admitted under the laws of the State of Michigan to do and carry on such business, doing business at the county of Muskegon aforesaid, heretofore to-wit, on the 29th day of March, A. D. 1882, at the city of Dayton, in the State of Ohio; to-wit: at the city of Muskegon aforesaid, on the application of the plaintiff made a certain policy of insurance in writing, whereby the said defendant in consideration of six dollars to it in hand paid by the said plaintiff, receipt whereof was thereby acknowledged, did insure the said plaintiff against loss or damage by fire, to the sum of four hundred dollars, to the following specified and located property, to wit: on his one story frame, shingle roof dwelling house and woodshed attached, situate, detached, on his two-acre lot situate on the northwest corner of Division street and Laketon avenue, in the city of Muskegon, Michigan, aforesaid.

And the said defendant, for the consideration aforesaid, did then and there and thereby promise and agree to and with the plaintiff, his executors, administrators or assigns, to indemnify and make good to plaintiff all such immediate loss or damage, not exceeding in amount the said sum of four hundred dollars, nor the interest of the said assured in the property, as should happen by fire to the property specified, as aforesaid, from the said 29th day of March, A. D. 1882, at 12 o'clock at noon, until the full end and term of three years next ensuing, to-wit: until the 29th day of March, A. D. 1885, at 12 o'clock at noon, which policy being No. 35,561.

And the said plaintiff further avers that at the time of the making, execution and delivery of said policy of insurance as aforesaid, and from thence until and at the time of the loss and damage hereinafter mentioned, he had an interest in said insured property to a large amount, to-wit:. to the amount of one thousand dollars, to-wit: being the sole owner thereof in fee simple absolute, to-wit: at the county aforesaid, and that afterwards,

once filled out the policy and delivered it. The plaintiff swears that it was not read to him, and that his attention was not called to any of its conditions or provisions, and that no questions were asked about mortgages or anything said on the subject, and that he did not disclose the existence of the mortgage. Mr. Haines testifies that O'Brien was silent in regard to incumbrance, although it is his recollection that he asked him about a mortgage. The policy contained this stipulation:

"If any application, survey, plan or description of the property herein specified is referred to in this policy, such application, survey, plan or description shall be considered a part of this policy and the basis of this insurance: provided, however, that this company will not be liable under and by virtue of this policy, if there be any omission or false representation by the assured of the title, incumbrance, condition, location or occupancy of the property, or any

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to-wit: on the 15th day of April, A. D. 1882, the said property so covered and insured in and by said policy of insurance as aforesaid, was burned, consumed and destroyed by fire, which did not happen or take place by means of any act or neglect of this plaintiff, or of any one in his behalf, whereby the said plaintiff sustained damages to a large amount, to-wit: to the sum of four hundred dollars, to-wit: at the county of Muskegon, aforesaid.

And the said plaintiff further avers that although he has in all things observed, performed and fulfilled all and singular the matters and things which on his part were to be performed and fulfilled according to the form and effect of said policy of insurance, and although he has sustained loss and damage on occasion of said fire to the said sum of four hundred dollars, yet the defendant has hitherto failed and neglected to pay to him the said sum or any part thereof.

The plaintiff avers that being so indebted the said defendant afterwards, to-wit: at said county, on, to-wit: the 20th day of June, A. D. 1882, faithfully undertook and promised to pay to said plaintiff the said sum of money, when thereunto afterwards requested: yet the said defendant, although often requested so to do, has not as yet paid the said sum of money or any part thereof, to the plaintiff's damage of four hundred and fifty dollars. Therefore he brings suit &c.

September 9, 1882. CAMPBELL & ALLEN,
Attys for Pl'ff.

Objection was made to receiving evidence under this declaration on the ground that it did not aver notice to defendant of the loss, nor show that it was due and payable nor state a sufficient consideration for the absolute promise to pay $400.

Objection was made to receiving the policy in evidence on the ground also, that the policy set up in the declaration is a policy payable immediately upon the destruction of the insured property by fire, while the policy offered is payable sixty days after proofs of loss, and the company is not liable upon it until after sixty days from the time when proofs of loss were furnished by plaintiff to defendant.

over-valuation or any misrepresentation whatever, either in a written application or otherwise."

The defendant contended in the circuit court, as it contends here, that the plaintiff's failure to inform the agent of the mortgage was a violation of the foregoing provision of the policy and a complete answer to the action. The circuit judge differed, and first observing that there was no written application, and no provision for a preliminary examination of the applicant by the agent, proceeded to charge the jury, in substance, that if they found that the policy was not read to the plaintiff before it was delivered to him, and that the agent gave it to him on his oral application without directing his attention to the conditions respecting incumbrance, and that the plaintiff on receiving the policy was ignorant of them, and that nothing was said either by the agent or the plaintiff before or after the emanation of the policy in regard to incumbrance, that they might then consider the existence of the mortgage as no impediment to recovery.

The defendant can sustain no exception to this charge. The provision in the policy is not applicable. The first paragraph relates to cases where applications, plans, surveys or descriptions are made and are by necessity in writing, and the last clause though not very clear, most obviously does not intend a case of mere silence in regard to the existence of incumbrance where no inquiry is made, and where no explanation is asked for, and the applicant is utterly unaware that any is required. If an insurer is apparently indifferent whether a property is unincumbered and is content to insure without in any way suggesting an interest in the question, the bare silence of the applicant upon it cannot be deemed a misrepresentation. If the applicant is guilty of no misleading conduct the insurer in such a case must be taken to assume the risk incident to the undisclosed incumbrance. It must not be intended that the principle would hold in regard to incidents obviously implying unusual risks, and not likely to be discerned or contemplated by the insurer. The case requires no observa-

tions on that subject. It is sufficient to suggest the distinction.

Third. By clause 10 of the policy the plaintiff was required to render, as soon after the fire as possible, a particular account of the loss, signed and sworn to, and containing certain particulars there enumerated. And it was further provided by clause 13 that in case of being required by any person appointed by the company, either before or after the rendition of the preliminary proof, the plaintiff should submit to examination under oath and subscribe thereto &c. And it was declared by the 9th clause that "the use of general terms or anything less than a distinct specific agreement, clearly expressed and indorsed on the policy, should not be construed as a waiver of any printed or written condition or restriction therein;" and the local agent Haines, who filled out and delivered the policy, testified that his firm, as local agents, had no authority to waive any conditions and never undertook to do so.

The fire occurred on the 10th or 11th of April, 1882, and the plaintiff notified Haines, the local agent, the next day, and he undertook to convey information to the home office, and did so. The defendant directed Mr. Garnsey of Grand Rapids, its adjusting agent for the district, to examine into the loss, and he repaired to Muskegon for that purpose on the 19th of the same month or in about a week after the fire. He called on the plaintiff for an account of the loss and for a statement of facts, and after interrogating the plaintiff as fully as he wished, he wrote out an elaborate detail containing everything from the plaintiff he saw fit to require. He then asked the plaintiff to sign this statement and swear to it. But the latter requested that before doing so it might be shown to his legal advisers, Messrs. Campbell & Allen, and he went with Garnsey to their office. Mr. Campbell objected that a few of the details were neither relevant nor proper, and that the plaintiff ought not to sign the paper and swear to it unless they were stricken out. Some discussion followed, and these passages were at length marked out and the plaintiff offered to subscribe and swear

to the statement as thus altered. But, after some hesitation, Mr. Garnsey decided to insist on the statement as originally drawn, and he shortly after went away and took the paper with him.

The failure of a technical consummation of a full exhibit at this time was caused by the difference referred to in regard to the fitness of the particular passages objected to. The parties to this interview do not perfectly agree in regard to all that was said, but what has been stated is not matter of dispute. The plaintiff swears that Garnsey stated to him on leaving that he, the plaintiff, would hear from him in a few days. But Garnsey testifies that he thinks he did not promise to communicate with him; that according to his recollection he said that if he had occasion to communicate with him he would do so through the agents, Haines & Chamberlain. He also thinks he made no further communication to the plaintiff. At the close of this interview, and on the same day, Mr. Garnsey made a long report of the case to the home office and sent with it the statement which the plaintiff had refused to sign. The report was long and accusatory, and it conveyed in the plainest manner the agent's positive opinion that the fire was a criminal burning by the plaintiff. This report was received at the home office, and thereafter the company continued silent.

The plaintiff waited till the 10th of May, and then addressed a letter through his counsel to the company. He referred to the disagreement with Garnsey concerning certain passages in the statement which the latter wrote out, and also to the delay which had taken place and to some other matters, and then informed the company that he waived his objections and would sign and swear to the statement in the form in which it was written out. The company made no reply and gave no intimation of having received the letter. It appears, however, that it reached the home office and that the secretary sent it to Garnsey, and also went himself to see that gentleman in relation to the matter it referred to. The conclusion reached by that interview is not expressly disclosed. The inference is

unquestionable. The defendant's conduct accorded with the report made by Garnsey, and it justified the implication that it refused payment of the loss on the ground of fraud. The letter remaining unanswered and unacknowledged, Mr. Campbell, on behalf of the plaintiff, called on Mr. Chamberlain, one of the local agents, and inquired what the defendant proposed to do, and he replied that it would not pay the loss because it was supposed that the fire was fraudulently contrived by the plaintiff.

This suit was then instituted to compel payment of the loss, and without previous service of preliminary proof. The defendant gave notice of false representations as matter of defense, but made no mention of the omission to furnish a statement of the loss. The statement made by Chamberlain to Campbell that defendant would not pay the loss on the ground that the burning was believed to be fraudulent was true. The company had decided. There is no room for any question on that subject. Indeed it is not denied. But the defendant claimed at the trial and claims here that Chamberlain's authority as local agent did not extend far enough to entitle him to give an instructive and truthful answer to the question put to him. He was expressly called upon in his character of agent, and in respect to a pending claim under a policy which his associate agent had given out. It is not denied that he knew his company had then determined not to pay, and for the reason which he explained. It is not denied that the plaintiff was entitled to the information sought, and it is not denied that the inquiry was in good faith. We think the plaintiff was entitled to receive from Chamberlain, as defendant's agent, the truth which he communicated, and to act upon it.

Under various forms the defendant raises the question that the omission to serve preliminary proof and submit to examination was an incurable defect. On this subject the circuit judge gave the following instruction:

"The plaintiff under this policy was not required to furnish any proofs of loss save the account required by clause 10 of the policy, which provides that the assured in case of

loss should render a particular account of the loss, signed and sworn to, stating any other insurance, the cash value of the property and his interest therein, and the purpose for which and by whom the property was used at the time of the fire, and when and how the fire originated. The adjusting agent of the company having come, within a few days after the fire, and examined the defendant as to the loss, &c., and reduced to writing the statement of plaintiff, or such parts of the statements as he saw fit, if you find that the plaintiff disclosed to the adjusting agent and furnished him at the time with all the facts and information required to be given in such account, and submitted to such examination as the adjusting agent then required, and offered to sign and swear to a statement setting forth the same, but the agent added to the statement matters about other fires and then required plaintiff to sign the statement, and plaintiff had a right to refuse to sign such statement as thus prepared, and if the plaintiff offered to sign and swear to the statement, after erasing those matters, but the agent insisted on their remaining in, and took the statement away with him, and promised to communicate with the plaintiff in a few days and failed to do so, and after waiting awhile the letter of May 10th was sent by plaintiff's attorney to the defendant, if you find that afterwards the agent of the defendant informed the plaintiff or his attorneys that the defendant repudiated all liability on the policy and would not pay the loss on the ground that the fire occurred through plaintiff's fraud, or upon other grounds not relating to the sending of the particular account, the plaintiff was not, under all the circumstances, required to render or furnish any further account before bringing suit."

This instruction was strictly applicable to the state of fact, and it appears to be unobjectionable in principle. Were it necessary to recur to the common doctrine which estops the insurer from objecting to the want or sufficiency of preliminary proof where he has put himself upon the extreme ground of absolute non-liability, the consequence would not be different. The ascertained facts would subject the case to that principle. The usual provisions against deviations from written terms, and by way of restriction of the power of particular agents, are in general only applicable to those parts which relate to the formation and continuance of the contract, and not to those portions which

assume to point out the matters and things to be observed by the insured after a loss, in order to enable him to sue, such as the giving of notice and the delivery of preliminary proofs of loss or submitting to examination. *Carson v. Jersey City Ins. Co.* 14 Vroom 300.

But here the insurer had a full investigation. The facts were all before its agent and were, moreover, in writing. The statement in the form in which the plaintiff at once offered to sign and swear to it, although very slightly abridged, was full and in substantial compliance with the call in the policy. But this is not all. He subsequently offered to subscribe and swear to it in the very form in which the agent originally drew it, and the offer was not accepted. It was not claimed to be too late. Indeed, no reason was given and we are not to search for one. None of the series of objections in this part of the case can be sustained. *Roper v. Lendon* 1 E. & E. 825; *Commonwealth Ins. Co. v. Sennett* 41 Penn. St. 161; *Great Western Ins. Co. v. Staaden* 26 Ill. 360; *Mason v. Harvey* 8 Exch. 819; *Walsh v. Washington Ins. Co.* 32 N. Y. 427; *Braunstein v. Accidental Death Ins. Co.* 1 B. & S. 782; *Charleston Ins. Co. v. Neve* 2 McMullan 237; *Patterson v. Triumph Ins. Co.* 64 Me. 500; *State Ins. Co. v. Maackens* 38 N. J. L. 564; *Imperial Ins. Co. v. Murray* 73 Penn. St. 13; *Killips v. Putnam Ins. Co.* 28 Wis. 472; *Lycoming Ins. Co. v. Dunmore* 75 Ill. 14; *Sexton v. Montgomery Ins. Co.* 9 Barb. 191; *Maher v. Hibernia Ins. Co.* 67 N. Y. 283; *West Rockingham Ins. Co. v. Sheets* 26 Gratt. 854; *Phillips v. Protection Ins. Co.* 14 Mo. 220; *Blake v. Exchange Ins. Co.* 12 Gray 265; *Catlin v. Springfield Ins. Co.* 1 Sumner 434; *Gilbert v. North American Ins. Co.* 23 Wend. 43; *Mercantile Ins. Co. v. Holthaus* 43 Mich. 423; *Schenck v. Mercer County Mut. Ins. Co.* 24 N. J. L. 447; *Clark v. N. E. Mut. Ins. Co.* 6 Cush. 342; Wood on Insurance 176, 832, 846, 837, 702.

The judgment should be affirmed with costs.

The other Justices concurred.

EDWIN THOMPSON v. PETER B. SANBORN.

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Tenancy at sufferance—Liability to pay rent.

One who enters upon the use of another's property with full knowledge of the rent demanded therefor is under contract obligation to pay such rent, even though he has originally refused to or has said that he would only pay under protest.

Error to St. Clair. (Stevens, J.) Oct. 25.—Dec. 20.

ASSUMPSIT. Defendant brings error. Affirmed.

Frank Whipple for appellant.

Avery Brothers for appellee. Action for use and occupation lies where there is a contract relation of landlord and tenant: *Lockwood v. Thunder Bay Boom Co.* 42 Mich. 537; beneficial occupation is sufficient ground to imply a promise; *Dwight v. Cutler* 3 Mich. 572; grantee of tenant holds under landlord and becomes tenant: *Bertram v. Cook* 44 Mich. 398; and it is not necessary to show an attornment: *Perrin v. Lepper* 34 Mich 294.

GRAVES, C. J. This action arose before a justice of the peace and was carried by appeal to the circuit court. The plaintiff recovered $29.21 and defendant brought error.

The claim set up was for the use and occupation of a small piece of plaintiff's land for a passage-way by rail to defendant's elevator in Port Huron. Prior to October 22, 1881, the elevator was owned by Charles A. Ward, and he occupied this passage-way under agreement with the plaintiff at $4 per week. At that date the defendant bought the elevator, and Ward informed him what he was paying to the plaintiff for the privilege on his land. The defendant thereupon called on the plaintiff to be allowed to continue the use of the way, but objected to the price which Ward had been paying. The plaintiff refused to reduce

the rate, whereupon the defendant made the reply that if he paid any rent it would be under protest. He proceeded to occupy but refused to pay anything for it.

The circuit judge charged among other things as follows:

"In this case there is no proof of an express contract on the part of this defendant to pay the plaintiff any rent, but I instruct you that if you find from the evidence that the defendant, after his purchase from Ward with full knowledge of all the facts that this was plaintiff's land and that Ward up to the time of the sale to defendant occupied this land under an agreement with the plaintiff whereby he paid a weekly rental therefor, took possession of the premises at the time of taking possession of the elevator, and continued to use and occupy them the same as Ward did while he owned the elevator, and after he had been informed by the plaintiff that if he did continue to occupy them he would be required to pay the same rental as Ward had paid, a contract would be implied from such occupation and possession on the part of the defendant to pay the plaintiff the same rental as he was receiving at the time the defendant took possession."

The charge was warranted by the facts and was entirely correct. The objection that there was no agreement to pay because the defendant manifested his purpose to dissent from the terms is fallacious. The defendant sought the privilege, and the plaintiff offered to grant it at the same price which Ward had been paying. The defendant's own testimony will admit of no other sense. The plaintiff was owner of the property and had the unquestioned right to prescribe the terms on which he would extend the privilege, and when he decided his decision impliedly excluded everything inconsistent. It was not for the defendant to make both sides of the agreement. The proposition was entire. He could decline the privilege on the terms proposed and forbear taking possession, but he could not accept the benefit and at the same time reject the condition. He could not split the offer and appropriate the plaintiff's property, and then turn round and reject the requirement to pay for it. If he could, it would be nothing less than a seizure of one man's property by another on his own terms. The defendant's act was conclusive on him. It was incon-

sistent with his verbal indication of dissent, and amounted to a positive assent. It was an emphatic waiver of objections, and submission to the plaintiff's terms. The other points have too little in them to call for comment.

The judgment is affirmed with costs.

The other Justices concurred.

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MARY J. STEWART, EXECUTRIX v. JAMES GOULDEN.

Contribution from co-indorsers

Where one of several indorsers has been held for the full amount of the note, he is entitled to contribution from the rest; and if any of the others have become insolvent or are beyond the reach of process, he is entitled, in equity, to recover from the remainder the proportion they would have to pay of the whole amount if insolvents and non-residents were excluded.

Appeal from St. Clair. (Stevens, J.) Oct. 25.—Dec. 20.

BILL for contribution. Defendant appeals. Affirmed.

Chadwick & Cline for complainant. A bill in equity is the proper proceeding to obtain contribution: *McGunn v. Hanlin* 29 Mich. 480; and one can elect the equitable remedy: Story's Equity 889; *Smith v. Rumsey* 33 Mich. 194; as at law a surety can recover from a co-surety only an aliquot part of the deficiency: 1 Pars. Cont. (6th ed.) § 34; *Currier v. Fellows* 27 N.H. 366; *Stothoff v. Dunham* 19 N. J. L. 185; DeColyar on Suretyship 339–49; while in equity the share of the insolvents may be collected from the solvents: Story's Eq. Jur. 496; and co-sureties out of the jurisdiction are not included: *McKenna v. George* 2 Rich. Eq. 15.

Atkinson & Stevenson for defendant.

SHERWOOD, J. The Daniels Italian Marble & Burial

Case Company made its three promissory notes for the sum of $500 each, payable to the order of William L. Bancroft, James Goulden, Taylor Daniels, Wallace Ames, George Knill, William Stewart and Nathan S. Boynton, at the First National Bank of Port Huron, and which were dated April 2d, May 10th and June 9th, respectively, and each bearing interest at the rate of ten per cent. per annum. The notes were regularly discounted at and became the property of the bank, on the transfer all the payees becoming indorsers, William Stewart being the last; and complainant claims his indorsement was procured by the others after they had all indorsed the note.

On or about the 20th day of June, 1877, the bank brought suit upon the three notes in St. Clair county circuit court, commencing the same by declaration. Service, however, was not obtained on Boynton and Daniels. William Stewart alone appeared and defended, claiming as his defense that two of the indorsers had been released without his consent by the holder. A final judgment was rendered in said cause in the circuit court in favor of the plaintiff, and against all the indorsers, for the sum of $1944.34 damages, and costs of suit, which were taxed at the sum of $66.16. Stewart appealed from the judgment rendered at the circuit to this Court, and the judgment at the circuit was reversed. A re-trial was had, the bank recovered, and Stewart again appealed to this Court, and the judgment was affirmed. The liability of Stewart was thus clearly established. 40 Mich. 348 and 43 Mich. 257.

Before the last judgment was rendered, however, Daniels left the State, and was insolvent, as was also the maker of the note and said Knill and Boynton, and it is claimed that Bancroft had no property that could be reached on execution, and was also a non-resident. It is also claimed that Goulden was vice-president and a director in the bank, and suggested or directed the levy of the execution issued upon the judgment upon the property of William Stewart, from whom the entire judgment, amounting to the sum of $2270.66, was collected.

On the 2d of February, 1881, William Stewart died, leaving a will, and the complainant, as his executrix, now brings this suit for contribution against the defendant, he being really the only solvent party liable who is within the jurisdiction of the court. The complainant had judgment for one-half the amount paid by her testator, and defendant brings error.

The judgment at the circuit, and its affirmance by this Court in 43 Mich., establishes the liability of the defendant upon the notes to the bank; and there is nothing in the special findings in this case which would relieve the defendant from the liability to contribute. The amount he should contribute depends upon the amount paid by the plaintiff and the responsibility of the other co-sureties. In equity one of several sureties who pays the debt for which all are bound may recover from the solvent co-sureties so much of the sum thus paid on the insolvent share as would fall upon them were such sum equally divided between the solvent sureties. Story's Eq. Pl. 496; *McKenna v. George* 2 Rich. Eq. 15; *Rynearson v. Turner* ante. p. 7.

The case of *Rynearson v. Turner* involves the same questions presented in this case. The whole subject was there gone into and the principles which should govern the action of the court and the reasons therefor were very clearly and forcibly stated by Mr. Justice Campbell, with whom I fully concur. That case necessarily governs this, and the ruling must be the same.

The defendant claims that at law the complainant could only call upon him to contribute an equal share with each of the other sureties, counting both solvents and insolvents; and having elected to proceed in equity for contribution, she must show that her testator has, in all things pertaining to the claim she makes, done equity; and that he has failed so to do in this: 1st, he made an agreement before any suit was brought by the bank, with three of the indorsers, that if the indorsers were obliged to pay the notes, four of them should share the amount equally; 2d, that William Stewart greatly delayed the collection by useless contests in the

courts, which were not made in good faith, and that by the delay the responsibility of Ames and Bancroft was lost.

Upon the *first* point it is not pretended that there was any consideration for the agreement claimed, or that at the time it was made any suit had been commenced against any of the indorsers. If this agreement had been binding and the parties sought to carry it out, there was no difficulty in Bancroft, Ames and Goulden paying in their part. It is conceded Stewart was perfectly responsible and the bank was ready to take the money, or any part thereof, on the claim. It is not easy to discover how the delay in payment by Stewart of his one-fourth could have prejudiced the payment of the balance by the other three parties to the alleged agreement.

Second. Either one of the other three might have paid the bank its claim or his share of the same, without waiting for the termination of the suit. If he had paid the whole he would have had his right of action, either at law or equity, for contribution against the others at once. This being the case it necessarily follows that Stewart, by the contest he made, deprived his co-sureties of no rights legal or equitable, and subjected them to no additional burden, unless they chose to receive it.

We find no error in the record, and the judgment must be affirmed with costs.

The other Justices concurred.

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The Fulton Iron & Engine Works v. The Township of Kimball.

Township bridges—Liability for soundness—Settlement of damages.

1. While a township putting up public bridges is bound to make them strong and secure, it is not obliged to anticipate every conceivable strain to which they may be subjected, such, for instance, as the passage of heavy machinery of a kind not used when the bridge is

built. And in repairing, it is only required to put a bridge in the same condition of strength and soundness as new bridges of the same kind.

2. A township is not an insurer of heavy machinery moved across a bridge within its limits.

3. Compromising with one person does not amount in law to admitting liability to a stranger to the compromise, even if the stranger has a claim growing out of the same transaction.

4. Proof of the reasons for precautions taken after an accident does not indicate foreknowledge of their necessity, and is irrelevant in an action for resulting injury if evidence is given of the real condition and appearance of the premises beforehand.

5. In an action for injury resulting from the breaking of a bridge, evidence of new methods in building bridges is immaterial unless it appears that there was fault in not knowing and using them.

6. Municipalities are under no legal obligation, outside of the Constitution and statutes, to build bridges where none have been before.

7. In an action against a township for an injury done to heavy machinery from the giving way of a bridge over which it was being moved, there was no error in admitting testimony that the approaches to the bridge were so steep that it had not seemed likely that very heavy loads could be placed on it without using extra teams; and that for several years and up to the day of the accident it had been safely crossed by unusually heavy loads.

Error to St. Clair. (Stevens, J.) Oct. 25.—Dec. 20.

CASE. Plaintiff brings error. Affirmed.

George P. Voorheis for appellant. Townships are liable for latent defects in bridges which the statute requires them to keep in repair: *Rapho v. Moore* 8 Am. Rep. 202; *Gregory v. Adams* 14 Gray 242; and this liability extends to injuries caused by omission to repair: *Requa v. Rochester* 45 N. Y. 129; *Davenport v. Ruckman* 37 N. Y. 568; *Erie v. Schwingle* 22 Penn. St. 384; *Hutson v. Mayor* 9 N. Y. 163; *Hickok v. Plattsburgh* 16 N.Y. 161 (note); *Bloomington v. Bay* 42 Ill. 503; the same rule applies to bridges as to highways: 2 Dill. Mun. Corp. §§ 579, 580; *Manderschid v. Dubuque* 29 Ia. 73; *Krause v. Davis County* 44 Ia. 141; *Smoot v. Wetumpka* 24 Ala. 112; *Chicago v. McGinn* 51 Ill. 266; a municipality may be liable for defects of which

it is ignorant: *Prindle v. Fletcher* 39 Vt. 257; *Dreher v. Town* 22 Wis. 675; *Weisenberg v. Winnecome* 56 Wis. 667; great danger demands greater watchfulness: *F. & B. Turnpike Co. v. Phil. Tren. R. R. Co.* 54 Penn. St. 350; a municipality must exercise active vigilance by its agents in performing the statutory duty of keeping bridges and highways in repair: *Mayor v. Perdue* 53 Ga. 607; *Todd v. Troy* 61 N. Y. 506; *Chicago v. Hoy* 75 Ill. 530; *Rosenberg v. DesMoines* 41 Ia. 415; *Cusick v. Norwich* 40 Conn. 375; ignorance of defects is negligence where it results from omission to make inquiry: *Boucher v. New Haven* 40 Conn. 457; *Alexander v. Mt. Sterling* 71 Ill. 366; the length of time a bridge has stood without repair is constructive notice that it needs examination: *McGinity v. Mayor* 5 Duer 674; *Griffin v. Mayor* 9 N. Y. 456; the mere appearance of the bridge will not excuse neglect: Whart. Neg. § 977; *Rockford v. Hildebrand* 61 Ill. 257.

Avery Brothers for appellee.

CAMPBELL, J. Plaintiff sued defendant for injury to a steam threshing engine, caused by the breaking down of part of a bridge over which it was passing. The jury found for defendant, and plaintiff complains of error in the rulings.

The whole circumstances resemble very closely, even to the details of the accident, those which were presented in *Perkins v. Medina* 48 Mich. 67. Several of the questions are mere repetitions of those raised in that case, and the court below so considered them, and decided in accordance with the views there expressed. We need not, therefore, go further than to examine how far questions arose not already thus disposed of, and in our view the differences are not material.

In order to recover it became necessary for plaintiff to show, not only damage from defects in the bridge, but fault in defendant in having a bridge in such condition; and such fault could only exist where there had been failure to repair injuries which defendant either knew, or had such notice of as should have led to the removal of the

mischief. This involved questions of fact for the jury under proper instructions, and inasmuch as the instructions given were in accordance with our own rulings, and left all facts fairly to the jury, there was nothing to complain of on this head, unless, as plaintiff's counsel distinctly claimed on the argument, townships should be held liable at all events as insurers, and not merely for neglect of duty. There is no authority, under the statute or otherwise, for any such extreme view; and we do not see how the various questions could properly have been taken from the jury, as plaintiff claimed they should have been.

Objection is made that the court erred in excluding evidence of a settlement made by defendant with one Bell, who was injured at the same time and who had charge of the engine when it fell. But inasmuch as plaintiff was a stranger to that transaction it could have no bearing on this controversy. A compromise with one person is in no sense legally an admission of any liability to some one else.

The court admitted full testimony concerning the exact condition of the bridge at the time of and after the accident. Among this proof was testimony showing that chains and other appliances were fixed upon various parts of the bridge. Plaintiff then proposed to ask witnesses why these chains were used, but this was held irrelevant. This ruling was correct. The fact that after the accident precautions were taken does not indicate that any knowledge of the propriety of such precautions was had before the accident. Proof was not excluded of the real condition of the bridge, and the jury had means of understanding that and all its appearances.

Neither was it material to know what new methods have been found desirable in bridge building, unless it is shown that these methods were such that defendant was at fault for not knowing and using them before. But it is questionable whether any point of this kind falls within any of the assignments of error, and we need spend no time upon it, as no offer was made to show any specific fault of this

nature beyond what was fully covered by the general instructions on the case as presented.

A point was made upon certain rulings which allowed the jury to consider whether the weight of the engine in question, with its accompaniments, was such as might reasonably be anticipated as likely to be placed on the bridge when it was built, and whether any such use should have been reasonably anticipated when the authorities planned it and provided for its completion.

It is claimed by plaintiff that inasmuch as the engine might lawfully be used on the highways, it was the duty of the township to have its bridges built and equipped so as to accommodate it.

There is some plausibility in this claim, but it goes further than the law will warrant. It has always been held that there is necessarily room for some discretion in determining what plans shall be adopted for public ways and their surroundings. There never was, and there is not now, any legal obligation on municipalities to build bridges where no bridges ever stood before, except under conditions and restrictions recognized by law or by the Constitution. The amount of money which can be raised to aid townships in building bridges which they cannot afford to build without aid is limited by the Constitution. Previous to the law of 1879 the limit was also fixed for money to be raised either for building or repairing. While, possibly, it was necessary that every bridge undertaken should be reasonably fitted and entirely safe, as far as could be secured, for such uses as it was apparently or really designed to subserve, yet it does not follow that every bridge must be adapted for all possible purposes. If a foot bridge could be afforded and a bridge for all traffic could not be afforded, it would be hard to say that the town must build the larger bridge or have none at all. And on the same principle it is reasonable to hold that in determining to build a bridge for general uses, it cannot be expected that the designers will anticipate uses which have not been known, and necessities which are not within ordinary experience. It cannot be a

legal wrong to build according to the light of the times when the building is done. The law of 1879 [How. St. §§ 1442–6] does not require changes to be made in the plan of existing bridges. When it requires repairs it may fairly be construed as requiring bridges to be put in as good a condition of strength and soundness as would make them as secure as new bridges of the same kind and plan. But it does not require a different structure.

In this case there was testimony showing that from its peculiar position with steep approaches, there was no likelihood that very heavy loads could be placed on it without the use of extra teams, which it could not be supposed would be used. It also was shown that up to this time the bridge had been safely crossed for several years, and up to the day of the accident by the heaviest loads drawn over the road, exceeding in some recent instances any ordinary burdens. It was not improper for the jury to consider all these things in determining how far the town was at fault in not planning a heavier structure. We notice no other points which are not, in our opinion, within the spirit of *Perkins v. Medina.*

The judgment must be affirmed with costs.

The other Justices concurred.

Castle Sutherland v. Alfred R. Carter.

Statute of frauds—Promise to pay another's debt.

A. let B. take a yoke of oxen to use in clearing land for A.'s wife, and with the understanding that B. should own the oxen when he had done $100 worth of clearing. *Held,* that this arrangement was not void under the statute of frauds.

Error to Saginaw. (Gage, J.) Oct. 26.—Dec. 20.

Replevin. Defendant brings error. Reversed.

F. Brucker and *Trask, Grout & Smith* for appellant. The statute of frauds has no application to a contract that has been performed: *Det. Hills. & Ind. R. R. v. Forbes* 30 Mich. 176; *Sovereign v. Ortmann* 47 Mich. 181; a promise to pay for work or materials furnished to a third person is original and not collateral: *Brown v. George* 17 N. H. 128; *Weyand v. Crichfield* 3 Grant 113.

Lawson C. Holden and *William R. Kendrick* for appellee, cited as to the application of the statute of frauds: *Bresler v. Pendell* 12 Mich. 224; *Corkins v. Collins* 16 Mich. 478; *Waldo v. Simonson* 18 Mich. 345; *Welch v. Marvin* 36 Mich. 59; *Baker v. Ingersoll* 39 Mich. 158; *Pratt v. Bates* 40 Mich. 37; *Gower v. Stuart* 40 Mich. 747; *Preston v. Young* 46 Mich. 103; *Mallory v. Gillett* 21 N. Y. 421; *Farley v. Cleveland* 4 Cow. 432: 9 Cow. 639; *Stewart v. Campbell* 58 Me. 439; *Putney v. Farnham* 27 Wis. 187.

CAMPBELL, J. Plaintiff brought replevin for a yoke of cattle which defendant held under an arrangement for their purchase, which the court below held void under the Statute of Frauds. It is not necessary to go into all the facts, as the case was left to the jury under instructions upon defendant's hypothesis, and ruled against him.

Upon this view, which the testimony seems to bear out, defendant was engaged in doing work on the land of plaintiff's wife, and needed a yoke of oxen. Plaintiff let him have the cattle, on the understanding that defendant should own them as soon as he had done a sufficient amount of clearing to make up their value, fixed at $100. Defendant did the work and claimed to own the oxen.

We cannot see how the Statute of Frauds covers such a case. It could in no way concern defendant what reason plaintiff had for desiring to have his wife's land cleared, and he might fairly assume that plaintiff and his wife had arranged or would arrange the matter to suit themselves. The property having been delivered to defendant on that condition, became his as soon as it was performed. Mrs.

Sutherland was a stranger to the sale. The only parties to that transaction were plaintiff and defendant.

The defendant was entitled to the charge which he requested.

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

The other Justices concurred.

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SAMUEL A. KENNEDY v. FREDERICK A. NIMS ET AL.

Appeal bond in chancery—Suretyship—Tender

1. The sureties on a chancery appeal bond must pay all costs, including those of the Supreme Court in case of affirmance, but they are not liable upon the bond for any portion of a deficiency left on sale of the appellant's property to satisfy the decree.
2. Tender by defendant of an amount actually due is not an admission of indebtedness to a larger amount claimed by plaintiff.

Error to Kent. (Montgomery, J.) Oct. 26.—Dec. 20.

ASSUMPSIT. Defendants bring error. Reversed.

Smith, Nims, Hoyt & Erwin for appellants.

Kennedy & Thompson for appellee. A tender admits the cause of action stated in the declaration: *Johnston v. Columbian Ins. Co.* 7 Johns. 315; *Spalding v. Vandercook* 2 Wend. 431; *Roosevelt v. N. Y. & H. R. R.* 45 Barb. 554; *Eaton v. Wells* 82 N. Y. 577; *Frink v. Coe* 4 Greene (Ia.) 555; *Johnson v. Triggs* id. 97; *Fisher v. Moore* 19 Iowa 84; *Woodward v. Cutter* 33 Vt. 49.

SHERWOOD, J. This action was brought on a bond filed on taking an appeal under Comp. L. § 5180 [How. St. § 6738] from a decree in a foreclosure suit wherein Sewall S. Vaughn was complainant, and Dwight Nims and Ann

W. Nims, his wife, were defendants. The penalty of the bond was $200, and the condition was in the following language:

"If said Dwight Nims and Ann W. Nims shall pay, satisfy or perform the decree or final order of the Supreme Court in said cause, and shall pay all costs in case the decree of the said circuit court in chancery shall be affirmed, then this obligation to be null and void."

The statute requirements of the bond are as follows:

"The appellant shall, within forty days, file with the register or clerk who entered such decree or order, a bond to the appellee, with sufficient sureties, to be approved by a judge of the circuit court or a circuit court commissioner, and in such sum as such judge or commissioner shall direct, conditioned to pay, satisfy or perform the decree or final order of the Supreme Court, and to pay all costs in case the decree or order of the circuit court in chancery shall be affirmed."

The case was originally brought before a justice of the peace, tried, and judgment rendered for the plaintiff. From this judgment an appeal was taken to the Kent county circuit, where it was tried before Judge Hoyt, without a jury, and the plaintiff again had judgment, which was set aside on motion of defendants, and the cause was retried at the circuit before his honor, Judge Montgomery, without a jury. Plaintiff again had judgment for the sum of $160, that being the amount of the penalty in the bond, less the amount tendered by Nims and left with the court. Defendants bring error.

The case is before us on special findings of fact and of law, and the only error assigned is that "the conclusion of law is not supported by the facts."

From the findings of facts it appears that the decree in the case appealed, and in which the bond was given, was affirmed with costs in the Supreme Court; that under the decree appealed from, and which was so affirmed, a sale of the mortgaged premises was had on the 11th day of April, 1879, and from the report of sale it appears that the costs of such sale and the commissioner's fees, together with the

complainant's costs at the circuit, were paid out of the proceeds of the sale; but the costs of the Supreme Court, taxed at $34.75, and the deficit on sale of the mortgaged property of $2438.76, were not paid, and could not be obtained after demand made therefor of the parties personally liable for the same under the decree.

The single question presented in this record is, Were the sureties in the appeal bond liable for anything beyond the amount of the costs taxed in the Supreme Court?—the costs in the circuit court having been paid, and no damages having been assessed, by way of penalty, on the appeal. The decision at the circuit was for the increased liability.

The question presented involves the construction of section 144 of the statute above given. It was decided in the case of *Kephart v. Farmers' & Mechanics' Bank of Michigan* 4 Mich. 602, that it was not intended by the statute to require the appellant to oblige himself to the performance of the decree of the Supreme Court in all its parts, whether he was bound to that extent or not in the order or decree below, but only to the performance of it in those particulars wherein he was individually bound by the decree appealed from. The appellant in that case was a second mortgagee who had been made a party defendant, but who was not liable for the indebtedness upon the first mortgage or any part thereof.

In the case of *Daly v. Litchfield* 11 Mich. 497, Mr. Justice Christiancy said: "We see no reason to doubt that the condition of the appeal bond (required by the statute) extends as well to the payment of costs decreed and taxed to the appellee in the court below as to those in this Court. The condition of the bond is, 'to pay all costs in case the decree or order of the circuit court in chancery shall be affirmed.'" In this case the decree was affirmed. In *Prosser v. Whitney* 46 Mich. 407, this Court held that when the decree at the circuit was affirmed the costs made in the case previous to decree in the court of chancery are, equally with the costs in this Court, within the condition of the appeal bond. The statute requiring this construction re-

gards the defendant as all the time in fault in making his contest when the decision is against him in the circuit, and will not allow him to take his appeal until he has made sure all costs incurred in making the contest, in case of affirmance.

In the case of *Omaha Hotel Company v. Kountze*, 107 U. S. 378, in an action upon an appeal bond, given on an appeal from the decree in a foreclosure suit under a statutory condition "that the appellant shall prosecute his appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs where the writ is a supersedeas, or all costs only where it is not a supersedeas," it was held: "if the bond is to be regarded as importing nothing more than the bond prescribed by the statute, it is clear that it did not operate as security for the original decree."

The object of the bond is to save all the rights of the appellee, without prejudice or diminution during the pendency of the appeal, and at the same time to prevent frivolous, vexatious and unnecessary appeals. It is not intended as an additional security for the original indebtedness of the delinquent party, but as an indemnity to the appellee against further trouble, expense and costs while the case is undergoing a review in this Court to ascertain whether or not error has been committed or injustice done the appellant by the decree of the court below. I do not think that under the findings in this case the surety in the appeal bond is liable for any portion of the deficit in the mortgage indebtedness.

The costs in the circuit were paid from the moneys realized from the sale of the property under the decree; and when this suit was brought the surety tendered the costs of this Court and the expenses of the suit to that time. This discharged his liability upon the bond. The tender was no admission of the amount claimed, but of an indebtedness to the amount he was actually liable for. The complainant received the amount tendered after the appeal to the circuit court was taken. I do not think the judgment is supported by the facts found by the circuit judge.

The judgment must be reversed, and a judgment entered for the defendant with costs of both courts.

The other Justices concurred.

HENRY M. CLARKE v. STEPHEN D. PIERCE AND JOEL LINSLEY.

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Accounting—Proceeds of joint business.

A bill for an accounting will lie wherever there are fiduciary relations between the parties under which the duty to keep and render accounts exists; and one who files such a bill for an accounting for his share of the proceeds of a business carried on upon joint account, is not confined to his remedy at law, whether a partner or not.

Appeal from Saginaw. (Gage, J.) Oct. 26.—Dec. 20.

BILL for accounting. Defendants appeal. Affirmed.

Wheeler & McKnight for complainant. It is a case for an accounting in chancery if the parties entered into a joint undertaking and each party was to be paid by or out of a share of the profits of the business: *Butterfield v. Beardsley* 28 Mich. 412; *Whipple v. Parker* 29 Mich. 381; *Richardson v. Welch* 47 Mich. 309; *Cochrane v. Adams* 50 Mich. 16; *Buel v. Selz* 5 Ill. App. 116; *Thornton v. Thornton* 31 Grat. 212; *Garner v. Reis* 25 Minn. 475: *Channon v. Stewart* 103 Ill. 541.

Camp & Brooks for defendants. Division of profits does not of itself establish a co-partnership: *Lewis v. Greider* 51 N. Y. 236; *Beecher v. Bush* 45 Mich. 188; *Wilcox v. Matthews* 44 Mich. 192; *Richardson v. Hughitt* 76 N. Y. 57; and where there is no co-partnership a person to whom money may be due from those who are conducting the business, has no lien upon its assets and they cannot be enjoined from closing up the business, nor can a receiver

be appointed: *McKenzie v. Cowing* 4 Cr. C. C. 479: *McCombs v. Merryhew* 40 Mich. 725; *Barry v. Briggs* 22 Mich. 201; *Simon v. Schloss* 48 Mich. 233.

CAMPBELL, J. Clarke filed a bill to obtain an accounting from Pierce and Linsley for his share of the proceeds of certain lumber business carried on upon joint account. Defendants were a Vermont firm, doing business in Burlington, and Clarke came to Saginaw under an arrangement with them to handle and ship lumber on their account, to be chiefly disposed of by them. There is some conflict about the extent and precise character of the business done. The chief contest was concerning Clarke's right to have defendants account for the proceeds of the business, and concerning his share in the results.

As the case chiefly involves facts, and as we concur in the conclusions of the court below, we need not discuss the testimony. We have no doubt that Clarke was to have one-half of the profits, and that he was entitled to compel defendants to an accounting. He is not confined to his remedy at law, whether they were partners or not. The jurisdiction for accounting covers all fiduciary relations where the duty of keeping and rendering accounts exists, and while there are cases in which the common-law remedy may be adequate, we do not think the present case is such that he ought to be turned out of a court of equity to seek an action at law. There is certainly strong reason for holding that a partnership existed, although in a somewhat limited way. But we deem this of no moment, as he has set out his claim fairly, and has established it in substance. The consideration of the items of charges and credits is not now proper, because it belongs more strictly to the accounting.

The decree must be affirmed with costs and the cause remanded for further proceedings.

The other Justices concurred.

JOHN WALLACE v. JOHN SORTOR, JUSTUS SORTOR, HENDRICK SORTOR, SETH P. TINSMAN AND FRED WEILNAU.

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Drain taxes—Interpleader.

1. A bill of interpleader is not the proper proceeding to enable a township treasurer to determine the right to the amount of specific drain taxes assessed against particular pieces of property and paid under protest, where the several property-owners, on the one hand, claim that the taxes are illegal and should be refunded, and, on the other, those individuals who have received township orders against the specific sums so paid, but whose interests are not themselves conflicting, present their orders to the township treasurer to be cashed.
2. A bill in chancery will not lie where the amount in controversy is less than $100; nor will it where the entire amount is more than that, but has to be disposed of under separate issues no one of which involves so much.
3. The amount of drain tax collected against any specific parcel of land is a separate fund by itself, and is not to be confounded with any other assessment; the money obtained on one allotment cannot be appropriated on account of any other. And though such taxes are paid into the township treasury they do not become township moneys.

Appeal from Monroe. (Joslyn, J.) Oct. 26.—Dec. 20.

BILL of interpleader. Defendants Sortor appeal. Reversed.

Grosvenor & Landon for complainant.

Ephraim Baldwin and *Otis A. Critchett* for defendants.

GRAVES, C. J. The complainant being the treasurer of the township of Raisinville, in the county of Monroe, was required to collect the taxes levied in 1881. He found upon the roll a distinct and special charge against each of the defendants Sortor, on account of a drain or ditch then recently made. They respectively refused payment, and he seized certain property of each to compel it. They sev-

erally denied liability upon the ground that the tax was illegal. But in order to save their property from sale, they paid under protest, and each brought his separate action against the complainant to recover back what he had paid.

Meanwhile, the defendant Tinsman had received an order from the township board against the share of liability which had been charged on defendant Hendrick Sortor, and the defendant Weilnau another order against the share of liability which had been charged on the defendants John and Justus Sortor respectively, and these orders being presented for payment were refused. This bill was then filed by complainant to compel the several defendants to "interplead and settle and adjust their said demands between themselves."

The defendants Sortor put in separate answers, and severally alleged that the proceedings to lay out and establish the drain and assess the tax were invalid, and the assessments void. They also claimed the benefit of a demurrer. The defendants Tinsman and Weilnau put in a joint and several answer, and insisted that they were entitled to payment of the orders, and that the proceedings to lay out and establish the drain were legal. The complainant filed a general replication, and the circuit judge proceeded to hear the matter on these pleadings, and he decreed that the bill was properly filed, and that the defendants should interplead and settle the matters in controversy between themselves, and he dismissed complainant with his costs to be paid out of the fund. The defendants Sortor appealed.

In considering the case under the form in which it now appears we are not to extend our views to any matters which are not presented by the bill. Independent statements of fact in the answers are not to weigh in the present aspect of the suit, and if we accept the showing made by the bill, does it exhibit a case for the jurisdiction of interpleader?

The exposition made by the bill is extremely meager. There is no explanation whatever of the origin of the claims which are supposed to conflict. The drain proceedings are

not described, and no hint is suggested concerning the nature of the objections. We are not informed when the ditch was established, nor when the work was performed, nor by whom, nor are we told what is claimed on these points. Indeed, there is no mention even of the law under which the work was done and the contested charges imposed. We are informed by the brief of the learned counsel for complainant, that the proceedings were under the Township Drain Law of 1871, (Comp. L. p. 586.) But here there is nothing said about the amendments made in 1875. It is scarcely possible that they are irrelevant.

Now it is plainly essential to ascertain the relation of one to another of the claims brought against individuals on account of the construction of drains under the township law. That they possess a character peculiarly their own is very apparent. *Dawson v. Aurelius Township* 49 Mich. 479. The law provides for assigning to each parcel of land to be drained or benefited the construction and maintenance of a distinct and specified portion of the drain, and the share marked out as due from that identical parcel is made a lien on it and an "obligation against the owner." In case he neglects to perform the allotment within a given time it becomes the duty of the drain commissioner to let the work to some one else, and on its performance to give a certificate to the contractor showing the amount and value and the description of the particular parcel of land against which the work is done. Unless the person whose allotment has been so worked pays the proper sum to the township treasurer and files a receipt with the clerk within a certain time, the clerk is to certify the item to the supervisor, who is required to levy it on the very land to which it applies. When collected, the sum is "received into the township treasury," but not as township moneys. *Dawson v. Aurelius Township* supra. It can be paid out only to the person entitled to receive THE SAME, on the order of the township board.

On examination of the statute it becomes clear that the charge against each parcel is a matter by itself, and that

the money received on account of it composes a distinct fund not to be confounded with any other of the same class, even though pertaining to the same ditch or drain. In a general sense these levies all fall into one category, which may be called for convenience a "ditch tax" or "ditch fund." But as between themselves they are separate and distinct. They are not capable of being blended into a common mass, and the money arising on one allotment cannot be appropriated on account of any other. Moreover, each may have its own peculiar questions of legality.

We may refer now to the relations which the defendants bear to each other and to the object of contention. There is no ground of controversy at all between the defendants Sortor. They are so many individuals separately setting up their several claims, neither of which has connection with any others or with any fund to which the others refer. Moreover, it does not appear that the same question is up in any two cases. So far as seen, each one may depend on a question peculiar to itself. No issue is possible between the defendants Sortor.

The same principle applies to the defendants Tinsman and Weilnau. As between them, there is no ground of contention. There is nothing on which to found an issue. How is it as between the Sortors, on the one hand, and Tinsman and Weilnau on the other? Tinsman has no concern with what is claimed by either John or Justus Sortor, and Weilnau has no interest in what is claimed by Hendrick Sortor, and there is no subject of controversy with which either of the Sortors has any business outside the matter of his own tax. The circumstance that Weilnau's order covers the shares of both John and Justus Sortor has no operation to unite those persons as joint or co-parties for the purpose of a litigation with him. There is no theory on which it would be possible to devise an issue with the Sortors as contestants on one side, and Tinsman and Weilnau on the other. It is not a case where one group of persons is arrayed against another in claiming a whole fund, nor a case where separate parts of a single fund are claimed by

A., B. and C. against D., E. and F., nor is it a case of promiscuous scramble either for the whole or for separate items of the same fund. There is no common fund to serve as a focus of conflicting interests. There may be similarity of questions, and that kind of common interest naturally arising from that circumstance, but that is not an interest in the subject of contention.

The case in hand differs fundamentally from *School District No. 1 of Grand Haven v. Weston* 31 Mich. 85. There the complainant was in the situation of a trustee holding an entire sum by a title which no one disputed, and numerous parties were striving to get portions which in the aggregate very greatly exceeded the whole body of the fund. Their pursuit was on separate grounds of claim and by different methods; but the demands of all were against the same thing. The extent to which any ought to partake directly depended on the existence and magnitude of the rights variously set up, and all the controversies centered in the single fund. In this respect there was no diversity.

In the case before us, so far as we can gather from the bill, the state of things is different. There are several objects of controversy without any common interest. Suppose it to be admitted that the bill states transactions from which it would be possible to carve issues for interpleader. Even then it would be unavoidable to acknowledge at least three perfectly distinct grounds of contention. Three or more independent issues would be required to accommodate the conditions of hostility, and three unconnected litigations. They could not be intermingled in the same case. There would be certainly one issue between Hendrick Sortor and Tinsman, a second between Weilnau and John Sortor and a third between Weilnau and Justus Sortor.

But even here a further difficulty appears. The whole subject of controversy is only about $135, and neither of such issues would involve $100.

On the whole it appears impossible to discover any ground on which the bill can be supported. The brief of the learned

counsel for complainant is very strong, but it cannot transform the actual transactions.

The decree should be reversed, and the bill dismissed with costs.

The other Justices concurred.

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THE GENESEE COUNTY SAVINGS BANK v. THE MICHIGAN BARGE COMPANY, THOMAS W. FERRY AND EDWARD P. FERRY.

Dissolution of attachments—Representations as to solvency—Rating by commercial agency—Corporate liability—Practice.

1. Proceedings to dissolve an attachment are special and not according to the course of the common law; they are interlocutory and do not affect the merits of the main action.

2. An application for dissolution of an attachment is in the nature of a motion and can be disposed of at chambers. But there must be a hearing and a trial of the questions of fact involved before a judge or circuit court commissioner, and he is to adjudicate questions of both law and fact and may apply the rules that govern the trial of such issues.

3. When the facts set up in the affidavit for an attachment are denied upon a motion to dissolve it, the plaintiff in attachment has the burden of protecting his lien by proofs outside of the affidavit.

4. The Supreme Court cannot review the decision of a lower tribunal upon the testimony submitted on an application to dissolve an attachment, unless there is entire absence of proof on some material point. But it will review its decision upon questions of law, if properly presented, and upon the exclusion of testimony.

5. A corporation was *held* bound by representations as to its solvency, made for the purpose of floating its paper by a member of a firm that was both payee and indorser and owned nearly all the stock and controlled the corporate operations.

6. Representations made by a person in business to a commercial agency are presumed to have been made for the purpose of obtaining credit, and if others, in giving it, rely on them as coming from him, they are admissible in evidence where such credit is in question.

7. A copy of written representations may be put in evidence where the original has been returned to the person making them, and he has failed to produce it on being notified to do so.

8. The liability of a corporation for the acts of one who, with its assent, has controlled and sold its paper for his own benefit, is no less than that of an individual would be.

9. On an application to dissolve an attachment granted on the ground that defendants had disposed of their property with intent to defraud creditors, it was proper to question a witness who testified that he held a mortgage on some of defendants' property, as to what the particular property was and whether he had ever paid defendants anything for the mortgage.

Certiorari to circuit judge (Arnold, J.) Oct. 30.—Dec. 20.

Motion to dissolve attachment. Dissolution allowed. by the circuit judge. Order set aside.

Long & Gold and *Geer & Williams* for plaintiff appellant.

George C. Stewart and *Blair, Kingsley & Kleinhans* for defendants.

SHERWOOD, J. On the 3d day of February, 1883, the plaintiff, by George A. Farr, its attorney, sued out of the circuit court for the county of Ottawa, a writ of attachment against the property of defendants. The attachment was founded upon an affidavit of the attorney for plaintiff, stating in substance, among other things, that he had good reason to believe, and did believe, that the said defendants were about to sell, assign and dispose of their property with intent to defraud their creditors, and that they had sold, assigned, disposed of and concealed their property with the like intent, and that the said defendants fraudulently contracted the debt respecting which the suit was brought. The claim upon which the suit was commenced was a promissory note made by the Michigan Barge Company for the sum of $5000, due February 23, 1883, and indorsed by Ferry & Bro., that being the firm name of the other two defendants. The defendant, The Michigan Barge Com-

pany, as appears from the record, was composed of defendants Thomas W. Ferry and Edward P. Ferry, and John Furlong, Henry G. Bigelow, Andrew Thompson and Dwight Cutler. The stock of the company consisted of $200,000, in shares of $25 each, and the defendants Ferry owned all of it except $675, which was divided among the other stockholders,—Furlong having $600, and the other three $25 each. The property of the Barge Company consisted of thirteen barges and several other boats, and an interest in others. On the day the attachment issued, the sheriff of Ottawa county levied the same upon eight vessels of various kinds belonging to the defendant, the Barge Company.

On the 5th of May, 1883, the Barge Company filed its petition in the circuit court in said county of Ottawa, and moved thereon for a dissolution of the attachment. A hearing was had upon the petition before the circuit judge, who, on the 26th day of June, 1883, entered an order dissolving the attachment, and restoring the property attached to the defendant. These proceedings are now before us for review on certiorari.

The proceedings are taken under Comp. L., ch. 201 [How. St. ch. 275.] They are judicial, and not according to the course of the common law. *Chandler v. Nash* 5 Mich. 416. The statute requires the circuit judge or circuit court commissioner to hear the proofs and allegations of the parties, and if a good and legal cause for suing out the writ is not satisfactorily made to appear to the court upon such hearing, it is his duty to dissolve the attachment and order the property restored to the defendant. The affidavit of the plaintiff, his agent or attorney, is prima facie sufficient cause for issuing the writ; but upon the facts being denied in the petition for a dissolution, the burden is cast upon the plaintiff to make good the cause he alleges by other competent proof in addition to that contained in his affidavit for the writ. He must maintain the affirmative of the issue thus made up in order to sustain his lien created by a levy under his writ. *Macumber v. Beam* 22 Mich. 395; *Brown v. Blanchard* 39 Mich. 790; *Powers v. O'Brien* 44 Mich.

317. The writ issued upon his information and belief that the causes alleged existed. He is called upon by the petition for dissolution to sustain by proofs his charges. *Hyde v. Nelson* 11 Mich. 354. So far as the original suit is concerned, the application to dissolve is entirely an interlocutory proceeding and does not touch or affect the merits thereof. *Edgarton v. Hinchman* 7 Mich. 352; *Gray v. York* 44 Mich. 415. It is in the nature of a motion and may be disposed of at chambers. *Gray v. York* supra. A hearing, however, is required, and a trial of a question of fact must be had; and there is no reason why the rules governing the trial of such issues should not be applied by the court upon the hearing. Questions both of law and fact are to be adjudicated by him. *Chandler v. Nash* supra. In this case sufficient proof of either of the three causes alleged in the affidavit for the writ to satisfy the circuit judge, would secure a continuation of the lien obtained.

We cannot review the decision of the circuit judge on the testimony unless there is an entire absence of proof on some material point. *Brown v. Blanchard* supra; *Cicotte v. Morse* 8 Mich. 424; *Berry v. Lowe* 10 Mich. 9; *Hyde v. Nelson* 11 Mich. 353; *Linn v. Roberts* 15 Mich. 443; *State Bank of Fenton v. Whittle* 41 Mich. 365; *Schall v. Bly* 43 Mich. 401. Questions of law arising in the case, when properly presented, are open to review in this Court. *Hyde v. Nelson* supra; *McGraw v. Schwab* 23 Mich. 18; *Johnson v. De Witt* 36 Mich. 95.

Keeping these rules in mind, we now proceed to the examination of the questions raised upon the record and the rulings of the circuit judge in the cause.

On the 12th day of June, 1883, the hearing on the application to dissolve was had before the circuit judge. On the 19th day of May previous, one Joseph O'Brien replevied four of the boats from the sheriff, three of which were being proceeded against at the time in the United States District Court for the Western District of Michigan in admiralty by other parties.

The plaintiff produced testimony (which was undisputed)

from the annual reports of the Michigan Barge Company, made pursuant to law (Comp. L. § 2688), showing that in 1882 the amount of its capital stock actually paid in was $200,000; that nothing remained unpaid, and it owed nothing; and that in 1883 it owed but $2601.51. T. W. Ferry was its president and Andrew Thompson was its treasurer, and at some time, through one or both of these officers, the company procured a rating at Bradstreet's Commercial Agency as owning property worth $200,000, while the plaintiff's testimony strongly tends to show that the property was not worth more than $100,000, several of the witnesses putting it below $70,000. It further appears from the record that the plaintiff obtained the note in suit from the firm of Joseph W. Orvis & Co., in New York city, in December, 1882, and that during the three months previous said firm placed upon the market and sold paper made by different parties and indorsed by Ferry Bros. to the amount of $70,000; that the indorsements were made by Thomas W. Ferry; and that $25,000 of said paper was given by the Michigan Barge Company, $20,000 becoming due December 20, 1882, and one note of $5000 was due the 23d of January previous. After this paper had been presented to Orvis & Co., T. W. Ferry assured them that it was perfectly good, "as good as could be made," and referred Orvis & Co. to the rating of the Barge Company and of Ferry Bros. (the latter being represented as worth $250,000 to $500,000) in the commercial agencies, and gave them to understand that his firm and the Barge Company were entitled to these several ratings, and referred the purchasers to these ratings to show the financial condition of the parties whose paper was offered for sale; and that Orvis & Co., relying upon their statements, purchased the paper and in a few days thereafter sold the note sued on to the plaintiff upon the representations of T. W. Ferry communicated to him by Orvis & Co. It further appears that when the moneys were received upon the paper disposed of by Orvis, it was ultimately passed to the credit of T. W. Ferry with Gilman, Son & Co., in New York. At the time of the sale of the

note in suit to Orvis & Co. and its transfer by them to the plaintiff, the testimony shows, and it is undisputed, that the indebtedness of the Barge Company, which was also secured by Ferry Bros.' indorsements, was between $50,000 and $60,000, of $35,000 of which E. P. Ferry admits he had knowledge.

From these facts the plaintiff asked the circuit judge to find that the indebtedness of the defendants in suit was fraudulently contracted. The court passed upon this question in the negative, and we cannot disturb that finding, provided he heard all the evidence offered upon that point, however much we might feel inclined to disagree with such finding.

T. W. Ferry at this time was president of the Barge Company, and his firm owned all but $675 of the $200,000 stock. He aided in the sale of the Barge Company's notes, to the knowledge of its officers and managers. Ferry & Bro. not only controlled its operations, but were really the Barge Company; and we fail to see any good reason why the Barge Company should not be bound by T. W. Ferry's representations so far as they had any bearing upon the sales and transfers of the note in suit.

We think the circuit judge erred in rejecting the report made by T. W. Ferry to Bradstreet's agency, and upon which the plaintiff claims to have relied and acted in this case. The business of these agencies is well known to the commercial community. Indeed it is said by Justice Rapallo, in *Eaton, Cole & Burnham Co. v. Avery* 83 N. Y. 31, that "the business and office of these agencies are so well-known, and have been so often the subject of discussion in adjudicated cases, that the courts can take judicial notice of them. Their business is to collect information as to the circumstances, standing, and pecuniary ability of merchants and dealers throughout the country, and keep accounts thereof, so that the subscribers to the agency when applied to by a customer to sell goods to him on credit, may by resorting to the agency or to the lists which it publishes, ascertain the standing and responsibility of the customer to

whom it is proposed to extend credit. A person furnishing information to such an agency in relation to his own circumstances, means and pecuniary responsibility, can have no other motive in so doing than to enable the agency to communicate such information to persons who may be interested in obtaining it, for their guidance in giving credit to the party; and if a merchant furnishes to such an agency a wilfully false statement of his circumstances or pecuniary ability, with intent to obtain a standing and credit to which he knows that he is not justly entitled, and thus to defraud whoever may resort to the agency, and in reliance upon the false information there lodged, extend a credit to him, there is no reason why his liability to any party defrauded by those means should not be the same as if he had made the false representation directly to the party injured." In these views of the learned judge we entirely concur. They are supported by *Commonwealth v. Call* 21 Pick. 515 and *Commonwealth v. Harley* 7 Met. 462. We think a person furnishing information to a commercial agency as to his means and pecuniary responsibility, is to be presumed to have done so to enable the agency to communicate the same to persons interested for their guidance in giving credit to him, and so long as such intention exists, and the representations reach the persons for whom they were intended, it is immaterial whether they passed through a direct channel or otherwise, provided they were reported by the agency as made by the party.

It is claimed the representations given by Ferry to the agency were in writing, and the plaintiff did not offer the original. The original was copied by the witness, and then it was handed back to Ferry. Plaintiff gave defendant's attorney notice to produce the original, which was not done, and Ferry was in Europe. Under the circumstances we think the testimony offered was proper, and should have been received.

It is not claimed that the note in suit was not lawfully given by the Barge Company; and the record, we think, tends to show that these notes were under T. W. Ferry's

control from the time they were issued until sold, and were sold under his direction and for his benefit, with the assent of the Barge Company; and under such circumstances the company must be bound by Ferry's doings in the matter. Its liabilities are no less than an individual's would be under like circumstances.

It is the duty of this Court in reviewing proceedings in this class of cases to consider the rulings of the circuit judge in excluding testimony which is competent and relevant in support of plaintiff's case where the attachment has been dissolved; otherwise the plaintiff might be deprived entirely of the benefit of his writ, when his evidence was at hand to show the intent to defraud charged against defendant. In nothing that has ever been said by this Court was a contrary ruling intended. Witness Akeley testified that he was acquainted with the Barge Company's property, and that he held a mortgage on the property. Counsel for plaintiff then asked witness the following questions:

"Of $20,000? On what particular barges?"

"Was there any consideration passing from you to the company for that mortgage?"

"Have you ever paid the company anything for the mortgage?"

Each of these questions was objected to and the objection sustained. One of the causes mentioned in the affidavit upon which the writ issued was that defendants had disposed of their property with the intent to defraud their creditors. Certainly the amount for which the mortgage was given, and whether anything had been paid for it, were material facts bearing upon that point; and the plaintiff was entitled to the testimony called for.

Several of the officers of the company were examined by the plaintiff's counsel to ascertain the situation of the property of the Barge Company, the amount of its indebtedness and by whom and when it was held. Answers were given with great apparent reluctance, and it was with much difficulty that any information at all could be obtained upon the points desired. While the secretary and treasurer of the

Barge Company denied, on the application to dissolve the attachment, that it was about to dispose or had disposed of its property with intent to defraud its creditors, he was unable to give the amount of its indebtedness or what disposition had been made of its property.

Further discussion of the case is unnecessary. The errors mentioned relieve us from the consideration of the other points raised by counsel.

The order of the circuit judge dissolving the attachment must be set aside and the application dismissed with costs of both courts.

The other Justices concurred.

FRANK BUTTRICK v. THE UNITED STATES FISH FREEZING COMPANY.

Questions of fact—Conclusiveness of verdict.

A verdict cannot be disturbed where the issue is purely of fact and is submitted upon the theory of each party in a proper charge.

Error to the Superior Court of Detroit. (Chipman. J.) Oct. 31.—Dec. 20.

ASSUMPSIT. Plaintiff brings error. Affirmed.

George S. Hosmer (*Dickinson, Thurber & Hosmer*) for appellant. Where plaintiff has shown the performance of services and their value, defendant has the burden of showing that they were gratuitously performed: 1 Pars. Cont. 445; *De Wolf v. Chicago* 26 Ill. 446; *Farmington v. Allen* 14 Mass. 172; *Lewis v. Trickey* 20 Barb. 387; *Livingston v. Ackeston* 5 Cow. 531; *Weston v. Davis* 24 Me. 374; *Moulin v. Columbet* 22 Cal. 509; *Dougherty v. Whitehead* 31 Mo. 255; Sackett on Instruction of Juries 449.

Trowbridge & Prescott for appellee. A service volun-

tarily rendered without request creates no obligation to pay for it, and no promise to pay will be implied: *Lange v. Kaiser* 34 Mich. 317; *Woods v. Ayres* 39 Mich. 345; *Bartholomew v. Jackson* 20 Johns. 28; *Jones v. Woods* 76 Penn. St. 408; *Dunbar v. Williams* 10 Johns. 249; *Hertzog v. Hertzog* 29 Penn. St. 465; *Anderson v. Hamilton Township* 25 Penn. St. 75; *Mumford v. Brown* 6 Cow. 475; *St. Jude's Church v. Van Denberg* 31 Mich. 287.

SHERWOOD, J. The plaintiff brings this action to recover for services claimed to have been rendered by him in behalf of the defendant in negotiating for the purchase of certain real estate for the use of the company in the city of Detroit.

David W. Davis was superintendent of the defendant company at the time it is claimed that plaintiff's services were rendered, and the plaintiff was subscriber for $2000 worth of defendant company's stock, was a friend of the company, and a frequent caller at the office of Superintendent Davis, by whom plaintiff claims he was requested or employed to negotiate or aid in negotiating the purchase of the property for defendant.

Davis claims and testifies that he never had any authority to employ the plaintiff to perform the services claimed for, and never did employ him to perform the same; that plaintiff was friendly to him at the time and was a frequent visitor at his office; that he supposed his interest in the prosperity of the company was the occasion of his visits, and whatever the plaintiff did or said was entirely voluntary.

A full hearing was had by the parties before a jury at the circuit. The issue upon the testimony was one of fact purely, and under a brief, clear and unexceptionable charge by the circuit judge, the case was submitted to the jury upon the theory of each party. The finding was against the plaintiff and should not be disturbed.

There is no error in the record and the judgment must be affirmed with costs.

The other Justices concurred.

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HENRY M. LOUD v. CHARLES WINCHESTER, GEORGE E. WASEY, AARON F. GAY, HERBERT F. WHITING AND HENRY N. LOUD.

Trust to secure payment—Right of beneficiaries to information—Personal benefits—Waiver—Supplementary orders.

1. The transfer by a debtor to a creditor of the title, possession and control of the debtor's property, whereby the transferee receives advantages in the exclusion of other creditors, furnishes a valuable consideration for the reduction of the debt and the release of personal liability.

2. Beneficiaries under a trust have the right at all times to be kept informed by the trustees as to its management.

3. Under a bill for an accounting by trustees any testimony that throws light on their management of the trust bears directly on the performance of their duty to keep the beneficiaries informed; and proof of misconduct and misappropriation by them is admissible whether anticipated and charged in the bill or not.

4. Strict performance of trust duties may be waived; but such waiver in the past and in the case of completed transactions will not justify or excuse subsequent laxity that has not been authorized or approved.

5. A discretion confided to trustees jointly cannot be independently exercised by one of them so as to ignore another even with the consent of others who, with him, would constitute a majority.

6. Trustees must not receive from their employment personal benefits that are not provided for in the trust; as *e. g.* by receiving special compensation for supervising transactions connected with the business confided to them, but unauthorized by the trust.

7. Where a case remains in court upon equities reserved and for future supervision, orders subsequent to the decree can be made as circumstances require.

8. An insolvent firm made an absolute warranty deed of its business and other property to its principal creditor. The latter conveyed it in trust to certain persons to be managed for his sole benefit, and empowered them to carry on the business, buy property, borrow money, sell lands and personalty and exercise other powers not inherent in mortgage relations. But at the same time the creditor and the trustees together executed a declaration of trust in favor of the firm, whereby, after the trust should be satisfied, the remainder

of the property was to be conveyed to it. *Held* that as between these parties this arrangement established a trust, and not merely a mortgage, relation, and that it placed the creditor under fiduciary obligations to the debtor.

Appeal from Iosco. (Tuttle, J.) Oct. 31.—Dec. 20.

BILL to enforce trust. Complainant and defendant Winchester appeal. Decree modified.

D. C. Holbrook and *Hanchett & Stark*, for complainant, cited, to show that the transactions in question established a trust, 1 Perry on Trusts §§ 82, 83; *Diefendorf v. Spraker* 10 N. Y. 246; *Scituate v. Hanover* 16 Pick. 222; *Lyle v. Burke* 40 Mich. 499; 2 Comp. L. 1871 § 4124 subd 5; *Wilkins v. Fitzhugh* 48 Mich. 81; *Ellis v. Secor*, 31 Mich. 190; trusts may be created under the statute by a letter, memorandum or recital, signed by the party creating the trust, or trustee; *Bates v. Hurd* 65 Me. 180; *Barrell v. Joy* 16 Mass. 220; *Moore v. Pickett* 62 Ill. 158; *Bragg v. Poulk* 42 Me. 502; 1 Perry on Trusts §§ 78 to 80, 81; the court of chancery has power to enforce the execution of a trust by declaring what it is and decreeing what acts are to be done by the trustee and restraining acts that ought not to be done: 2 Perry on Trusts § 816; *McCartney v. Bostwick* 32 N. Y. 60; *Coates v. Woodworth* 13 Ill. 659; *Marshall v. Caldwell* 125 Mass. 435; *Lasley v. Lasley* 1 Duv. 117; *Callis v. Ridout* 7 Gil. & J. 1; *Stone v. Hackett* 12 Gray 227; and where the instruments creating a trust contain no provision for its revocation, a party who joined in creating the trust cannot revoke it; *Fellow's Appeal* (Penn.) 9 Rep. 124; 1 Perry on Trusts § 104; the court has full power to remove any of the trustees when from improper conduct in the management of the trust he appears not to be a suitable person to execute the trust, and protect the interests of the cestuis que trustent; 2 Comp L. 1871 § 4139; 1 Perry on Trusts §§ 275, 276; 2 Story Eq. J. §§ 1287, 1288, 1289; *Deen v. Cozzens* 7 Robert. 189; *Scott v. Rand* 118 Mass. 217; *Atty. Gen. v. Garrison* 101 Mass. 238; *People v. Norton* 9 N. Y. 178; *McPherson v. Cox*

96 U. S. 419; *In Re Morgan* 63 Barb. 622; *Quackenboss v. Southwick* 41 N. Y. 122; *Deraismes v. Dunham* 22 Hun 86; Kerr on Receivers 20, 22; *Brown v. Vandermeulen* 41 Mich. 418; *Preston v. Wilcox* 38 Mich 578.

Cutcheon, Crane & Stellwagen for defendants, cited, to show that the arrangement between the parties was a mortgage: *Taylor v. Cornelius* 60 Penn. St. 187; *Locking v. Parker* L. R. 8 Ch. App. 30; *Parsell v. Thayer* 39 Mich. 467; *State Bank v. Chapelle* 40 Mich. 447; *Curtiss v. Sheldon* 47 Mich. 262; a bill to redeem is the mortgager's only remedy against the mortgagee: *Goldsmith v. Osborne* 1 Edw. 560; *Locking v. Parker* L. R. 8 Ch. App. 30; *White v. Lucas* 46 Iowa 319; one cannot file a bill for the sole purpose of having the instrument declared a mortgage: *Micou v. Ashurst* (1876) 55 Ala. 607; when a mortgager makes a mortgagee a party to a bill praying relief, it is the same thing as praying to redeem: *Cholmley v. Countess of Oxford* (1741) 2 Atk. 267; *Flanders v. Chamberlain* (1872) 24 Mich. 305; *Goodenow v. Curtis* (1876) 33 Mich. 505; one cannot redeem except upon the payment of the whole mortgage debt: *Johnson v. Harmon* 19 Iowa 56; *Knowles v. Rablin* 20 Iowa 101; *Collins v. Riggs* 14 Wall. 491; *Martin v. Fridley* 23 Minn. 13; an executory agreement to take part of an admitted debt in satisfaction of the whole is nudum pactum: *Pinnel's case* (1602) 5 Co. 117; *Cumber v. Wane* (1716) 1 Strange 426; *Heathcote v. Crookshanks* (1787) 2 Term 24; *Lynn v. Bruce* (1797) 2 H. Bl. 317; *Seymour v. Minturn* (1819) 17 Johns. 169; *Warren v. Skinner* 20 Conn. 559; *Molyneaux v. Collier* 13 Ga. 406; *Rose v. Daniels* 8 R. I. 381; *Ryan v. Ward* 48 N. Y. 204; *Bryan v. Foy* 69 N. C. 45; *Mitchell v. Sawyer* 71 N. C. 70; *Hayes v. Davidson* 70 N. C. 573; *Line v. Nelson* 38 N. J. L. 358; *Wharton v. Anderson* 28 Minn. 301; *Perkins v. Lockwood* 100 Mass. 249; *Clifton v. Litchfield* 106 Mass. 34; *Blake v. Blake* 110 Mass. 202; part payment of an admitted debt will not support an agreement to release the whole debt: *Fitch v. Sutton* (1804) 5 East 230; *Har-*

rison v. Close (1807) 2 Johns. 448; *Mechanics' Bank v. Hazard* (1816) 13 Johns. 353; *Blanchard v. Noyes* (1826) 3 N. H. 518; *Wheeler v. Wheeler* (1839) 11 Vt. 60; *Down v. Hatcher* (1839) 10 Ad. & El. 121; *McKenzie v. Culbreth* 66 N. C. 534; *Rea v. Owens* 37 Iowa 262; *Bryan v. Brazil* 52 Iowa 350; an agreement for the reduction of a debt without consideration will not be specifically enforced: *Minturn v. Seymour* (1820) 4 Johns. Ch. 498; *Moore v. Hylton* (1830) 1 Dev. Eq. 429; *Acker v. Phœnix* (1834) 4 Paige 305; *Tufnell v. Constable* (1836) 8 Sim. 69; *Gurley v. Hiteshue* (1847) 5 Gill 217; *Norris v. Slaughter* (1851) 3 Greene 116; *Watts v. Frenche* 19 N. J. Eq. 407; *Simmons v. Clark* 56 Ill. 96; *Bunge v. Koop* 48 N. Y. 225; *Smith v. Tyler* 51 Ind. 512; an agreement to extend the time for the payment of a debt needs a consideration to support it: *Kanady v. Burk* 18 Mich. 291; a stipulation in the mortgage, that on default, the mortgagee shall be entitled to the rents, issues and profits of the mortgaged premises will not be enforced: *Hazeltine v. Granger* 44 Mich. 503; a mortgagee in possession is not bound to engage in adventure and speculation for the benefit of the mortgager: *Hughes v. Williams* (1806) 12 Ves. 493; a defendant mortgagee in possession, is not bound to account except on a bill to redeem: *Chapman v. Smith* (1837) 9 Vt. 153; *Portland Bank v. Fox* (1841) 19 Me. 99; *Weeks v. Thomas* (1842) 21 Me. 465; *Seaver v. Durant* 39 Vt. 103; *Onderdonk v. Gray* 19 N. J. Eq. 65; *Hubbell v. Moulson* 53 N. Y. 225; *Tooner v. Randolph* 60 Ala. 356; *Cockburn v. Edwards* L. R. 18 Ch. Div. 449; nor to render annual accounts: *Lord Trimleston v. Hamill* (1810) 1 Ball & B. 377.

CAMPBELL, J. The object of the bill in this case is to protect complainant's interest as beneficiary under a trust covering timbered lands and other lumbering property and business connected with it, on the ground of denial of his rights and various acts detrimental to the objects of the trust. Relief was granted to the extent of declaring the trust and ordering an accounting, as well as fixing salaries and regulating some matters of administration, reserving

further equities. Complainant appeals because the decree does not go far enough in some directions, and Winchester appeals generally. The other parties do not appeal. The case involves the existence and character of the trust, and various complaints of disregard and mismanagement. As some questions are raised concerning the consideration of the arrangement, and the reduction of Winchester's debt which the property was designed to secure, a brief reference is necessary to the transactions out of which the dealings grew.

For some ten years before January, 1877, complainant had been doing business with different parties in lumbering and salt making, and in carrying on a store connected with his other business in Oscoda, in the county of Iosco. Defendant Gay had always been one of the partners. Winchester had been at one time a general, and at one time a special partner, but had left this relation some time before, and was a very large creditor to an amount, as claimed, of about $440,000. At this time complainant and Gay were the only partners, and they owed other debts of about $225,000 and taxes between nine and ten thousand dollars. The property consisted chiefly of timbered lands, mills, salt blocks, lumber and vessels, and a stock of goods at Oscoda. The land titles were in different shapes and in different names and were partially encumbered to Winchester and others.

In the latter part of 1876 Winchester obtained titles or securities on more or less of the property, and there was reason to expect proceedings of other creditors to get pay for their debts. Some negotiations were had with Winchester, which resulted in a set of conveyances and other instruments to provide for the payment out of the property of Winchester's claim, which he agreed to reduce to $275,000 and to secure the balance of the property for the benefit of Loud & Gay. To this end Loud & Gay made an absolute warranty deed of their property wherever situated in Michigan, and Winchester executed a conveyance of most of it, as described and designated, in trust to George E.

Wasey, Herbert F. Whiting and Henry N. Loud (a son of complainant), to be managed and disposed of for purposes on its face designed for Winchester's own benefit entirely. He and the trustees at the same time executed a declaration of trust in favor of Loud & Gay, after his own debt should be paid. A further paper of similar character related to certain lands not covered by the other instruments. These papers were all part of one transaction, and dated January 1, 1877.

The first paper needing attention is the deed from Winchester to the trustees. This was not a conveyance in fee, but ran to the grantees, their successors and assigns for ten years, and no longer. They took it in trust for these purposes:

First. To take possession of their property and carry on therewith "a general lumber and salt business at Oscoda, Michigan," and purchase such other "personal property as may be necessary therefor,"—to make all needful repairs to mills, salt blocks and other property, insure and pay taxes, employ all necessary assistants and agents to carry on the business, to stock and carry on the store in connection with said business, "and to mortgage any portion of said property for the purpose of raising money with which to carry on and conduct said business."

Second. To sell any and all of the property, real or personal, at any time they may deem best for Winchester's interest at public or private sale, but no real estate to be sold without written consent of Winchester, or his representatives or assigns. All property purchased was to be subject to the trust.

Third. The proceeds of business and sale of any property but realty were to be applied *first*, to taxes, insurance and business expenses or expenses of sales; *second*, to buy up any liens of third parties deemed best for Winchester's protection and benefit; *third*, to pay proceeds of all real estate directly to Winchester, and to pay him, his heirs, executors, administrators or assigns the remainder of receipts, profits and proceeds.

Fourth. They were to make annual statements, and Winchester reserved the right of nominating, if he chose, persons to act as their agents to assist in carrying on the business.

Fifth. At the end of ten years everything was to be turned over to Winchester.

It is manifest that if Winchester owned this property absolutely or had any other interest in it, this so-called trust being entirely for his own benefit, would, if standing alone, be nothing more than a power of attorney coupled with no interest and at all times revocable. It is further manifest that it contains powers which, if his interest was as a mortgagee, could not lawfully be granted without the concurrence of the owners of the equity of redemption.

But the declaration or provision in favor of Loud & Gay, made as part of the same transaction, indicates the true character of this arrangement. That instrument is executed by Winchester and the three trustees, and is of the following purport:

It recites the execution of the other conveyance, and that Winchester owns other timbered lands in Michigan. It then declares that the amount to be paid in all to Winchester is $275,000, with interest at the rate of 5 per cent., payable as follows: $25,000 during the first year (1877); $35,000 in each of the second and third years (1878 and 1879); $30,000 in each of the fourth and fifth years (1879, 1880), and $40,000 a year thereafter, till the principal and interest should be fully paid. But in case of Winchester's death before full payment, the whole interest should be remitted and only the $275,000 principal paid. All surplus moneys beyond the specified sums in any year were to be used in the discretion of the trustees in buying up claims against Loud, Gay & Co., or paid over to Winchester. The trustees could, until forbidden, cut not more than 15,000,000 feet a year of logs from other lands of Winchester, who also reserved the right not only to revoke this right to cut other timber, but also to require interest to be paid, notwithstanding his death.

The property remaining was to be conveyed to Loud & Gay after the trust was satisfied, but they were to take no interest before. A similar declaration was made concerning some other lands not conveyed to the trustees.

There was an unwritten understanding that Loud & Gay should continue to manage the business as before, and that Wasey and his co-trustee, Henry N. Loud, should be the acting trustees, and Wasey be the financial manager or agent. Whiting was not expected to do active duty. The business was carried on with these several persons acting in these capacities until some time in 1880, when complainant was removed from the management, and Gay continued on a double salary of $6000, besides compensation for management of business of the Oscoda Boom Company. The trust business was carried on under the name of the Oscoda Salt and Lumber Company, and contracts were made in that name. Some of complainant's sons were employed in the business.

In 1880, on the return of complainant from the south, where he had wintered, he found fault with Wasey's management, and had some correspondence with Winchester on the subject, who informed Wasey of what had been written. The result of this difficulty was ultimately the removal of complainant, before referred to, and an attempt by Winchester to repudiate the trust as terminated by non-payment of the sums provided for. After this Wasey refused to recognize complainant's rights, and to a certain extent, and as to any interest in complainant, denied the authority of his co-trustee, Henry N. Loud.

Only a small part of the annual sums mentioned was paid to Winchester, and complaint is made that, instead of devoting money to this purpose, large outlays were made, with Winchester's consent, for other purposes. Among these, as alleged, were the purchase of $30,000 worth of pine lands, the rebuilding of a burned mill and salt blocks, and the failure to apply large accumulations of personal property to pay Winchester. Complaint is further made that the books are not so kept as to exhibit the true state of the business;

that Gay and Wasey manage correspondence in their personal names, and refuse information, and refuse to recognize complainant's rights, and act merely for Winchester, and draw such salaries as they choose; and that while Whiting is absent and takes no part, Henry N. Loud, who is the only trustee practically acquainted with the business, is thwarted and ignored, and the policy of economical management and payment of the debt subordinated to extravagance and expansion of business. These parties are also charged with lending the credit of the concern, and keeping it from the books and from complainant's knowledge, and with keeping a book-keeper who is impudent and acts in disregard of Henry N. Loud's rights of inspection of books, and who does not make proper entries. It is charged that the purpose is to let the debt accumulate and prevent complainant from getting any results out of the property.

The first thing to be looked at is the nature of this arrangement and its consideration. It is claimed by defendant Winchester that he is merely a mortgagee in possession, and that not only must this be treated as a bill to redeem, but the reduction of the debt was without consideration, and the whole is due.

As no other creditors are before the court, we are only interested in regarding the mutual interests of the parties between whom this contest arises. And we think that, although this arrangement was made to secure a debt, it very clearly involves trust powers which are in no way inherent in mortgage relations. It contemplates the management of an extensive business, the purchase of property, the borrowing of money, the sale of lands and personalty, and some other powers and action of peculiar character. The combined action of Winchester and the trustees devotes the entire estate to a species of management very plainly fiduciary, and the action of Loud & Gay in putting the whole legal title where this arrangement covers it, and their assent to it, complete the trust relation. The transfer of title and possession, and the relinquishment of control in

the manner provided, whereby Winchester not only secured for himself and the trustees immediate possession but important rights of management, furnished a valuable consideration for the arrangement whereby the debt was reduced and personal liability released. He received advantages over the other creditors, who might have levied on the lands if merely mortgaged, and might have secured a standing by purchasing the equity of redemption, and thereby possessory rights until foreclosure as well as the right of inquiring into the nature and extent of Winchester's bona fide claims. As between these parties, we can see no ground for holding defendants exempt from the obligations attaching to the fiduciary relations relied on.

In this view the question how far the trust has been abused, and how far it can be complained of after the actual dealings of the parties, becomes the main subject of controversy. But there is, perhaps, a preliminary inquiry concerning the breadth of the issues. It is claimed by the defense that all proof of misconduct and misappropriation of the trustees, not anticipated and charged in the bill, is immaterial and must be thrown out. This, we think, is not so. The beneficiaries under a trust have the right to be kept informed at all times concerning the management of the trust, and it is the duty of the trustees to so inform them. It is not generally presumable that the beneficiaries have such information from independent sources. When, therefore, a bill is filed to call trustees to an account, any testimony throwing light on their management bears directly on the performance of this duty, and may be considered in taking the accounts and in determining the view to be taken of the conduct of the trustees.

It is also claimed by the defense, and with justice, that a beneficiary cannot blame a trustee for action which he has himself approved or suggested beforehand, with knowledge of the condition of affairs. There is no doubt that parties may waive the strict performance of trust duties. But while this is so, in regard to completed transactions, it is equally clear that the beneficiary may require future deal-

ings to conform to the trust, and that past laxity will be no excuse or justification for future laxity which has not been authorized or approved.

With this preliminary statement it becomes necessary to look at what the trust contemplated and required. Its entire scope includes no more than the duty of conducting and continuing an existing local business at Oscoda, including the management of mills and salt blocks run in connection, and the management of a store, also in connection with the same business. The cutting of timber to supply the mills, and perhaps the purchase of logs for the same purpose, and such collateral arrangements as usually belong to such a local lumbering business, may also, perhaps, be included. Power was given to borrow money, if necessary, on mortgage. The whole purpose of the trust was to manage the property to raise money to pay off obligations. It did not contemplate the enlargement of business for any other purpose, nor its establishment elsewhere, and it did not contemplate the creation of further obligations not necessary in the business itself, or for repairs.

It further expressly appropriated the whole income, and required it all to be expended in the extinction of existing liabilities. No room was left for accumulation or enlargement. And the necessity of such an appropriation is obvious. If the property was to be retained and accumulated, and the debts left to accumulate also, the risk of destruction by fire or casualties and the risk of depreciations and business straits, might lead to an entire sacrifice, when, if the debts were continually cut down, the ultimate prospects would be very different, and the chances of saving a surplus would be much greater.

As we have no full rendering of accounts on the record, it cannot yet be determined to what extent complainant is estopped by what took place before the winter of 1879–1880. It does not appear thus far that the course of the trustees, in their diversion of the income from its proper uses, was not assented to. When the accounts come in it is possible this may be changed. But for our present pur-

poses no complaint seems clearly tenable before the return of complainant from Florida, although there is much to criticise as improper if not assented to.

The facts show that under the management as conducted, instead of keeping the business within its ordinary course and paying off the debts as far as possible, very little attention was paid to this; and although the results have been large, the payments have been in no proper proportion to them. It also appears that instead of confining himself to such financial management as was contemplated he should assume, of a business the ordinary matters of which were to be conducted by local superintendence, Wasey has absorbed a very large and general management, practically independent in many respects of his co-trustees, and has not dealt with his co-trustee Henry N. Loud civilly or according to his legal duty, but has ignored him to a considerable extent, and has encouraged the book-keeper to do so. He also disregarded well-founded charges of irregularity in the book-keeping. Under this trust, as written, and as the parties had a right to deal with it, the three trustees all stood on the same footing, and were all equally entitled and bound to act. The only arrangement made whereby a majority could act independently, was as to Wasey and Henry N. Loud. No such arrangement was ever made as to Wasey and Whiting which would justify ignoring Loud. Still less could Wasey use his own judgment alone, either with or without the consent of Whiting, as it is obvious he has done to a considerable extent. Whatever purely executive business his co-trustees might have entrusted to him, any business calling for the discretion of the trustees officially could not be thus assumed or allowed.

The business with Monroe & Co., at Cleveland, does not appear to have been agreed upon by the trustees, and seems to be a very remarkable outgrowth of a trust which was to be conducted at Oscoda. By this arrangement a large proportion of the lumber produced, on which a balance of over $180,000 was unpaid at one time, was kept shipped to a firm at Cleveland entirely on credit, and subject to be sold

out by that firm with no security but such as would come from a lien on the leasehold premises and improvements, and on the contents of the yard, which were intended for sale under a reserved power of supervision, which would have been of but moderate use in case of misconduct. The yard was not an agency, and the trust authorized no such agency. The fact that Wasey was paid for his own personal supervision of this Cleveland business was of itself in violation of the general doctrine which prevents personal benefits to trustees from their employment, and this doctrine was recognized in the decree which compelled him to account for it. But this substantial transfer of so large a part of the business from Oscoda in a body into another state, and the agreement for continuing this large credit business for lumber, can hardly be harmonized with the trust purposes.

The only explanation that can be found is in the policy evidently and plainly asserted that Winchester had become by his repudiation of the trust entitled to be regarded as mortgagee in possession, and the trustees as his trustees. This doctrine is not tenable. He had at all times power to require the employment of new managers, and to compel the trustees to live up to the trust. Instead of this he seems to have acquiesced in the action had before he attempted in 1880 to repudiate the trust, and since that time Wasey has done his individual bidding or obtained his acquiescence, and neither has respected any other rights as they should have been respected.

It appears affirmatively that in 1880 complainant urged strongly the application on Winchester's debt of all the unnecessary accumulations, but Winchester did not consent but undertook to get rid of the trust altogether, and is responsible personally, chiefly, if not entirely, for the subsequent policy. Upon the examination of witnesses to prove the value of Wasey's services, a main ground of commendation propounded was the large accumulation of assets under the trust, amounting in all to $404,065.22, and leaving, after deducting payments to Winchester and debts to

Loud, Gay & Co., a clear balance of $288,682.73. This amount is claimed by defendants to be correct, and if so, it is, so far as we can judge, sufficient to wipe out all or nearly all of Winchester's claim. It ought to have been so applied as far and as fast as possible. It may possibly be overstated. The accounting will probably show, and the decree should in respect to this be modified somewhat.

Another important question is whether for these violations of trust Wasey should be removed. If we were satisfied that complainant's rights were endangered, it would be necessary to do so. But while we are satisfied the duties have not been performed with proper regard to mutual rights, it is not clear that much of this conduct has not been had under a legal misconception, and it is further clear that Winchester is responsible personally, and that probably the interests of complainant can be preserved in the accounting. By Wasey's removal the trust would remain in Loud and Whiting, and there are strong reasons why the discretionary powers should not be so transferred while all the trustees are living. No new trustee could be well selected in Wasey's place without confusion, if such an appointment should be found otherwise proper. The only other alternative would be a receiver. But if it should turn out on accounting that the trust has not substantially fulfilled its object, there are objections to any needless employment of a receiver to exercise such powers as the continuance of such a business would entail, which should make it a last resort.

As all the equities not now dealt with can be disposed of after the accounting, we are not disposed to disturb the official standing of the trustees, preferring now to assume that with an understanding of their duties they will hereafter act harmoniously and in a business-like way in accordance with their strict duties.

We see no reason for disturbing the decree for costs, and for the present, at least, we are not disposed to interfere with the salary arrangement, except as to the non-resident trustee. The record shows no reason for giving him an an-

nual salary of the same amount as the rest. He may very likely be entitled to some pay for services, but it may better be determined hereafter.

We are also of opinion that the decree should require the application without delay of all available personal property on hand towards the payment of the debt of Winchester, and that hereafter all available proceeds of the business be similarly applied as fast as realized in the same way, although they may exceed the $40,000 yearly referred to in the decree as it stands.

As the case must remain in court upon the equities reserved, and for future supervision, any further orders can be made hereafter as circumstances require. The propriety of some outlays complained of will depend somewhat on the accounting.

The decree will be modified accordingly, and complainant will be entitled to costs against Winchester. The record to be remanded for further proceedings.

The other Justices concurred.

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Hugh McIntyre v. The Michigan State Insurance Company.

Insurance—Payment of premium note—Evidence—Laches.

1. Where an insured person gives a premium note in payment of his policy he is bound to attend to its payment himself at maturity and is not excused by the non-presentation of the note especially if it specified no place of payment.

2. The presumption that a note which specifies no place of payment is to be paid at the residence of the person liable upon it, is one that applies to indorsers.

3. The conditions prescribed by an insurance policy as to the payment of a premium note cannot be waived by an insurance agent if the policy expressly stipulates that they shall not be.

4. In an action on an insurance policy plaintiff sought to meet the de-

fence that the premium note had never been paid by showing that the agent of the insurance company had told him the company had given him, the agent, credit for the note. The plaintiff's further offer to show that he understood this to mean that the agent had paid the note was properly excluded as mere inference; and the agent's statement to that effect, if made after the fact, would have been mere hearsay.

5. A provision in the policy of a domestic insurance company that omission to sue for twelve months after a loss should be conclusive against the validity of the claim is not suspended for the period occupied in attempting to sue in foreign jurisdictions.

Error to Sanilac. (Wixson J.) Oct. 31.—Dec. 20.

ASSUMPSIT. Plaintiff brings error. Affirmed.

Geo. P. Voorheis and *A. R. Avery* for appellant. The place to pay a note, if not specified, is at the maker's residence: Story on Promissory Notes § 235; *Taylor v. Snyder* 3 Den. 145; *Bank of America v. Woodworth* 18 Johns. 315; *Pendleton v. Knickerbocker Ins. Co.* 7 Fed. Rep. 169; an insurance agent who advances payment to the company and takes the note of the insured and negotiates it does not relieve the company from liability: *Hodsdon v. Guardian Ins. Co.* 97 Mass. 144; *Home Ins. Co. v. Curtis* 32 Mich. 402; *Ag'l Ins. Co. v. Montague* 38 Mich. 548; a limitation on suits upon insurance policies is against public policy; *Eagle Ins. Co. v. Lafayette Ins. Co.* 9 Ind. 443; *Grant v. Lexington Ins. Co.* 5 Ind. 23.

Millard, Weaver & Weaver for appellee. It is the duty of the debtor to seek his creditor and pay his debt when it becomes due: Story on Prom. Notes 228, 230; Chitty on Bills (8th ed.) 391–2; *Wallace v. M'Connell* 13 Pet. 136; as against the maker of a note, it is not necessary to allege or prove presentment or demand of payment, even when the note is made payable at a particular place: *Reeve v. Pack* 6 Mich. 240; an insurance agent authorized to receive applications and collect and remit premiums, but not authorized to issue policies, has no power to extend the time of payment of renewal premiums: *Critchett v. Am. Ins. Co.*

53 Iowa 404; *Bouton v. Am. Mut. Life Ins. Co.* 25 Conn. 542; *Marvin v. Univ. Life Ins. Co.* 85 N. Y. 278; *Waynesboro Mut. F. Ins. Co. v. Conover* 98 Penn. St. 384; *Guernsey v. Am. Ins. Co.* 17 Minn. 104; *Catoir v. Am. Life Ins. & Trust Co.* 33 N. J. L. 487; even a promise that the "note might lay over for a few days," would not be a waiver of the forfeiture: *Wall v. Home Ins. Co.* 36 N. Y. 157; *Thompson v. Knick. Life Ins. Co.* 104 U. S. 252; the waiver by an insurance company of its right to declare a policy void because the note given for the premium was not paid at maturity, does not preclude the company from insisting upon the condition in the policy declaring the same void, if the premium note is past due and unpaid at the time of loss: *Ferebee v. N. C. Ins. Co.* 68 N. C. 11; a custom of an insurance company not to demand punctual payment of a premium note at the day, is a mere matter of voluntary indulgence, and not a permanent waiver of the clause of forfeiture, or an agreement to do the same in future: *Thompson v. Knickerbocker Life Ins. Co.* supra.; limitations as to the time within which action may lie on an insurance policy are sustained in *Riddlesbarger v. Hartford Ins. Co.* 7 Wall. 386; *Ripley v. Ætna Ins. Co.* 30 N. Y. 136; *Cray v. Hartford Ins. Co.* 1 Blatch. 280; *Fullam v. N. Y. Union Ins. Co.* 7 Gray 61; *Portage County Mut. Ins. Co. v. West* 6 Ohio St. 599; *Patrick v. Farmer's Ins. Co.* 43 N. H. 621; *Dutton v. Vermont Mut. F. Ins. Co.* 17 Vt. 369; *Williams v. Vermont Mut. Ins. Co.* 20 Vt. 222; *Wilson v. Ætna Ins. Co.* 27 Vt. 99; *Brown v. Roger Williams Ins. Co.* 5 R. I. 394; *McFarland v. Ætna Ins. Co.* 6 W. Va. 437; *Keim v. Home Mut. Ins. Co.* 42 Mo. 38; *Carraway v. Merch. Mut. Ins. Co.* 26 La. Ann. 298; *Brown v. Savannah Mut. Ins. Co.* 24 Ga. 97; *Merch. Mut. Ins. Co. v. Lacroix* 35 Tex. 249; *Provincial Ins. Co. v. Ætna Ins. Co.* 16 U. C. (Q. B.) 135; *Johnson v. Humboldt Ins. Co.* 91 Ill. 92; *Lynskey v. Asylum Life Ass. Co.* 9 Ir. L. R. 299; *Ketchum v. Protection Ins. Co.* 1 Allen 136; *Woodbury &c. Bank v. Charter Oak Ins. Co.* 31 Conn. 517; *Carter v. Humbolt Ins. Co.* 12 Iowa 287;

Stout v. City &c. Ins. Co. 12 Iowa 371; *Roach v. N. Y. Ins. Co.* 30 N. Y. 546; *N. W. Ins. Co. v. Phœnix Oil &c. Co.* 31 Penn. St. 448; *Underwriter's Agency v. Sutherlin* 55 Ga. 266; *DeGrove v. Metropolitan Ins. Co.* 61 N. Y. 594; *Wilkinson v. First Nat. F. Ins. Co.* 72 N. Y. 499.

GRAVES, C. J. The plaintiff was insured by defendant in 1878 in the sum of $600, and on the 21st of July, 1879, he procured another policy from the company for $1700. It was for three years, and covered his barn and certain other property. He paid the premium by his note made in these terms:

"$17. FREMONT, MICH., July 21, 1879.

In 90 days, for value received in insurance by the Michigan State Insurance Company, I promise to pay to the order of the secretary of the company the sum of seventeen dollars, with interest. HUGH McINTYRE."

The business was transacted by the company through its local agent, Mr. James Brown of Brockway Centre, a place near to the insured property and to the plaintiff's residence. The note was handed to Brown on his delivering the policy. Among the provisions in the policy was one requiring payment of the premium note at maturity, and another prescribing that in case of any action commenced against the company more than twelve months subsequent to a loss, the lapse of time should be taken as conclusive evidence of the invalidity of the claim. The words of the provision first named are as follows:

"A promissory note given for such premium shall be deemed the payment of the premium until said note shall become due; but in case said note shall not be paid when due then this policy shall be void and of no effect, and shall continue void until the payment of said note. And when paid, if before a loss, this policy shall be in force and effect until its expiration, subject to the conditions therein contained."

A secondary provision was inserted to preclude any deviation from the express terms except by an explicit stipulation with defendant's secretary. It reads as follows:

"There shall be no revision or evasion of any of the

terms or conditions of this policy, and no agent or servant of this company has any right or power to waive or to dispense with any of the terms or conditions of insurance as printed or contained in the application or in this policy, excepting that the same is done by the concurrence of the secretary of the company, indorsed hereon or otherwise specifically acknowledged in writing by him."

These clauses were not covertly inserted. They did not enter the contract by a back door. They were heralded by the application itself, in that the plaintiff declared as follows:

"I hereby further agree that the policy of insurance based on this application shall be void if the premium or note or any part thereof given for the same remains unpaid at the time agreed upon, and acknowledge myself indebted for the full amount of the premium or note given for the policy issued on this application. This application is made after a full knowledge to me that no agent of said company has any authority to waive or dispense with true answers to all the above questions or with any provision of this application or the policy."

Moreover, it is admitted by the plaintiff that on the execution of the policy his attention was expressly directed to this clause for avoiding it for non-payment of the note, and that in answer to his observation that he thought it did not amount to much, the agent Brown remarked that he thought it did.

About the close of 1879 the defendant withdrew from insurance and reinsured its risks in the Home Insurance Company of New York, and on the 1st of January, 1880, it notified its policy holders, including plaintiff, thereof. August 11, 1880, the plaintiff incurred a loss within the words of the first policy and also of this, and on the 7th of September he exhibited the proper proof.

The premium note on this last policy had never been paid. It had remained in Brown's hands in order that the plaintiff might take it up, and subsequent to the loss the latter offered to pay it, but the agent refused to accept payment. The defendant paid the loss covered by the policy of 1878, but declined to pay anything on the policy of 1879.

In March, 1881, the plaintiff commenced a suit in the court below, but the same was regularly dismissed for want of jurisdiction. The plaintiff then assigned the policy to a brother residing in the territory of Dakota for the mere purpose of having a suit instituted in a Federal court in his name, and in August, 1881, the suit so had in view was commenced, but in November following the court dismissed it for want of jurisdiction. November 30, 1881, the policy was reassigned to the plaintiff, and by reason of State legislation, which meanwhile had taken place, he was enabled to sue in the court below, and he thereupon commenced the present action. The period between the loss and the time of the beginning of this suit was much more than twelve months. The circuit judge expressed himself as satisfied that the failure to pay the note was fatal to the action, and he directed a verdict in favor of the defendant. He further observed that he was not certain that the application of the clause cutting off suits instituted after twelve months would not depend on whether the two actions commenced without jurisdiction were or were not brought in good faith.

It is perfectly clear that the plaintiff never offered to pay the note until subsequent to the loss. But he contends that no offer was necessary to preserve the policy from suspension. He insists that by legal effect the note was only demandable at his residence, and that it was incumbent on defendant to make a call there for payment before setting up the fact of non-payment as a ground of suspension.

This is not a tenable position. The doctrine indicated relates to the case of indorsers, whom, as being under engagements for the debts of others, the law so far favors as to require some preliminary effort to get payment from the party primarily liable. The reason of the rule does not fit the case of maker and payee, and hence the rule itself does not apply. As between the latter parties the maker is bound to seek the payee and offer payment, and so the plaintiff understood the obligation. He looked upon the transaction as one which required him to follow the note,

and not as a contract which permitted him to remain passive and to pay only on being called on at his house. He was under no misapprehension, and the fact that the note was yet unpaid on the occurrence of the loss was owing to no fault or failure of duty on the part of the defendant. The instrument might have been drawn payable at the plaintiff's residence, but he did not elect to require it. He made it payable generally, and the form of the undertaking expresses the intent. He bound himself to seek the payee or holder, and mere possession of the money at his house with the will to pay it could avail nothing in point of law. His undertaking went further. No demand on him by the defendant was necessary to make the note either due or suable. Mere non-payment was default, and no facts arose to excuse it. *Thompson v. Insurance Co.* 104 U. S. 252.

This view of the case being unsustained, the plaintiff next urges that there was evidence for the jury to pass on that the agent Brown consented that the policy should operate to cover losses without payment of the note. There are two answers to this argument. The *first* is that it was made an express term of the transaction that the conditions should not be waived or varied by means of any act or assent of Brown. The *second* is that there was no evidence fairly tending to show that he consented to anything of the kind.

A further point may be referred to. It is said that the plaintiff undertook to show that the note was actually paid by the agent Brown, but was forbidden to make the proof. The plaintiff, testifying for himself, stated that he had a talk with the agent Brown subsequent to the fire, and that Brown then told him that the company had given him, Brown, credit for the note. The plaintiff's counsel then offered to show by the plaintiff that the latter in that conversation understood Brown as meaning that he had paid the note, and the court, under objection, ruled out the offer. The ruling was unobjectionable. The proposal was to have the plaintiff testify concerning how his mind operated under the agent's statements, and not to show what it was that the agent said.

His construction of the agent's meaning may have been not only unauthorized, but entirely unreasonable. But suppose that the purpose was to get a disclosure of the language which the agent used. It was a call for mere hearsay. The agent must have been speaking of a past event, and not of a matter which was then occurring. This is not all, however. The agent was himself subsequently called by the plaintiff and fully examined on the subject. And, moreover, the claim that he had paid the note was destitute of foundation.

The proper effect due to the provision against actions instituted after twelve months from a loss requires no special consideration. In view of the facts in this record we are not ready to share in the doubts felt by the circuit judge, and we cannot admit that it was at all material whether in proceeding without jurisdiction to launch the other cases the plaintiff acted in good faith. The defendant was a domestic corporation and accessible always to domestic process, and the delay in bringing this suit was exclusively owing to the plaintiff's purpose to subject it to a forum where it was not suable, and to which the law had refused jurisdiction over it. See *Arthur v. Homestead Fire Ins. Co.* 78 N.Y. 462; *Riddlesbarger v. Hartford Ins Co.* 7 Wall. 386.

There is nothing to impeach the result and the judgment must be affirmed with costs.

The other Justices concurred.

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NATHANIEL D. MACUMBER v. THE WHITE RIVER LOG AND BOOMING COMPANY.

Pleading—General expressions—Variance.

1. A general expression superadded to specific words in the charging part of a declaration is construed as a term of the same class as the rest.

2. Damages as for positive malfeasance charged in the declaration cannot be recovered upon evidence of non-feasance only; and defendant is not required to meet such a showing.

Error to Newaygo. (Fuller, J.) Oct. 5.—Dec. 21.

CASE. Defendant brings error. Reversed.

Norris & Uhl for appellant. Variance between allegata and probata in actions for injury is fatal: *Fitzsimons v. Inglis* 5 Taunt. 534; *Shaw v. Boston & Worcester R. R.* 8 Gray 72; *Penn. &c. Nav. Co. v. Dandridge* 8 Gill & Johns. 248: 29 Am. Dec. 549; *Tucker v. Tarbell* 11 Allen 131; *Stone v. Swift* 4 Pick 389; *Detroit, Hillsdale & Ind. R. R. Co. v. Forbes* 30 Mich. 165: a plaintiff cannot recover on evidence of negligence not alleged in the declaration: *Flint & Pere Marquette R'y Co. v. Stark* 38 Mich. 715; Cooley on Torts 660: a declaration for negligent injuries must aver the fact and manner of negligence; and the plaintiff should be confined to what is set forth in his declaration: *Marq. &c. R. R. v. Marcott* 41 Mich. 433; *Batterson v. Chic. & G. T. Ry.* 49 Mich. 184.

Albert G. Day for appellee. The sufficiency of the declaration was not disputed in *White River Log &c. Co. v. Nelson* 45 Mich. 578.

GRAVES, C. J. The charge brought against the company, and which the plaintiff called upon it to answer, was for damming up the water by gates, booms, timbers, chains, ropes, pins, poles, logs and other appliances, and thereby flooding the plaintiff's land. The circumstances of the wrong were laid as being acts of a direct and positive nature, and the instruments used were described in terms, with a single exception, where a general expression was introduced. But in that case the meaning would accord with the subject-matter (Broom's Max. 575), and the construction would follow the rule that words of specification draw into the same class those general terms which are superadded to attain the end without further prolixity. *American Trans-*

portation Co. v. Moore 5 Mich. 368; *Hawkins v. Great Western R. R. Co.* 17 Mich. 57; *McDade v. People* 29 Mich. 50; *Brooks v. Cook* 44 Mich. 617.

The case brought against the defendant was consequently one of malfeasance, and was so exactly marked out by the facts set forth as to leave no room for speculation in regard to its legal identity. It seems, however, that no evidence was put in to convict defendant of the form of injury thus alleged. The charge so informs us. Still, the jury were allowed to return damages on the supposition of some remissness of defendant in its management of drives; or, in other words, the court considered it competent for the plaintiff, under a complaint for malfeasance, to recover upon a supposed non-feasance. We are not able to assent. *Funk v. Arnold* 3 Yeates 428; *Breedlove v. Turner* 9 Mart. (La.) 353; *Dunlop v. Munroe* 7 Cranch 242; *Doane v. Badger* 12 Mass. 65, 69; *Mayor v. Humphries* 1 C. & P. 251; *Hullman v. Bennett* 5 Esp. 226; *Fitzsimons v. Inglis* 5 Taunt. 534; *Parker v. Rensselaer & Saratoga R. R. Co.* 16 Barb. 315; *Hill v. Supervisor &c.* 10 Ohio St. 621; *Simonds v. Pollard* 53 Vt. 343 (1881); 1 Chit. Pl. 140, 141, 147, 402.

CAMPBELL and COOLEY, JJ. concurred.

COOLEY, J. In this case the boom company is sued for damming and obstructing a river by logs, booms &c., and thereby setting back the water and causing it to overflow the plaintiff's land. On the trial the circuit judge submitted the case to the jury on the theory that there was no evidence in the case showing that the company had done any act to obstruct the river as charged, but told them, in substance, that they might find the company responsible for a failure to perform with diligence its duty to float the logs cast into the river by others, and to run them in a proper manner so as to prevent injury to the plaintiff's land by backwater. On this instruction the plaintiff recovered upon a case not made by his declaration, and which defendant had not been called upon by the pleadings to meet.

If we could judge of the case by this record, we should believe the plaintiff has strong equities; but when the plaintiff recovers upon a case that he has not summoned the defendant to meet, we cannot know that the defendant has in fact attempted to meet it. But whether he has or not, it is certain he was not required by law to do so.

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

GRAVES, C. J. and CAMPBELL, J. concurred.

SHERWOOD, J. dissenting. The action in this case is for the recovery of damages caused by the defendant's obstructing the free passage of the waters in White river, thereby causing a rise therein, and overflowing the plaintiff's land, and preventing his clearing, improving and cropping the land during each of the years from 1876 to 1881, both inclusive. The declaration contains six counts, all precisely alike, except that the damage claimed in each is for a different year from that in the others. Plea, general issue. The cause was tried by jury, and the plaintiff had a verdict for $400. Defendant brings error. The bill of exceptions contains the substance of all the evidence.

It is conceded that the plaintiff was the owner of the lands overflowed, and that White river passes through the same; and that the defendant is a corporation and did business upon the White river during each of said years; and the testimony shows that the defendant controlled the movement of all logs upon the river. White river is also shown to be a navigable stream for the floatage of logs, and there seems to be no controversy but that the defendant drove and controlled all the logs which came into the river during each of the years in which the plaintiff claimed damages. It appears that White river since 1860 has been largely used for the purpose of driving logs, and in so doing from 1873 to 1882 its waters passing through the land of the plaintiff were controlled by the defendant, and that the company so dealt with the logs in the stream by its acts and omissions that jams occurred very frequently opposite to and below

the premises of the plaintiff, and thereby the water of the river was raised to such an extent as to cause serious injury to the lands of the plaintiff and to his crops growing thereon.

None will claim, I apprehend, that an individual could so fill White river with logs, or in any other manner obstruct the natural flow of the stream, to the injury of the lands of the plaintiff, without becoming liable for the damage caused thereby. Neither could the defendant so control said stream, either by acts of omission or commission, as to produce a like result, without subjecting itself to such liability.

The rights of the plaintiff, if violated at all, the testimony tends to show were made the subject of frequent invasions, and each time from the same cause, through a period of five or six years; and I fail to find in the testimony that any effort was made on the part of the defendant to prevent a repetition of the injury in any year succeeding the first. The record, as I recollect it, shows beyond controversy that previous to the time defendant assumed control of the floating business upon the river, the plaintiff's lands were not subject to such overflow, although a large logging business was then done on the stream. If the use of the river by the defendant company to the extent it did, rendered it necessary to overflow and destroy the valuable farming and timber lands of the plaintiff, as the testimony tends to show, it was not only the right and privilege of the defendant, but it was the company's duty, to either lease or buy the plaintiff's premises, or in some manner make suitable recompense to the plaintiff for the injury done to his lands. The statute creating this company not only authorizes but contemplates that this shall be done in such cases.

It is true our rivers are great public thoroughfares, subject alike to be used for the benefit of the public and all classes of persons, both natural and artificial, but neither can make use of them to the prejudice or destruction of private interests or rights without first making just compensation therefor.

In this case it was the duty of the company to drive the logs it had in charge down the river with care, and without

any unnecessary injury to the adjacent lands, or the timber or crops thereon, or other damage to the owners thereof; and for that purpose to furnish all necessary appliances and a sufficient number of men. I fully agree with Chief Justice Graves in his statement of the duty of the company when he says "it was the duty of the company to see that its connection with the logs did not result in causing any more flowage of the plaintiff's land than would occur by the passage of the logs in a purely natural way. It had no right to deal with them in any mode whereby jams would be formed or enlarged so as to cause the water to overflow the plaintiff's land when it otherwise would not; or cause it to overflow there more than it would were the logs left to themselves; and if jams were formed or enlarged in that way to such extent that they did cause the water to flow the plaintiff's land, the company is liable for all that flowage beyond what the flowage would have been, if any, had the logs been allowed to float down naturally and without artificial interference." *White River Log & Booming Co. v. Nelson* 45 Mich. 578. It pretty clearly appears from the record that the plaintiff received quite extensive injury to his property from the lumbering operations carried on upon the river during the several years mentioned in the declaration under the management and control of the defendant, and it would seem that the judgment rendered affords but a slight compensation for the damage sustained, and unless the case presents insurmountable legal objections the judgment should not be disturbed.

The most difficult question presented is upon the insufficiency of the declaration to cover the case presented by the proofs. While its general insufficiency must be conceded as applied to most cases, still I think, in view of the rights conferred, and the peculiar duties assumed by the defendant upon White river in making use of its waters for running logs, the defendant may be held liable for the injury stated in the testimony under the several counts contained in this declaration. It cannot, however, be regarded as a precedent in this class of cases. It is true, it contains no allegations

of duty, but of its duty the defendant could not fail to be cognizant. Not only the law giving the defendant an existence, but the Constitution of our State, both disclose and enjoin that duty, and it is hardly necessary to aver a duty thus imposed upon the defendant by general statute and the organic law, and which is contained in the license under which alone the defendant may do business at all.

The overflowing was clearly caused by the piling up of the logs at certain points of the river, near or below the plaintiff's lands. With a sufficient force of men this could have been mostly prevented by the defendant. And whether the obstruction of the waters was done by allowing the accumulation of the logs by the natural current of the stream, or by the efforts and labor of defendant's servants, can make but little difference so long as the overflow was under the control of the defendant. The error, if any, upon this point could not have been prejudicial, as it would have been cured by a simple amendment of the declaration, which might have been allowed at the close of the testimony by the changing of a very few words. The case was tried on the plaintiff's theory, and full defense was made by defendant; it has lost nothing in the form of the action. This decision of the question made upon the declaration disposes of a large number of defendant's exceptions.

There are in this case forty-nine assignments of error. It is unnecessary to consider them in detail. Assignments from 3 to 28, both inclusive, relate to the injury to the plaintiff's premises and the extent of his damages. The objections were made to the admission of testimony under what was supposed by counsel to be an insufficient declaration, and probably would not otherwise have been taken. It appears from the testimony that the lands overflowed were bottom lands, partly cleared and partly in process of clearing, and, when cleared, capable of growing any crop usually raised by farmers in that vicinity. Testimony was given tending to show the amount of crops of various kinds the land was capable of growing when cleared, and the value during the period for which damages were claimed, for the purpose of

showing the extent of plaintiff's injury. The witnesses appeared to be all competent to speak upon the subject, and their testimony was competent as furnishing some data to the jury upon which they might estimate the plaintiff's damages. It was also in evidence that it was the intention of plaintiff to complete the clearing of this land; that he was actually engaged in doing so; and that his work was arrested by the overflow. No error is discovered in these rulings which could prejudice the defendant.

There is no error in the questions put to witness Walters, contained in the first and second assignments of error. They relate to the survey of the lands claimed to have been injured, and to the map of the premises as made by him and its correctness.

We have carefully examined the charge of the court in this case, and think it fully covers all the questions raised in the remaining assignments of error relating to the rulings of the court on the requests presented, and to those portions of the charge excepted to. The charge is fair, and upon these questions it states the law correctly. It is quite as favorable to the defendant as he could have reasonably expected under the testimony. The same, I think, may be truly said of the judgment.

The circuit judge, in his charge to the jury, expressly told them that the defendant would not be liable for the necessary injury to the lands of the plaintiff in properly driving the logs down the river, or for such injury as might arise from freshets; and that defendant was not an insurer of plaintiff's property against damage necessarily occurring in driving the logs properly. And while, as the circuit judge says, there is no *positive* testimony of acts of defendant in piling up the logs in the river, or in causing them to accumulate in the stream to such an extent as to occasion an overflow of the plaintiff's land, still there is testimony in the case *tending to show* that such was the fact, and that the result was occasioned by the wrongful conduct of the defendant, and I think the case was properly submitted to the jury.

The judgment should be affirmed with costs.

JOHN J. WATTS AND RICHARD J. WATTS v. THE TITTABAWASSEE BOOM COMPANY.

[See 47 Mich. 540.]

Navigable streams—Obstructions by boom companies.

A boom company is liable in damages for needlessly or wilfully obstructing a navigable stream to the hindrance and consequent injury of persons driving their own logs.

Error to Midland. (Judkins, J.) Oct. 9–10.—Dec. 21.

CASE. Plaintiff brings error. Reversed.

M. H. Stanford for appellants.

John Moore and *Hanchett & Stark* for appellee.

SHERWOOD, J. Plaintiffs during the years 1874, 1875, 1876, 1877 and 1878 were engaged in manufacturing and transporting square oak timber to market. The lumber was obtained in Gladwin county on one of the tributaries of the Tittabawassee river, and the latter was used by them in running the timber down to the Saginaw during each of those years. It was a navigable stream for floating rafts, logs and timber from Edenville to its mouth.

The defendant is a corporation; was organized in 1864, and during the years above mentioned was engaged in the business of running, driving, booming, rafting and delivering logs on the Saginaw, Tittabawassee, Chippewa and Pine rivers and their tributaries.

The plaintiffs, in their declaration, state their cause of action in six different counts, and allege, in substance, that the Tittabawassee is a navigable stream; that in each of the five years above mentioned they placed in said river rafts of square timber to be floated down the river, and that the defendant obstructed the navigation of the stream by means of booms placed across the river, whereby the plaintiffs' rafts were stopped, delayed, broken up and some of

the timber lost. Each count avers that the defendant placed its booms across the river, intending to prevent the plaintiffs from proceeding down the river with their timber, and the last three counts state that the defendant wrongfully, wilfully and unlawfully obstructed the navigation of the river by means of the booms—the cause of action as stated really being the act of the defendant in obstructing the navigation of the river without any right to do so, intending thereby to prevent the plaintiffs from floating their timber down the stream.

Defendant pleaded the general issue. The cause was tried by jury; at the close of the testimony the court directed a verdict for the defendant and judgment was entered in accordance therewith. The plaintiffs bring error. The return contains all the testimony given on the trial, and the only error assigned is the court's instruction to the jury.

The statute under which the defendant corporation is organized sufficiently apprises the parties of what the defendant may lawfully do, and the evidence shows it has been conducting the business authorized ever since its organization, and there is no question made by the parties but that its field of operation extended to those portions of the Tittabawassee river where the obstructions complained of were made or occurred.

The defendant in doing its business placed a boom across the river a short distance above the village of Midland, known as Pier boom, and at a point about seven miles above the mouth of the river placed another, known as the Bryant trip, these two being among, if not the only, obstructions of which the plaintiffs complain. At least, it is claimed that the booms thrown across the river at each of these places caused the other obstructions from which plaintiffs claim to have been injured.

The logs which the defendant had charge of were placed in the river above the booms, many of them coming in from the tributaries of the Tittabawassee, and the plaintiff's logs when they entered the river, were preceded by several miles of logs several feet deep.

The Tittabawassee empties into the Saginaw river, and it is the business of the defendant to take the promiscuous mass of logs, float them down the Tittabawassee, and at the booms separate and put them into rafts, and in that condition deliver them to their respective owners along the Saginaw river or at the mills. The defendant has no control over the amount of logs to be put in the river, nor the manner of putting them in, and neither puts in any logs itself nor causes them to be put in. Many times it is necessary to stop the mass of logs going down the Tittabawassee river to allow those in the tributaries to enter it, and vice versa, in order to secure to each person an equal chance in the use of the river, and when this is done, and the river is full, the tendency is to cause a jam. In order to separate the logs and raft them, it is frequently necessary to place them in side or rafting booms, and many times considerable river space is required for that purpose. The Bryant trip is used for the purpose of stopping the logs and letting them through into the side booms.

It does not appear from the evidence that the Bryant trip was used for any other purpose. These booms were evidently intended to facilitate the navigation of the stream, and are supposed to be placed at the most advantageous points for that purpose. We think the proofs clearly show that the logs could not be safely handled without placing them into rafts on the Tittabawassee river. When stopped, the logs form into a jam or dense mass, piled one upon another, from bank to bank, so that a raft of timber above or in the jam cannot be moved any faster than the mass of logs until those below have been displaced or carried down the stream. The evidence shows the plaintiff's timber rafts were run down into the jams which formed above the Pier boom and Bryant trip, and were then delayed, and were moved no faster than the logs forming the jams. No other obstructions are complained of. It is claimed by defendants that the testimony tends to show that whenever rafts reached the boom or trip they were permitted to pass with as little delay as possible.

The statute under which the defendant corporation was organized, authorized the formation of corporations for the purpose of "running, driving, booming and rafting logs" on any of the streams or waters within this State. They have power to acquire, use and hold, by lease or purchase, all such real and personal estate as may be necessary for the purpose of carrying on the business of the corporation. The Act further provides that such boom or booms shall be so constructed and used, as far as practicable, as to allow the free passage of all boats, vessels, crafts, logs, timber, lumber and all other floatables along such waters. Power is also granted to make all necessary contracts "for driving, booming, rafting and running logs." Sess. L. 1864, p. 23, secs. 1 and 14. By the Laws of 1873, section 14 was amended so that the proviso above referred to reads as follows: "and provided further, that such boom or booms shall be so constructed, and so far as practicable used, as to allow the free passage of boats, vessels, crafts, logs, timber, lumber, or other floatables along such waters." This section was again amended in 1875, but the foregoing provision in relation to the construction of booms, was retained, and has since remained the same. Laws 1875, p. 30; Laws 1881, p. 237.

Under its charter the defendant has the power and right, on the streams where it may lawfully do business, to construct, use and maintain all necessary booms for its business, provided that such booms shall be so constructed and, so far as practicable, used as to allow the free passage of boats, vessels, logs and other floatables along such waters. The location, extent, manner of construction and number, is left to the determination of the defendant, subject only to the restrictions mentioned.

Any person has a right to use the stream to the extent he may choose, provided he does not encroach upon the rights of any other person to do the same thing. Navigable streams are to be used in common and for commercial purposes, and no one person or company of persons, under enactments of the Legislature or otherwise, have the right to monopolize their use. They may be used by all persons having business

upon them, and when many persons make use of them, and to the extent of their full capacity, there is danger from encroachments upon each others' rights, and it is entirely proper for the government to regulate their use under such circumstances, and it may very properly authorize corporations to look after and control, within reasonable regulations, their use by persons having business thereon. For this purpose the defendant corporation was organized, and, while acting under proper and reasonable restrictions in the performance of its duties, its action is legal, and it cannot be held liable, though damages result therefrom.

The statute does not limit the extent of the business which may be done upon the rivers. The defendant, therefore, is obliged to accept the condition of things as it finds it, and drive down the river and separate and deliver the logs and timber in the shortest time possible under the circumstances, when there is water sufficient to float the property in its charge. So far as relates to the use of the stream, defendant has the same rights, no more and no less, than each individual would have for whom it does business had they not employed the defendant to drive their logs.

As we have already said, the defendant puts no logs in the stream, neither is it authorized so to do. The preservation of a free passage of boats, logs and other property down the river is not made a condition to the company's doing business, but it is required to preserve such "free passage as far as practicable." To say as far as possible would be, in some instances, to destroy the usefulness of the stream almost entirely, because the amount of logs carried down the stream might be so limited that no one person's could touch those of any other, and thus would be defeated the object of the law in making the stream a public thoroughfare, and the best interests of all the parties seriously jeoparded.

In determining whether in any particular instance it is practicable to preserve the free passage required by the law, it is necessary to take into account the size, character and capacity of the stream, and the extent of the business re-

quired to be done upon it. Much more difficulty is experienced in a small or shallow stream than in a large or deep one in preserving a free passage, when the streams are covered with logs, so that what may be considered best, most reasonable and practicable must necessarily depend upon the situation on any given occasion, and the amount of business to be carried on. It will also be readily discovered that when jams occur the logs must cease to run, and no man can say to another: "You had no right to put your logs into the stream," and it is equally true no man desires to obstruct the free passage of his neighbor's or his own logs. Neither can logs, after they have gone promiscuously into the river, be selected out and each parcel placed in the raft or delivered to the owner, until they have been stopped long enough to be conducted into side booms for that purpose. These things are necessary to be done in carrying on the business of the defendant, and if proper care and expedition are used in so doing it is all that can be expected of defendant. By the defendants so doing, navigation of the stream is aided and improved and the transportation of property of all persons along the rivers greatly facilitated, and it is evident that without such aid the business in the vicinity of these rivers in the great lumber regions of our State could not be done.

It has always been proper to stop a mass of logs in a river for the purpose of securing the rights of several owners of the same, or to prevent their loss or destruction. Of course, when this is done on the small streams, navigation is of necessity for the time being impeded. The only question which can arise in such cases is whether the stoppage of the logs was done in a reasonably prudent manner, and was continued no longer than was necessary to accomplish the object. If there has been want of care and diligence, or any neglect on the part of the company, either in doing the business or in constructing the booms, and damage ensued, then it will be liable for the injury or damage which is the immediate and necessary consequence of such want of care and diligence, negligence or wrong.

If the defendant has any power which an individual has not, it is the right to construct booms in the streams necessary to facilitate the running of the logs, but not to delay them. Of course, whatever was done in this case was intentionally done by the defendant, and although no wrong or injury was intended by defendant to plaintiff, still, if such wrong was committed, it cannot escape the legitimate and necessary consequences. During the years in which damages are claimed the defendant took charge of all the logs in the Tittabawassee river below the mouth of the Tobacco, which is a tributary, and in the vicinity of which the plaintiffs manufactured their square timber.

The plaintiffs' testimony tends to show that in the fall of 1874, and during the winter following, they manufactured one thousand pieces of square oak timber, of which nine hundred and fifty pieces were rafted into cribs in the Tobacco river; that on April 7, 1875, cribs containing two hundred and fifty pieces were run out in the Tittabawassee and down the same within four or five miles of Midland pier; that the pier was closed, causing a jam at that point, and by this obstruction the cribs were delayed six weeks. After passing this pier they ran down to Baily's bridge, when they encountered another jam caused by the closing of Bryant trip. At this point they were delayed eight weeks, and thereafter they were four weeks in passing Bryant trip. So that they were from the 7th of April until about the 1st of September in running these two hundred and fifty pieces from Edenville to the mouth of the Tittabawassee. About the 15th of May, 1875, the remaining seven hundred pieces entered the Tittabawassee from the Tobacco, and after running down two miles below Edenville struck a jam caused by the closing of Midland pier. Of this parcel, 180 pieces were run through Bryant trip during the summer, the cribs having been broken in the jams; about 100 pieces were lost; 420 pieces were at great expense recovered from the bottom of the river and from the shores where they had been crowded out by the jam, and passed the Bryant trip about the 1st of July.

This statement of the operation of the defendants with the plaintiff's timber sufficiently indicates its doings in each of the other seasons claimed for, and we therefore omit further detail. We may, however, say that we discover nothing in the record showing any unusual stage of water in the Tittabawassee during either of the years mentioned.

The record also shows that plaintiffs were prevented from opening the pier or booms and breaking the jams by the defendant, and thus were obliged to take the timber below Bryant trip at such times as defendant permitted them to pass that point. There is testimony tending to show that if the plaintiff had been allowed to break the jams and open the booms as requested, and as they might have done for the years 1875, 1877 and 1878, they could have run their timber from the mouth of the Tobacco to the mouth of the Tittabawassee, without the loss of any timber, within one week. There is also evidence tending to show that with a liberal expenditure of money on the logs in the Tittabawassee river in each of the years in which plaintiffs claimed to have been injured, the defendant might have greatly expedited the running of the plaintiff's timber.

It is claimed in the plaintiff's declaration, on the first count, after making the other proper preliminary averments, that said defendant, intending to prevent said plaintiffs from proceeding with their said timber in, upon and along the waters of the Tittabawassee river, and to cause them great injury and damage by its agents and servants, did abridge and obstruct and dam said river at many points in such a manner as to greatly hinder, delay, prevent and prejudice the plaintiff in the free navigation thereof by placing booms across the river for that purpose, * * * whereby they suffered great damage. The second and third counts contain the same averments. The last three counts aver that the defendant by its agents and servants wrongfully, willfully and unlawfully did dam, abridge and obstruct the Tittabawassee at many points by placing booms across the river, intending thereby to prevent the plaintiffs from proceeding along the river with their timber and to cause

them great injury and damage, and that they did thereby sustain great damage.

Under the declaration containing these averments the circuit judge held in his direction to the jury that the law gives the defendant the right to impede navigation to a certain extent, but no further than is necessary for carrying on the business it authorizes. The company has a right to take the logs down, and if, after the exercise of reasonable skill and diligence, it delays parties above, it is not responsible. The court further stated, "Now, a man who commences a suit, must commence it upon a theory which will make the defendant liable if the facts are proved. If the plaintiff in this case can recover, in my judgment it must be upon the theory that, in the exercise of the right given by law to this boom company, they were guilty of negligence, they were guilty of carelessness, they did not do what the law granted them the right to do, or did it in an unlawful manner, and in consequence of that fact the plaintiff suffered damage." And because the declaration did not recognize the right of defendant upon the river, and no negligence was charged therein, and none claimed to be shown by the plaintiff, the circuit judge directed the verdict for the defendant.

All obstructions to the free use of navigable streams are prohibited by the law of the land. Angell on Water-courses, 554; *Hart v. City of Albany* 9 Wend. 571. Constitution art. xviii, § 4. Still such free use or navigation does not necessarily mean navigation of the streams in their natural condition unobstructed and unimpeded. *Benjamin v. Manistee River Improvement Co.* 42 Mich. 634.

The State may authorize the improvement of these natural highways by water; but it is precluded from doing so itself by article xiv, § 9 of the Constitution. This defendant was not authorized to improve the Tittabawassee river, but simply to use it, for other parties, as a natural person might do, to the extent of the powers granted to the defendant. This defendant corporation was created for the purpose of aiding and facilitating the floatage of logs and timber along the Tittabawassee river, among others; and the statute does not authorize it to retard or destroy such floatage. Its busi-

ness was not to improve the channel of the river, but relieve its waters of their burden of logs. To obstruct the natural and free passage of cribs and rafts of logs by the entire obstruction of the channel, was prima facie unauthorized and wrong. It was a public nuisance. *Hall v. Tittabawassee Boom Company* 51 Mich. 377. The statute giving the defendant existence, can be invoked for protection only in the performance of lawful acts.

The claim made in the declaration is for acts charged to have been done wilfully and unlawfully, totally obstructing navigation on the river. The acts charged are not those of negligence arising from acts of omission or of commission, but of prima facie positive wrong, acts which the defendant has prima facie no right to do. We think there was testimony tending to support these charges contained in the declaration. It clearly appears by the testimony of plaintiff's witnesses, that in one instance the defendant, by reason of the course pursued, was from the month of April to the month of September in getting his logs from the mouth of the Tobacco to the mouth of the Tittabawassee, when one week would have been sufficient if the obstructions had been removed and the rafts been allowed to pass down with the natural current. The question of negligence was not necessarily involved in the case. The action is case, and the motives of the defendant's agent are immaterial. *Isle Royale Mining Co. v. Hertin* 37 Mich. 332. The defendant sought to justify its action as necessary, reasonable, right and proper in the premises under its chartered authority. This necessarily involved a question of fact, which we think should have been submitted to the jury under proper instructions from the court.

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

CAMPBELL J. concurred.

COOLEY J. I think there was some evidence in this case to go to the jury, and concur in the reversal.

GRAVES C. J. concurred.

GEORGE H. THOMAS v. ADELBERT SCHRAM.

Justice's court—assumpsit.

A declaration in justice's court set forth that by false warranty of a horse defendant had obtained plaintiff's note for it, and that on discovery of the fraud plaintiff had rescinded the sale, tendered back the horse and demanded the note, but defendant had refused to surrender it, to plaintiff's damage, its amount. *Held* that this may be sustained as a declaration in assumpsit.

Error to Genesee. (Newton, J.) Oct. 10.—Dec. 21.

ASSUMPSIT. Defendant brings error. Affirmed.

Lee & Aitken, Long & Gold and *Isaac Marston* for appellant.

Howard & Thayer and *Wisner & Johnson* for appellee. One who rescinds for fraud and tenders back the article bought, can recover under the common counts for the money received by defendant to his use: *Moore v. Mandlebaum* 8 Mich. 433; *Beardslee v. Horton* 3 Mich 563; *Spencer v. Towles* 18 Mich. 11; *Scott v. Bush* 29 Mich. 523.

PER CURIAM. This suit was begun in justice's court. The questions in it arise upon the amended declaration upon which the trial took place. In that declaration the plaintiff complains that defendant sold him a horse, and by false warranty obtained from him a promissory note for the sum of one hundred and fifty dollars; that plaintiff, on discovery of the fraud, rescinded the sale and tendered back the horse and demanded back the note; that defendant refused to surrender the note, to plaintiff's damage the amount thereof, wherefore he brings suit. The defendant claims that this is a declaration in tort; and if it is, the justice had no jurisdiction of the case under it. I do not think this is the case. The declaration is in assumpsit to recover

back the value of that which defendant has obtained without consideration, by means of a fraud. This was the view taken by the circuit judge.

I do not think any of the errors relied upon are well assigned, but the others seem to me to require no special attention.

The judgment should be affirmed.

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Donald Maclean v. James E. Scripps.

Libel—Evidence as to illicit intercourse—Photographic fac similes—Denial of guilt—Motive—Legal malice—Special verdict—Conduct of counsel.

1. A physician accused of illicit intercourse with a patient sued his defamer for libel. *Held,* that he could show the patient's physical condition as bearing on the probability of the charge. But in contradicting the patient's testimony that she was weak and sick at home, the defence were properly confined to that issue, and it was not error to exclude their testimony as to her mode of employment there and her visiting elsewhere.

2. Photographic copies of handwriting are inadmissible as evidence of existing documents if the originals can be had.

3. Testimony that on a certain occasion a person had not denied guilt is properly excluded if evidence is admitted of all that was said and done, and the inferences are left to the jury.

4. In an action for newspaper libel, the motive of a subordinate in publishing the article complained of is irrelevant if not communicated to his principal, the defendant, and if a showing has been made of everything that passed between principal and subordinate before publication. And where the defendant besides testifying that he had no ill-will toward plaintiff and did not know him, and that he had put implicit confidence in his subordinate, had also been allowed to show all that took place before the publication, and the information on which he acted, there was no material error in excluding a question as to whether he had any purpose to injure plaintiff in assenting to the publication especially where it was put by his own counsel in cross-examining him when called by the plaintiff to show his control of the paper.

5. The willful publication of injurious statements involves the design to produce whatever injury must necessarily follow; and when done

purposely, knowingly and for no good purpose or justifiable end, it is malicious in the sight of the law even if done without any actual personal ill-will.

6. A general verdict was given for the plaintiff in a libel suit based on the republication of statements already published in Canada, and affecting the reputation of plaintiff who was a professor in the University of Michigan. The jury were then asked specially whether the publication had been made because the charges had been published generally in Canadian papers, injuriously affecting, in plaintiff's opinion, the best interests of the University and for the purpose of calling attention thereto as a matter of public duty and in order that there might be a public investigation by the regents of the University. The jury answered, as to previous publication, "We say, not generally to his knowledge, the evidence only going to show he had seen the two Tilsonburg papers"—and as to the purpose of the republication they answered negatively. They afterwards answered the whole question in the negative. *Held*, that the answers were legally identical.

7. Where a jury answered a special question by saying they had no means of knowing, and that they did not know from the evidence, and afterwards answered simply that they did not know, and court and counsel treated the answer as a negative, it was so treated in the appellate court.

8. The power of the Supreme Court to review the action in a circuit court on the trial is derived entirely from the statute and common-law practice on bills of exceptions; and if the action of the circuit court has not been excepted to the Supreme Court cannot review it.

9. Where the course of counsel in addressing the jury has not been excepted to and ruled on, the Supreme Court can not review it even though recited in the bill of exceptions.

10. A false and injurious publication made in a public journal "for sensation and increase of circulation" is, in a legal sense, malicious.

11. A jury was instructed that their answers to special questions must conform to their general verdict or they would overrule it. *Held*, that if this was misleading as giving the general verdict precedence it was too late to object to it after the jury had retired and when the judge could not correct it.

12. Rehearing will not be granted on the ground that a son of the judge who wrote the opinion belonged to a firm who were attorneys of record for one of the parties when the suit was brought, especially if the firm did not manage the case and did not appear in the appellate court.

Error to the Superior Court of Detroit. (Chipman. J.) Oct. 12.—Dec. 21.

CASE. Defendant brings error. Affirmed.

John Atkinson, *Henry W. Montrose* and *Isaac Marston* for appellant. While malice may sometimes be inferred from a privileged publication (*Atkinson v. Free Press* 46 Mich. 383; Odger's Law of Libel 280; *White v. Nicholls* 3 How. 287; *Thomas v. Croswell* 7 Johns. 264; *Wright v. Woodgate* 2 C. M. & R. 573; *Cooke v. Wildes* 5 E. & B. 328; *Shurtleff v. Stevens* 51 Vt. 501: 31 Am. 707; *Woodward v. Lander* 6 C. & P. 548) it may not unless the language is a clear abuse of the privilege: *Somerville v. Hawkins* 10 C. B. 583; *Spill v. Maule* L. R. 4 Exch. 232; *Laughton v. Bishop of Sodor and Man.* L. R. 4 P. C. App. 505; *Taylor v. Hawkins* 16 Q. B. 322; Folkard's Starkie § 575; and the malice which makes it an abuse must be malice in fact: *Clark v. Molyneux* 3 Q. B. Div. 237; *Capital Counties Bank v. Henty* 5 C. P. Div. 515; *FitzGerald v. Campbell* 15 L. T. 75; *Lister v. Perryman* L. R. 4 H. L. 521: 3 Exch. 197; *Edwards v. Chandler* 14 Mich. 475; a verdict is bad if the answers to special questions do not correspond to it: *Cole v. Boyd* 47 Mich. 98; *Selleck v. Griswold* 49 Wis. 48; it is a duty to expose facts affecting the public interests: *Palmer v. Concord* 48 N. H. 216; *State v. Burnham* 9 N. H. 41; *Kelly v. Sherlock* L. R. 1 Q. B. 689; *Kelly v. Tinling* id. 699; *Henwood v. Harrison* L. R. 7 C. P. 622; *Toogood v. Spyring* 1 C. M. & R. 181; *Whitely v. Adams* 15 C. B. (N. S.) 417; *Gott v. Pulsifer* 122 Mass. 235; *McBee v. Fulton* 47 Md. 403; as to abuses by counsel in opening and closing, see *Forsyth v. Cothran* 61 Ga. 278; *Tucker v. Henniker* 41 N. H. 322; *Brown v. Swineford* 44 Wis. 290; *Rolfe v. Rumford* 66 Me. 564; *Koelges v. Insurance Company* 57 N. Y. 638; *Martin v. Orndorff* 22 Ia. 504; *Hoxie v. Insurance Company* 33 Conn. 474.

Russel & Campbell, *Levi T. Griffin* and *Otto Kirchner* for appellee. Opinions as to handwriting cannot be based on photographs: *Tome v. Railroad Company* 39 Md. 93; *Taylor's Will Case* 10 Abb. Pr. (N. S.) 300; *Ebron v.*

Timpleman 47 Tex. 503; actual intention to injure need not be proved against a defendant in a libel suit: *Barr v. Moore* 87 Penn. St. 385; *Pennington v. Meeks* 46 Mo. 217; *Buckley v. Knapp* 48 Mo. 152; *Rodgers v. Kline* 56 Miss. 808; *Haley v. State* 63 Ala. 89.

CAMPBELL, J. The issues in this case, although several assignments of error appear in the record, were mainly rested on a few classes of questions. The libel sued on, which contained recitals tending to show that plaintiff, while a medical professor in the University, had illicit relations with a Canadian lady patient and kept up an obscene correspondence with her, was claimed by defendant to have been published under circumstances rendering him legally blameless. The plea of not guilty was accompanied by a notice which relied *first*, on privilege, resting on the previous publication in Canadian newspapers, without contradiction, and the right of the press to make the charges public as affecting the good fame and interests of the University, and as requiring investigation; *second*, the truth of the charges; and *third*, accord and satisfaction.

No errors are assigned bearing on the last two questions except as they relate to matters of evidence. The question of privilege and the treatment of it by the court are the main questions apart from the incidental interlocutory ones as to rulings of various kinds.

The court below held that the publication was in its nature privileged, and that the plaintiff had the burden of showing both its falsehood and that it was not published with proper motives. This ruling renders several questions unimportant and considerably narrows the legal issues.

Upon the question of truth the plaintiff introduced a considerable amount of testimony concerning the state of health of the lady in question, and also to account for her history while at Ann Arbor. The methods of proof on this subject appear to have been the usual ones, and admissible if the facts of her condition were pertinent at all. We think her physical condition as affected by the diseased state

described was pertinent to the inquiry and had some bearing on the probabilities. Its weight, of course, would depend on its relation to other facts introduced on the question of innocence. Complaint is made that defendant was not allowed to contradict her sickness by evidence of her condition at her home thereafter. The court excluded testimony in regard to her employment at home and visiting, but told counsel they might contradict her evidence as to her weakness and sickness there. This they did not see fit to do. This was the only question relevant to contradict what had been shown for plaintiff, and there was no error in confining the testimony to that issue.

The chief controversy centered upon the genuineness of a scurrilous letter written over a fictitious signature and addressed to C. D. Brenton, at Tilsonburg, the home of Mrs. Wardle, the lady in question. The theory of the defense was that plaintiff wrote it in Kingston and sent it to Mrs. Wardle under that assumed name. The handwriting of this letter was therefore the most important matter involved in the whole case. If plaintiff wrote it he had no cause of action. All of the charges in the libel originated in what was said and done about this letter.

The handwriting was made the subject of testimony from persons proving it in the ordinary way from personal familiarity with the plaintiff's writing, and by experts on both sides giving testimony from its appearance by comparison. So far as the former kind of evidence is concerned there are no rulings which are peculiar, or which in our opinion require special consideration. But there was an exclusion of certain expert testimony of which complaint is made as being very important, and as improperly ruled out. This is contained in a number of depositions in which the experts undertook to determine identity of hands from a number of photographs of letters, including the Brenton letters and some letters claimed to have been genuine letters of plaintiff.

The originals of these papers were not claimed to be lost or out of reach. The fact that there were photographs pro-

duced, claimed to be from the originals, of itself indicates that no such difficulty probably existed, and the case was not claimed to depend on any impossibility of producing them. No authority seems to justify the proof of the handwriting of obtainable originals, by any species of imitation or copy. That photography may be used to obtain close imitations is no doubt true. But it is not a recognized fact that all of the appearances of a written document are capable of such exact reproduction that the copy will fully represent the original. It is the original paper which in this case raised all the difficulty. The proof to be admissible must relate to that. We do not think that secondary evidence was admissible. This question was before us in the *Foster Will Case* 34 Mich. 23, where our view was as now expressed. *Hynes v. McDermott* 82 N. Y. 49 is an instructive case in the same direction. Some other cases of similar purport were cited on the argument. We do not think the court erred in this ruling.

It is also objected that the defendant was not allowed to show that in the domestic disturbances attending the production of the Brenton letters, Mrs. Wardle did not deny the charge of her guilt. How far these facts were admissible in this suit is not now important, because the court below admitted proof of all the circumstances so far as relevant to Mrs. Wardle's testimony, and only required proof of what was said and done, leaving the inferences to be drawn by the jury. There was no ruling which prevented the jury from becoming acquainted with all that the witnesses could say on the subject of express or implied confessions, or denials so relevant.

It is also urged that defendant was not allowed to prove his own motives and those of his subordinate McVicar in publishing the article. The error assigned as to McVicar was that he was not allowed to answer the single question, "Why was this article published?" That as to Scripps was, that having been called by the plaintiff to show his interest in and control over the paper, and his publication of a subsequent article referring to this libel suit, he was asked

on cross-examination by his own counsel: "Will you state whether you had any purpose to injure him (plaintiff) in assenting to the publication, or on other grounds?" This was objected to as not proper cross-examination, and also that if the article was privileged it must justify the grounds. The court ruled it out.

So far as McVicar's motive was concerned it could not affect defendant one way or the other, except as communicated to defendant for his information. The court allowed all that passed between McVicar and defendant before the publication to be shown fully. This was all that could be relevant here. So far as Scripps is concerned he also was allowed to show all that occurred previous to the publication and the information on which he acted. He testified that he put implicit confidence in McVicar's statement, and that he had no ill-will against plaintiff; and did not know him and had never seen him. After this testimony it is difficult to see how he was injured by the exclusion of the other question. It would not probably have been error to allow it, but aside from its being put on cross-examination upon a different issue, the facts already drawn out rendered it of no further consequence beyond repetition. If the facts existing were such as to render the publication proper, the motives already indicated, if believed, would under the charge of the court dispose of any such question.

The chief discussion of law is on the question of privilege. Defendant claims the article was absolutely privileged. The court held it was privileged unless shown to be both false and published without good motives and maliciously.

That a person may publish falsehoods of another who occupies a position in which his conduct is open to public scrutiny and criticism, without any reference to the object to be secured by the publication, is a doctrine which has no foundation that we have been able to discover. Whether this article, taken as a whole, was privileged until reason was shown to the contrary, is not now important, and need not be discussed, because the plaintiff is not the complaining party, and the ruling below went as far as possible to

hold it so. That the privilege is lost by malice is elementary law in such cases. The question which the court below discussed, and which is discussed here, is whether the malice must be actual personal ill-will to plaintiff, or whether the publication of what is necessarily injurious and done purposely and knowingly, and not for any good purpose or justifiable end, is legally malicious within the law of libel.

Upon this we think there is no room for serious question. The term "malicious" cannot be improper to designate a willful injury without just reason. It is not claimed that there is any room to question the injurious character of this article. Neither can it be questioned that the willful publication of it necessarily involves a design to produce such injury as is a necessary consequence of it. This being so, it would be a violation of all the analogies of legal language to hold that a willful injury is not malicious if made without any good cause. The Constitution, in regard to criminal prosecutions for libel, restricts the defense of truth to cases where the libel, even though true, is published for good motives and justifiable ends. This is only another form of saying that malicious publications are not privileged from criminal prosecution, even if true. In civil cases the truth is always privileged, but in cases of false charges their publication, if privileged, must be privileged by the occasion. Private reputation cannot be left exposed to wanton mischief without redress, and a doctrine that would put the reputation of strangers on a worse footing than that of acquaintances cannot be sound. The reiterated cautions concerning the presumption in favor of privilege left no ground for complaint as to the burden which was laid on plaintiff throughout. It may be noted that the defendant's notice of defense is framed on this theory.

Complaint is also made concerning the action of the court touching certain questions put to the jury. The jury returned a general verdict for plaintiff. At the same time they answered a question whether the publication was made because the article had been published generally in Canadian papers injuriously affecting, in defendant's opinion,

the best interests of the University of Michigan, and for the purpose of calling attention thereto as a matter of public duty, and in order that there might be a public investigation by the regents;—to the first clause, "We say not generally to his knowledge, the evidence only going to show he had seen the two Tilsonburg papers." The remainder they answered negatively. To the inquiry concerning any other or further motive they answered: "Sensation and increase of circulation." To a third question, as to acquaintance with the plaintiff, they answered they did not know of any from the evidence, but that he must have known plaintiff by reputation. As to spite, malevolence, ill-will or enmity of heart entertained by defendant, they said they had no means of knowing.

In answer to questions put by plaintiff, they answered in separate answers that defendant published the article in disregard of plaintiff's rights and reputation, not caring whether it was true or false; that he did it to create a sensation, and without any investigation of the truth of the charge.

Upon being sent back, by the acquiescence of both parties, to answer defendant's third and fourth questions more distinctly, the court instructed them upon every question to answer yes or no, and to answer no on any question on which they were not satisfied. On their return they again answered the third and fourth questions by saying they did not know, and the first question, as a whole, in the negative.

These new answers were, in our opinion, identical legally with the first answers, and as court and counsel all agree that answering that they did not know was equivalent to a negative, we have no doubt that this is correct. Treating it as such, there is nothing in any finding inconsistent with the general verdict, unless upon the defendant's theory of privilege, which, as already said, we do not think correct.

The only remaining questions which have any importance relate to alleged abuses of counsel in their addresses to the jury, which it is claimed made reference to things entirely improper. We have, however, no means of considering

these questions. They form no part of the common-law record, and although the bill of exceptions recites the matters complained of, there was no ruling of the court and no exception. We have no right, under bill of exceptions, to review anything but such action of the court itself as is excepted to. The power of this Court to review the action in circuit courts on trials is one derived entirely from the statute and common-law practice on bills of exceptions. The law has left all things not legitimately belonging to exceptions to be managed by the circuit courts in furtherance of their own authority. We have no more power to review what they have not passed upon, than to exercise original jurisdiction in civil matters. It would be going entirely beyond our authority to notice what has not been ruled on and excepted to below.

The judgment must be affirmed with costs.

GRAVES, C. J. and COOLEY, J. concurred.

SHERWOOD, J., dissenting. This suit was commenced on the 16th day of September, 1882. The plaintiff in this case was a physician and surgeon, and a professor of surgery in the University of Michigan, and had been during the previous ten years. He brought his suit against the defendant for libel, in the Superior Court of the city of Detroit, for the publication of an article in the *Evening News* on the 11th day of September, 1882, and recovered damages in the sum of $20,000. The defendant was the controlling editor and publisher of the *Evening News* of the city of Detroit, a daily paper having at the time of the publication complained of a circulation of over 35,000 copies.

The declaration counts upon the malicious publication by the defendant of the following article, which plaintiff alleges is a false, scandalous and defamatory libel of and concerning him, viz.:

"DEBAUCHERY AND RUIN.

THE SAD STORY OF A CRAZED HUSBAND AND BROKEN FAMILY.

THE WRECK OF A CANADIAN HOME CHARGED TO A MICHIGAN UNIVERSITY PROFESSOR.

"For a month past a tale of debauchery and ruin, in which Michigan is interested, has been going the rounds of the Canadian press, and should have come to the knowledge of some of the regents of the Michigan University, the good name of which institution is being seriously compromised in the story as told. It is the subject of much talk at Ann Arbor, as a *News* reporter found on visiting there a few days ago to make inquiry as to the 'physician' or 'professor' referred to in the Canadian press in this connection. The story as told by the Tilsonburg, Ont. papers is substantially as follows:

"Sometime ago a respectable farmer and stock-dealer of Dereham township, Oxford county, Ont. named Joseph P. Wardle,

TOOK HIS WIFE TO ANN ARBOR

to be treated for cancer, of which, it seems, she was finally cured and returned home, though not before making familiar acquaintance with her physician. Mrs. Emily Wardle had a cousin, a Mrs. Hotchkiss, who resided at Ann Arbor, but whom for some reason Mr. Wardle did not wish his wife to visit; and when she returned to Ann Arbor subsequently it was ostensibly to consult the physician regarding her health. In the fore-part of July last, while at her home in Dereham, Mrs. Wardle received from Ann Arbor a letter from Mrs. Hotchkiss, notifying her that she (Mrs. H.) would shortly pay her a visit, and saying, 'If you don't tell any stories about me, I won't tell any stories about you and the doctor.'

"It appears that prior to this time Wardle had some suspicion of his wife's fidelity, and having seen this letter, the expression above quoted confirmed them in a measure, and he determined to

WATCH HIS WIFE CLOSELY.

On Wednesday, July 26, he called at the post-office in Tilsonburg for his mail, which was handed him. On looking it over he found a letter addressed to 'C. D. Brenton,' which he returned to the clerk, saying it was not for him. But the

clerk assured him that Mrs. Wardle always asked for and received the letters so addressed, when the husband's suspicions were further aroused, and he kept the letter, opening and reading it at the first opportunity. The letter contained no date, but the envelope was postmarked Kingston, July 24, and had evidently been mailed at Kingston, Ont. on Sunday, and forwarded by the early morning train of Monday, July 24. Its contents revealed to Mr. Wardle full

PROOF OF HIS WIFE'S INFIDELITY

to her marriage vow, and on returning to his home in no enviable frame of mind he charged her with lewdness, and she did not deny her entanglement with the doctor. The injured husband then ordered his unfaithful spouse to leave the house, giving her all the personal property she claimed as belonging to her, and furnishing her with $308 in cash. She was driven to Woodstock, where she took a Great Western train to Michigan, and is supposed to have gone to Mrs. Hotchkiss at Ann Arbor.

"The editor of the Tilsonburg *Observer* obtained a copy of the Kingston letter above referred to, and which was signed, 'Devotedly yours, John E. Wellcorn, Kingston, Ont.' and says that the language it contained was most disgusting (unfit for publication)—

AN AWFUL LETTER

to be seen by a husband addressed to his wife, and with the assurance that she was receiving such regularly. The editor further asserts that on comparing the original letter, signed as above, with others received from the Ann Arbor physician by Mrs. Wardle, no one can for an instant doubt that all were written by the same person; besides, Mrs. Wardle had told her husband previously that this physician was in Kingston, and that she expected him to visit them on his way to Michigan.

"Five days after this terrible discovery, on Monday evening, July 31, Mr. Wardle left for Buffalo by the Canada Southern road with a load of lambs, but before he reached that city his troubles had

DRIVEN HIM CRAZY

and at 2 o'clock in the morning of August 1, the conductor telegraphed ahead for help to secure the unfortunate man when the train should reach its destination. On arrival at Buffalo Wardle had become so violent that he broke loose

from those in charge of him, hurled himself in front of a moving train, and would have been killed but for being seized by a powerful man and jerked from the track. He was sent back to Tilsonburg the same day, and on Wednesday, August 2, on information laid by his daughter, was sent to Woodstock jail, to be kept under proper restraint until arrangements could be made for his admission to and proper care

IN THE LUNATIC ASYLUM

at London. Dr. Joy, of Tilsonburg, expressed a hope that his insanity would disappear after a time, and his mental balance be restored, as the actual cause of the attack was loss of sleep, the poor man not having slept or rested an instant from the time he read the fatal letter.

"The Tilsonburg *Liberal* makes some quotations from letters previously received by Mrs. Wardle from the physician, and adds: 'Whether this is the correct way for physicians to correspond with patients, we leave it with the reader to say.' Other letters were discovered, but the daughter of Mr. and Mrs. Wardle, a young lady, destroyed the most of them. A letter to Mr. Wardle was found, however, containing a sort of apology from the doctor for the interest taken in Mrs. Wardle's illness.

ENSNARED BY THE RASCAL.

"The *Liberal* is informed, on good authority, that Mrs. Wardle was not afflicted in any way whatever, but had been ensnared in this rascally physician's affection, and could not resist the temptation of paying him an annual visit, and adds: 'If professors of this description are to be kept at the head of important institutions, the usefulness of hospitals, etc. will soon be gone. And what certainty and security is there for the safety of any man's wife or daughter's character being left untarnished after once visiting them for the treatment of any disease whatever? It is to be hoped that this matter will be looked into, and if the professor is guilty we will have great pleasure in making his name public.'

WARDLE STILL INSANE.

In reply to an inquiry by telegram from the *News*, the following special dispatch was received this afternoon from the Tilsonburg *Observer*:

'TILSONBURG, ONT., Sept. 11.

Mr. Wardle has not yet recovered sanity. No new developments here in the scandal.'"

To the plaintiff's declaration defendant pleaded the general issue, and accompanied the same with a notice that he would show on the trial (1st) that before the publication of the article complained of, and on the 3d day of August, 1882, the statements and charges therein contained were published in several newspapers published and circulated extensively throughout the province of Ontario, in Canada, and in numerous other papers published in said province and extensively circulated therein, and also in Michigan; and that the plaintiff, during the whole of the time of said publication, was at the city of Kingston, in said province, and knew of the publication of the charges, and actually saw the article in one of said papers, and that he maintained silence in relation thereto, and took no action to contradict the statements or vindicate his reputation or that of the University of Michigan, wherein he was retained as professor, and which was thereby being disgraced; further, that the authorities of the University had taken no action in regard thereto, to learn of the truth or falsity of said charges, although the people of the State were largely interested in its good name, fame and credit; and it was therefore a matter of public concern and to which the public attention should be called. That the defendant, well knowing the premises, and the injury such reports would have upon the University, and believing the attention of the people should be called to the matter, published the alleged libelous article as a matter of great public interest and concern, and therefore insisted that the article was privileged. (2d) That the statements in the alleged libelous article were true. (3d) That after the publication of the article counted on, and on the 12th day of September, 1882, upon complaint being made by defendant that he had been injured by the publication of the article, the defendant offered to do anything reasonable in the premises to satisfy the plaintiff for any injury done him; and then and there agreed to publish an article such as the plaintiff should dictate, which was to be in full satisfaction for all injuries done him by the publication of the article counted on; and that in pursuance of the

agreement an article was dictated by the plaintiff and published by the defendant in the *Evening News* on the 13th day of September, 1882.

In pursuance of the order of the circuit court the defendant filed a bill of particulars of the matters relied upon under his plea of justification. The general verdict was accompanied by special findings of fact in response to questions presented to the jury by counsel on both sides, and submitted to them under special instructions relating to the same. The record contains a bill of exceptions purporting to give the substance of all the testimony in the case. The defendant assigns sixty-six errors. In the sixty-second assignment it is claimed no testimony was offered by plaintiff to maintain the statements of his counsel in his opening, of plaintiff's wide-spread and great reputation. There was sufficient testimony offered tending to support this statement.

Counsel for plaintiff, in his opening to the jury, in stating the character of the *Evening News* and its conduct by the defendant, said: "This has been an extraordinary publication from the outset. It has not been a mere chronicler of news, * * * but in its own peculiar way it has pandered to passions;" * * * and "to the public appetite for vile, indecent slanders upon reputable men in this and other communities. * * * It has been the boast of its editors and publishers, from the time the sheet was started, that it could afford to pay the damages awarded in actions of libel, by reason of the increased circulation which the publication of those libels would give it. Soon after the publication of this sheet began, libel suits rained down upon it like hail. Action after action and prosecution after prosecution followed, and then James E. Scripps thought it advisable to shield himself under the cover of a corporate organization," called "The Evening News Association," and under that shield he has continued the publication of the paper.

The vile letter mentioned in the alleged libelous article was addressed to C. D. Brenton, and to account for letters

being received by Mrs. Wardle, at the post-office, directed to that name, counsel for plaintiff, in his opening to the jury, stated that in the year 1881 Mrs. Wardle formed the acquaintance of a Miss A. G. Brenton, who lived in Hamilton, and afterwards in the city of Detroit, and asked the young lady to correspond with her, which she consented to do; that Mrs. Wardle wrote to Miss Brenton, but instead of addressing her letters to A. G. Brenton, directed them to C. G. Brenton, and in accordance with a request upon the envelope, the letters were returned to her at Tilsonburg post-office, in the province of Ontario; that in this manner she received two letters thus returned, one from Detroit and the other from Saginaw; that Mrs. Wardle, after discovering the mistake, sent to and received from Miss A. G. Brenton, at Detroit, several letters, in which an understanding was had between them that Miss Brenton was to visit Mrs. Wardle; that Mrs. Wardle also talked freely with her daughter Lizzie and Miss Ostrander, who was staying with Mrs. Wardle's family, about these letters, and that her husband also knew of the correspondence with Miss A. G. Brenton. Referring to the statements in the alleged libelous article, counsel for plaintiff further said to the jury:

"I will show you that James E. Scripps knew they were not true; that he inquired into them, and he was told they were not true, and that he endeavored to back out of this and publish a complete retraction for the sum of $300. 'Three hundred dollars have I expended in proving the guilt of Donald Maclean, and now if you, Donald Maclean, will pay over the $300, I will take back this malodorous mud which this mud-flinging institution on Shelby street, which I have established, has thrown upon you, and not only upon you, but upon all men both fair and foul.'"

To account for the origin of the Brenton letter,—the one mentioned in the libelous article,—and to show the probability of its being a forgery, counsel for the plaintiff further stated to the jury:

"In the jealousies which are engendered by the strife for professional success, Dr. Maclean has made enemies;" he is "a man that sticketh closer than a brother, and a man who strikes hard when he does strike; and the result has been

that while he has gathered about him a band of friends who will stand about him till the end, he has also bitter enemies —men who would rejoice in his downfall, men who would conspire to his downfall, men who would leave nothing undone to accomplish his downfall; and it may be, if this letter was received by Wardle—I don't know—it may be that this letter was the work of their hands. There was a man, and he now walks in the city of Detroit, who stated that he would drive Prof. Maclean from the University. He says: 'Damn him, I will drive him from the University. He has everything to lose, and I have nothing to lose.' He made his boasts openly. He was seen riding with the attaches of the *Evening News*. He walked about and drove about with the reporters of the *Evening News* just before this publication appeared. And when Dr. Farrand went with Prof. Maclean to see James E. Scripps, Dr. Farrand says: 'It is the work of this man,' naming him; 'it is the work of this man. He has threatened to drive Maclean out of the University repeatedly, and this is part of the scheme to that end.' James E. Scripps did not deny it, gentlemen of the jury,—James E. Scripps did not deny that this letter was published at the instigation of this man. And we shall show you, gentlemen of the jury, that when this letter appeared this man was seen walking through the streets of Detroit, with the *Evening News* in his hand, saying, 'Damn him, I have got Maclean now. I have put up this job on him, and if this will not drive him from the University I have got something that will.' Gentlemen of the jury, this scheme is in complete accord with the the whole course of the *News*. For the past few years its columns have been filled with attacks upon the professional schools of the University. Article after article appears, attack after attack, aspersions not alone upon the head of the University; and this, gentlemen, may have been,—I don't know as it is, but we shall put before you all the facts just as we have them, and leave you to judge,—I say, gentlemen of the jury, this attack may have been a part of the scheme."

For the avowed purpose of showing malice, counsel for the plaintiff stated to the jury that among other things, the plaintiff would prove that one Michael J. Dee

"purported to represent Mr. Scripps in a negotiation which a friend of Dr. Maclean undertook, unknown to Dr. Maclean. Mr. Tom S. Applegate, editor of the Adrian *Times*, looked into the matter of this letter. He is an

acquaintance of Dr. Maclean of many years' standing. He has corresponded with him from time to time, and knows his handwriting thoroughly. He looked into it in order to know about it. He looked at a photograph of the letter and became convinced that it was not in the handwriting of Dr. Maclean. He went to see Mr. Scripps, and found Mr. Dee. Mr. Dee said he represented Mr. Scripps. If Mr. Scripps denies this, and says he does not represent him, what I say goes for nothing. But Mr. Dee said: 'I represent Mr. Scripps, and I am ready to talk with you about it.' Mr. Applegate said to Mr. Dee: 'Now I have examined this letter, and it is not in the handwriting of Dr. Maclean. There is no doubt about it.'

Defendant's Counsel. 'Why do you state this?'

Plaintiff's Counsel. 'Because it shows the malice of James E. Scripps in doing what he subsequently did.' Mr. Dee, after talking with Mr. Scripps, and knowing what Mr. Applegate thought about it, having every reason to believe that this letter did not emanate from Dr. Maclean, said: 'If you will pay what expense we have been to so far, $300, we will drop the whole matter and take it all back.' I stated that to you in another connection. It has a bearing in this case in many ways, but it has a bearing upon the aspect of the case in which James E. Scripps seeks to escape the consequences of this publication under the plea of privilege. It shows that James E. Scripps knew or had reason to know, that this publication was false; and notwithstanding that, he not only put upon the records of this court a plea of justification charging Dr. Maclean with the authorship of this letter, but in addition to that he published the charge broadcast in the *Evening News*."

All the foregoing statements made by counsel for plaintiff, in his opening to the jury, are objected to by the defendant, and are made the subject of his assignments of error numbered 63, 64 and 65. When these statements were made, it was with the avowal of plaintiff's counsel (he being interrogated upon the subject) that he proposed "to offer evidence of everything" he stated.

The testimony, as stated by counsel, if given, and believed by the jury, would prove the defendant an habitual libeler, and his paper a dispenser of slime; that in the present case he maliciously inflicted an injury upon plaintiff of the most

atrocious character, without the least justification or excuse, and so known to be by defendant at the time he did it; and that he was a blackmailer of the meanest sort, offering to retract his false and libelous statement for the sum of $300.

Counsel further made statements which, if believed by the jury, would sufficiently explain and make clear every suspicious circumstance connecting the plaintiff with the Brenton letter and Mrs. Wardle's receipt of letters addressed to that name. The testimony proposed must be conceded to have been material; but when the evidence in the case was closed no testimony had been given to establish any of the facts thus laid before the jury in the opening of the case by plaintiff's counsel, whose reputation for ability, candor and integrity was in some measure a guaranty that the facts were as stated, and that proofs would be made of the same.

The facts alleged in the paragraphs of plaintiff's opening objected to, if they existed, were competent testimony for the plaintiff in making out his case; and the promise of his counsel that he would prove them should have been redeemed or the statements should not have been made. It impressed upon the minds of the jury not only the facts stated, but a theory of the case which could not have been inferred from the evidence independently of those facts. They gave a coloring to very much of the evidence that made it false, and other portions unreliable and delusive and prejudicial to the defendant to an extent beyond any known means of ascertaining by court or counsel. They could not fail to impress the jury unfavorably towards the defendant, and they were allowed to remain as presented, without comment, throughout the trial. Such a state of things cannot exist and a fair trial be had or justice in the case be properly administered.

The mischief complained of in the opening statements of counsel has, on several different occasions, received the attention of this Court. In the case of *Scripps v. Reilly* 35 Mich 371, which was for libel, counsel for the plaintiff

was permitted against objection to read, in his opening statements to the jury, certain articles from the newspaper in which the libel appeared, upon his statement that it was done in good faith and that he intended to offer the same in evidence; but he failed so to do. The Court say: "if all the articles allowed to be read in the opening statement had been afterwards given in evidence, their reading in the opening, however contrary to settled practice, might not have offered anything proper for consideration here. Questions concerning their admissibility would fall under another head. But where it is manifest the trial judge has fallen into a serious mistake—one likely to have hurt a party—an error mentioned in the books as an abuse of discretion—this Court is bound to take cognizance, or disregard its constitutional duty of supervision. It is a chief duty of the trial judge to secure fair play to litigants, and so far as practicable to shape the order and course of proceedings in such a way that neither party will be put to a disadvantage not due to his case or its mode of management by his counsel." The Court in this case further say: Rule 62 of the circuit court "indicates very distinctly the extent of both right and duty. It draws a line between 'evidence' and 'facts,' and contemplates a 'fair' statement of the 'facts' expected to be 'proved' before putting in the testimony or 'evidence' by which these 'facts' are expected to be 'proved.' Neither the nature of the proceeding, nor that fairness it is intended to promote, nor the plain meaning of the rule, gives any sanction to the claim that in this opening statement the plaintiff's counsel may read at length to the jury any documentary matter he may assert his intention of subsequently offering as evidence."

I fully agree with Mr. Justice Graves in the case, in the following statement by him of the tenor and scope of the text-books upon this subject, and the rule as he deduces it therefrom:

"The text-books in this country which deal with the subject are distinctly agreed concerning the end and scope of this opening address. They all represent it as a proceeding

prefatory to putting in evidence, and as one practically necessary to make an advance exhibit of the legal nature of the controversy and its salient peculiarities, and enable the judge, jury and opposing counsel to apprehend the necessities of the plaintiff's case and correctly understand the drift and bearing of each step and each offer of proof as it shall occur subsequently. And considering that its office is to afford preliminary explanation, that it is to precede proofs and precede controversy before the jury, and is not to embody or convey proof or prepossess the jury, they unite in substantially denying the right to make use of it to get before the jury a detail of the testimony expected to be offered, and especially any not positively entitled to be introduced, and deny the right to use it as a cover for any topics not fairly pertinent. A brief summary or outline of the substance of the evidence intended to be offered, with requisite clear and concise explanations, are considered proper. But a relation of expected oral testimony at length, or a reading of expected documentary proofs at large, or any other course fitted to mislead the triers, should not be tolerated." * * * Green's Pr. § 443; 1 Burrill's Pr. 234; 3 Waite's Pr. 86; 1 Tiff. & Smith's N. Y. Pr. 553; Puterbaugh's Ill. Pl. & Pr. (2d ed.) 589; Bouv. Inst. 333, 334. See also 1 Archb. Pr. 191; 3 Chit. Gen. Pr. 878 et seq.; 2 Broom & Hadley's Comm. (Am. ed.) 264, 265; *Ayrault v. Chamberlain* 33 Barb. 229.

In that case some of the articles read to the jury in the opening were not offered in evidence at all, and the court says: "The omission [of the circuit judge in his charge] to tell the jury to disregard the articles not offered was no doubt an inadvertence of the court. The effect, however, was the same as if it had been designed. But if the charge had been to disregard all unadmitted articles, it would not have cured the error. Because it is quite impossible to conclude that the jurors had not been influenced too far by the erroneous rulings and proceedings to be brought into the same impartial attitude by the court's admonition, which they would have held if the counsel for defendant in error

had been properly confined in his opening statement. * * * The error in this case was not cured, and is one subject to review, and is sufficient to require a reversal."

In that case the error consisted in the prepossession by the jury of the facts read to them by counsel from a paper, of which no testimony was offered; and in the present case the prepossession of the facts was obtained by a statement to them of the same by counsel, of which no proof was offered. There is really no essential difference in the sources from which the error arises in the two cases.

The case of *Scripps v. Reilly* was again before this Court in 38 Mich. 10, and the same question was reviewed, though in a different form, and Mr. Justice Marston, in delivering the opinion of the Court, said:

"Everything having a tendency to prejudice or influence a jury in their deliberations, which is not legally admissible in evidence on the trial of the cause, should be, so far as possible, kept from coming to their knowledge during the trial. An impression once made upon the mind of a juror, no matter how, will have more or less influence upon him when he retires to deliberate upon the verdict to be given, and no matter how honest or conscientious he may be, or how carefully he may have been instructed by the court to not permit such incompetent matters to influence him, or have any bearing in the case, it will be very difficult, if not impossible, for him to separate the competent from the incompetent, or to say to what extent his impressions or convictions may be attributed to that which properly should not have been permitted to come to his knowledge. But whatever the reason for the rule may be, all courts agree in excluding incompetent testimony, and that an error in this respect will be sufficient cause for reversal. This rule would be but slight protection if counsel or witnesses could be permitted to make a statement, but not under oath, of the incompetent testimony, or counsel state the same fully to the jury in their argument, or otherwise. The essence of the wrong consists in the fact that such incompetent testimony is brought to the attention of the jury, more than in the

method adopted in communicating the fact. No matter how the information is derived, the result is the same."

The question here made was also considered by this Court in the case of *Porter v. Throop* 47 Mich. 313. In that suit the proponent was charged with improper conduct in procuring a will to be made in his favor by his mother, and the contestant, in opening his case to the jury, stated that the proponent had been guilty of the like disreputable conduct in influencing his feeble brother to make a will in his favor. Contestant was permitted to make this statement against the objection that the matter stated was irrelevant and could not be proved. Mr. Justice Cooley, in delivering the opinion in that case, said of the jury:

"How far their minds would be poisoned by the assertion it would be impossible to know; but the statement of respectable counsel that the damaging fact was susceptible of proof, would almost inevitably, in the minds of those unaccustomed to an investigation of legal facts, attach suspicion to the conduct of the party accused, and place him at a disadvantage not justified by the law. It would compel him to take up the burden of defending his actions and motives before they had been in any legal manner attacked or impugned, and while all legal presumptions were in their favor. * * * It seems almost inevitable that this course should have had some tendency to defeat the ends of justice. The case was one which, upon its facts as subsequently developed, might well be considered close and doubtful. Whichever side began the case with a prejudice in the minds of the jury against his adversary, was possessed of an advantage which might in the end prove controlling. If that advantage was obtained by putting before the jury damaging facts which could not be investigated in the case, and which for that reason it was improper for counsel to assert, it was an unfair and illegal advantage, and the court should have interposed to prevent it with promptness and efficiency."

I think these remarks apply with great force to the present case. It is true, the facts stated to the jury in that case were irrelevant,—and so were many of them in the present

case,—but, relevant or irrelevant, if no proof is made or offered of them, the injurious effect is the same; and I think even greater in the case of relevant than of irrelevant testimony. The irrelevancy of the facts may be so apparent to the jury that their statement will make no lodgment in their minds or be entirely rejected by them without any instructions from the court; while if the facts stated and not proved are relevant, this will seldom be the case.

I fully agree with the learned counsel for the plaintiff that, in a case like this, "it would be remarkable indeed if the evidence in all things bore out the opening" statements of counsel, "and all that can be required of them is that they act in good faith, with a proper sense of the obligations which must rest upon them as officers of the court." But there is also an obligation resting upon clients, in this regard, to place the facts they can prove, and the names of persons by whom they can prove them, fully and truly before their counsel. This is a duty they owe to the opposite party and to the court; and if they fail to do this, and thereby lead their counsel into the error of making statements, in their opening to the jury, of facts of which there is no proof, to form or complete a basis for some favorite theory in the case, the client should take the consequences of such a proceeding, and the opposite party should not be prejudiced or allowed to suffer therefrom. Of course, slight omissions, discrepancies or mistakes not prejudicial will not be noticed; but where there has been a wide departure from the rule in this regard, one which is likely to injure the party affected thereby, it becomes the duty of the appellate court to consider the same, and if possible relieve against such injury. And the magnitude and importance of the case only makes the duty of the appellate court more imperative. After a careful examination of the record upon this subject, I am unable to avoid the conclusion that, under the rule established for the guidance of court and counsel, and under the decisions of this Court above referred to, the alleged errors now under consideration are well assigned.

Exactly what action is necessary for the party to take who is injured by such irrelevant or unsupported statement of facts, made by counsel to the jury, in order to save his rights, is not very well settled by the practice in this State. The practice, however, should be such as will, in all cases of the kind, fully protect the injured party. The question relates to the orderly conduct of the case upon the trial, and is one peculiarly within the province of the circuit judge, and within his discretion so long as that discretion is properly exercised; and I fully agree with the previous decision of this Court, that "when it is manifest the trial judge has fallen into a serious mistake—one likely to have hurt the party—an error mentioned in the books as an abuse of discretion—this Court is bound to take cognizance, or disregard its constitutional duty of supervision." Circuit court Rule 97 provides for an issue roll for the use of the court and counsel upon the trial of a cause. By it the court is advised fully what issues are in the case, and it is the duty of the trial judge, when counsel make their opening statements to the jury, to see to it that facts which are clearly inadmissible under the issue are not stated in the opening.

Objections of opposite counsel can do little or no good. He certainly cannot anticipate such statements will be made, and he cannot object to them until after they are made. It is then usually too late to remedy the mischief, and as to facts stated which are relevant and not proved, objections must necessarily be of no avail. The jury having been prepossessed with these facts all through the trial, it can hardly be expected that they would remain—and go to the jury-room—uninfluenced by the impressions made.

While it would be very proper for the court in many cases to instruct the jury to banish from their minds entirely any views they might entertain, induced by such statements, (and it is possible such instructions might sometimes have the effect of remedying the evil), still, if the verdict should be against the party prejudiced, it would be impossible to know whether the court's instructions were heeded or not.

The law never places the rights of parties in such jeopardy, and there is something wrong in any practice which allows it to be done. In this case no suggestion whatever seems to have been made to the jury by the court, or excuse offered by plaintiff's counsel in their presence, in regard to the irrelevant matters, or to the facts stated which were unsupported by any evidence. The party offending does so at his peril, and he has no occasion to complain if he finds the chances against him. I can see no occasion for any action on the part of the injured party until the verdict has been rendered. There can be no safety in requiring as a condition precedent to taking future remedial action, that the party injured shall make objection or take exceptions, or apply to the court for special instructions, when it would be impossible for him or the court to know whether or not the instructions, if given, would or could be made to remove the mischief produced by the erroneous proceedings. It is only when the verdict is against him that he has any cause to act. He may then move for a new trial at the circuit, or have resort to his writ from this Court; and this seems to have been the course pursued by the defendant in this case.

In connection with this subject the last assignment of error may be properly considered. Under it exception is taken to the remarks of plantiff's counsel in making the closing argument. Some things were stated not warranted by the testimony, and the remarks were not strictly in order, but I do not think they can be regarded as seriously prejudicial.

Seven assignments of error relate to testimony showing the health and physical condition of Mrs. Wardle, covering the period during which defendant's pleadings allege plaintiff had criminal conversation with her. The object of the testimony was to prove the untruthfulness of the charge by showing her physical infirmities such as to render it impossible or at least improbable. This testimony was competent and the several objections were properly overruled. It is claimed that the testimony giving Mrs. Wardle's

statements, showing her condition at the time they were made, was especially objectionable. The rule in this State, however, has been otherwise settled. *Hyatt v. Adams* 16 Mich. 200; *Johnson v. McKee* 27 Mich. 471; *Elliott v. Van Buren* 33 Mich. 49.

After the plaintiff had rested, the defendant, to show that Mrs. Wardle was not in the low state of health testified to on the part of the plaintiff, propounded the following questions to Miss Ostrander, one of his witnesses and a lady who lived in the Wardle family: "1st. State whether Mrs. Wardle was in the habit of driving out a good deal herself and visiting at various places. 2d. Will you state whether Mrs. Wardle was, before the time of Mr. Wardle's coming home with this letter (meaning the Brenton letter) that you speak of, in July, in the habit of remaining home most of the time; whether she did a good deal of visiting from one town to another?" These questions were both objected to by plaintiff's counsel, but no ground was stated for the objection. The objections were sustained by the court. This was error. The testimony tended to meet the case made by the plaintiff on that point, and the answers should have been allowed. (The permission granted by the court was insufficient to cover the ground; it did not cure the error.)

On the re-examination of Mrs. Wardle, the plaintiff proved a conversation between her and her husband, in the presence of her father, which occurred on Friday night before she left, relating to the charge he made against her, and her avowal of innocence, and her intention to prove it. This was objected to. It was not proper re-examination and was irrelevant. The proof was of a character to prejudice and was erroneously admitted.

John McVicker testified, on the part of the defendant, that he was the managing editor of the *Evening News;* that he superintended and gave directions in preparing the matter for the paper; that he had general supervision of what matter went into the paper outside of the editorial columns proper; that the alleged libelous article was in his department, and was written by himself; that he got his

information in regard to it from publications in the Tilsonburg *Observer*, the Tilsonburg *Liberal*, the Toronto Globe, the Woodstock, Ontario, *Times*, and the Chicago *Times*—all Canada papers except the last; and after stating some other efforts made to ascertain the facts, he was asked, "Why was this article published?" Counsel for plaintiff objected to the question, but stated no grounds for the objection. The witness further stated that the defendant first saw the article on the day it was published in the *Evening News*, and that witness informed the defendant of the publicity of the scandal and the facts he had learned at that time.

James E. Scripps, the defendant, was also examined, and testified in his own behalf that he was not acquainted with the plaintiff when the article complained of was published; that he believed what McVicker told him in regard to the matter; and that he had no ill-will of any kind towards plaintiff. Defendant's counsel then asked the witness the following question: "State whether you had any purpose to injure him [the plaintiff] in assenting to the publication, or whether you did it on other grounds." Plaintiff's counsel objected, saying: "It is not proper cross-examination, and the article itself must justify the grounds, if it is privileged." The court sustained the objection to each of the foregoing questions, and exceptions were properly taken.

I think the second question was proper and the defendant should have been permitted to make his answer. It enabled him to state with what motive and faith he made the publication. The plaintiff sought to obtain exemplary damages; and to mitigate those, at least under the rule in this State, it was clearly admissible. In *Scripps v. Foster* 41 Mich. 746, which was an action for libel, Mr. Justice Marston says: "In this State, it is the settled doctrine that in an action like the present, where the plaintiff seeks to recover exemplary damages, the defendant on the trial may introduce facts and circumstances tending to show that he acted in the matter complained of in good faith, and that after using all proper precaution he had good reason to believe

that the facts as published were true." It was substantially conceded by counsel for plaintiff, in his opening, that if the Brenton letter was shown to be in the handwriting of the plaintiff, the defense would be complete. The case was close upon the facts,—sufficiently so at least to make the question of motive and good faith very important; and under the practice in this State, as settled by this Court, the defendant was not limited in making his proofs upon that subject to outside facts and circumstances, but could himself testify directly as to his good faith, and what were his motives. *Watkins v. Wallace* 19 Mich. 57; *Beebe v. Knapp* 28 Mich. 53. This, however, he was not permitted to do.

Upon another branch of the case, as it went to the jury, the testimony queried after was entirely proper. The case was tried on both sides upon the theory that the article complained of was prima facie privileged; and the court (I think correctly) so charged the jury. The University of Michigan is the most useful and important and the best known of all our public institutions. It is the pride of our commonwealth. It is the seat of science and of education in literature and art, and in all the learned professions; and is open and free to all our youth, both male and female, throughout our borders. Citizens from all parts of the Republic and adjacent provinces, in large numbers, avail themselves of its benefits. Every citizen, man, woman and child in this State is interested in its good name, fame and prosperity. Its general management and supervisory care is intrusted to a board of regents elected by the people, and its pecuniary support is derived from the public treasury. Among the departments at the institution, authorized by the Legislature, is that of medicine. Great care is required and has always been exercised in selecting pure, intelligent, learned men for the professorships in the various departments. Not only is all the learning in the medical profession taught at the University, but to aid the student and give him practical instruction in the pursuit of his studies, the professors in this department are authorized to treat all

manner of ailments and diseases, at the institution, of all persons who may apply for relief there. For more than thirty years, through the vigilance, probity and ability of its president and several faculties, it has acquired and justly so, a name and fame for usefulness, unsurpassed and perhaps I might say unequaled, by any other of the kind on this continent. That good name, fame and usefulness, every person knows, has been acquired only by the efforts and energy of professors who have borne irreproachable lives and characters in carrying forward the great works entrusted to them, and can only be maintained by such. No one can fail to discover that any gross moral delinquency or criminal conduct on the part of any member of any one of the several faculties, must necessarily injure and impair the usefulness of that department, and seriously affect its good name and fame. Dr. Maclean stood at the very head of the department of surgery, and had for several years. Mrs. Wardle was an invalid from the province of Ontario, visiting the institution for treatment, and for some time occupied one of the public hospitals. It was charged by her husband and believed by her family, and reported through several papers in the province where she lived, that the plaintiff had taken advantage of his profession and the position he occupied, to seduce Mrs. Wardle, and held criminal conversation with her; and that the evidence of his guilt was in letters of his own writing in possession of her husband; and was so strong that Mr. Wardle had discarded his wife and was so shocked by the disclosure that he had lost his reason and become violently insane. If the charge was true, the defendant, as editor and publisher of a paper with 35,000 or 40,000 subscribers, had not only the right, but faithful journalism made it his duty, to publish these facts; to "cry aloud and spare not." His paper would have been unworthy the support of any people making any claim to morality, had he failed so to do. The charge was severe, though if true, the language was not unjust; neither was it more than might reasonably be expected from "honest indignation" in such a case. Some allowance must be made for

that. The charge concerned a public man in a high public position, in charge of most important public interests; those in which all the people were interested. He was a public servant, paid from the public funds; and the article concerns his conduct while in that service, which was a proper subject for public discussion and criticism, and I think the article was privileged within the law as expounded by this Court. Certainly it must be so if charges of alleged fraud against a member of a board of trade is within the protection, as held by my brother Cooley in *Atkinson v. Detroit Free Press* 46 Mich. 341; in which opinion upon this subject I fully concur. If then, the publication was privileged, whether true or not, (unless the privilege was abused,) it was a perfect defense; but if through malice, carelessness or neglect it was lost, (as it might be), the defendant was liable. The plaintiff assumed that defendant abused and lost his privilege. In such event the good faith of the defendant was competent testimony to mitigate damages, and his motives and object proper upon the subject of malice. For that reason he should have been permitted to make his answer to the question objected to, and whatever other showing he had upon that subject. *Farr v. Rasco* 9 Mich. 353; *Huson v. Dale* 19 Mich. 17; *Foster v. Scripps* 39 Mich. 376 and 383; *Scripps v. Foster* 41 Mich. 742; *Miner v. Detroit Post and Tribune* 49 Mich. 358; *Atkinson v. Detroit Free Press* 46 Mich. 376; *Barrows v. Bell* 7 Gray 301; Addison on Torts 931; Cooley on Torts 218, 210, 211; Odgers on Libel and Slander 4, 182, 264, 265; *McBee v. Fulton* 47 Md. 403.

McVicker was one of the editors; in fact, had principal charge of matters concerning this State, and knew the reasons for giving every article in his charge to the public. He it was who wrote the article, and he and the defendant authorized its publication. He consulted with the defendant about publishing it, and knew just what motives prompted not only the writing of the article, but its publication. His individual reasons and motives, unknown to and unconnected with those of defendant, were unimport-

ant; but so far as they might have been or were approved by the defendant, they became the defendant's, and were competent, and I think, should have been given to the jury. The rejection of this testimony was also error.

The deposition and testimony offered to show the handwriting of the Brenton letter to be plaintiff's, by using photographic copies of writings conceded to be his, was inadmissible and was properly rejected. No necessity was shown for a resort to secondary evidence; and, at least until such exigency is shown to exist, the reasons given by Chief Justice Folger in *Hynes v. McDermott* 82 N. Y. 50, are sufficient for its exclusion. He says: "We may recognize that the photographic process is ruled by general laws that are uniform in their operation, and that almost without exception a likeness is brought forth of the object set before the camera. Still, somewhat for exact likeness will depend upon the adjustment of the machinery, upon the atmospheric conditions, and the skill of the manipulator. And in so delicate a matter as the reaching of judicial results by the comparison of writings through the testimony of experts, it ought to be required that the witness should exercise his acumen upon the thing itself which is to be the basis of his judgment." The objection was not one of form only, but related to matter of substance, and was timely taken.

All the other assignments of error relating to rulings on the admissibility of testimony, I have examined with care, and have not discovered any error therein which can be regarded as prejudicial to the rights of the defendant. The record shows that the learned judge before whom the case was tried used his best endeavors, amid all its complications, to exercise a fair and reasonable discretion in all his rulings upon the trial, and in such case this Court will not disturb them for immaterial fault or error that could not harm the complaining party. *Somerville v. Richards* 37 Mich. 299; *McKeown v. Harvey* 40 Mich. 228; *Shipman v. Seymour*, id. 274; *Fraser v. Jennison* 42 Mich. 206.

The plaintiff's first and second requests should have been

given. They were warranted by the testimony. They were not given in substance in the charge, and particularly the second. The court substantially told the jury that, under "proper restrictions, in a proper and decent manner, and in a right spirit," the press of the country had a right to comment on the libelous article from the Canada papers, "call attention to it," and "demand investigation." These restrictions were too indefinite. They attached conditions to privileged communications, unknown to the law, most difficult to prove, and, as regards what constituted them but few men would agree. The difference between the charge and request is very material. Had the request been granted the jury would have understood that when the interest of the University was involved, the occasion was a privileged one, and that it was proper to let the people understand what was being said about it, with such comments as the occasion might call for. The instruction asked was plain and simple. The charge, as given, attached important conditions, upon which any jury might find much difficulty.

Counsel for plaintiff asked the court to give his third request as follows: "That the article sued upon is prima facie privileged, and, whether true or false, no recovery can be had upon it unless the jury are satisfied that it was published through malice towards plaintiff." This request was properly refused. The article was prima facie privileged, and the authorities all agree that the defendant could not loose his protection without he had been guilty of actual or legal malice. Actual malice, or as it is frequently termed, express malice or malice in fact, is always *towards* the plaintiff, and intended, and is that feeling of the human heart which prompts the desire to do another harm or injury; and of all the passions it is the most wicked. This is the kind of malice referred to in the plaintiff's request just given. And when a privileged communication is published with this feeling as its controlling motive, the publisher loses his protection.

There is also another way, as I have already said, in which he may lose his privilege, and without entertaining

any actual malice, or even ill-will towards the injured party. He may do so if he publishes as true what he knows to be false, of another, or if he publishes libelous matter without believing it true or having probable cause to believe it true, or if he suffers the publication to be made carelessly or negligently without knowing or having probable cause to believe its truth. Either of these cases would constitute what is termed in the books Malice in Law; and, like malice in fact, will cause the publisher to lose his privilege.

It is left for the trial judge to admit the testimony tending to prove the existence of either kind of malice, when it is alleged, and which will necessarily vary according to the circumstances of each particular case. A libel, though privileged, may itself contain evidence tending to show actual malice, as for instance, when the language used in the libel is so violent, intemperate and vindictive, as to clearly overshadow a plain statement of the facts or matter claimed to be proper to be given to the public. I quite agree with Mr. Justice Cooley, "that the case must be very clear to justify the court in a conclusion of malice before the extrinsic facts are shown," and I will say further that whether the libelous article contains such intrinsic evidence as tends to show actual malice, is a question always to be determined (however difficult it may be) by the court, and if it does not, it should not be allowed to go to the jury upon that point. The request ignores the existence of any testimony in the case of legal malice, and was therefore wrong, and the plaintiff's fourth request has the same infirmity.

There was no error in refusing to give the plaintiff's fifth, ninth and eleventh requests. They contained no questions of law, and the views of the court were not required on the questions of fact.

The sixth, eighth, tenth, thirteenth and fourteenth requests were all substantially given in the charge of the court.

There was testimony in the case tending to prove legal malice, and therefore the plaintiff's twelfth request was properly refused.

The plaintiff's counsel, in their seventh request, asked the court to charge the jury that they could not infer malice from the evidence that the article was untrue, but it must be shown, in addition, that the defendant knew it was untrue before such inference can be made. The request states the law correctly. Odgers, 267, 274; Townshend on Slander and Libel 599. And upon the claims made by plaintiff's counsel, the request was a very proper one for the jury, and should have been given as requested. Its substance does not appear in the charge. The refusal of the court to allow the jury to take the exhibits in the case with them to the jury room, was within his discretion; and his action in this matter cannot be reviewed in this Court.

No handwriting of the plaintiff was introduced in evidence which any of the witnesses saw made, so that in ascertaining whether the Brenton letter was in the genuine writing of the plaintiff the important testimony on both sides came from comparing it with what was conceded on the trial to be Dr. Maclean's handwriting. Witnesses on the part of the plaintiff testified they had seen him write, and knew his writing, and after comparing the Brenton letter with the genuine, pronounced it not the plaintiff's. There were eleven witnesses, besides the plaintiff's wife, who were sworn for the plaintiff on the subject of handwriting, none of whom were experts. On the part of the defendant five were sworn,—all experts of unquestioned ability,—who pronounced it genuine. It is not easy to see what advantage one set of witnesses had over the other, except as the one had seen the doctor's movement of the hand as he carried it over the paper on several different occasions in making the writing, and were able to carry that operation in their minds. In any event, if the testimony of experts can ever be satisfactory and rise to the dignity of good and convincing evidence, it is upon the subject of determining the genuineness of handwriting under the circumstances as they existed in this case.

The instance suggested by counsel for one of the parties in this case very happily and with much truthfulness shows

the relative circumstances under which the testimony of handwriting in a case like this must be considered and weighed by the jury. "Three witnesses are called to prove the handwriting of A. The first has seen him write five times; the second has received five letters from him in as many years, and has none of them before him; the third has five admitted letters before him to compare with the disputed one. It is evident the first witness must give his opinion upon a comparison with the writing he saw A. do. The second must rely upon his comparison with the letters he received. It is entirely clear that, added to the uncertainties of the testimony given by the third witness, are the uncertainties of memory in the cases of the first and second. It would be marvelous indeed if the memory of the first and second witnesses gave them an absolutely correct idea of his handwriting. The third witness has an absolutely accurate standard for comparison." It would seem that the value of the third man's opinion ought to be as good as that of either of the others.

The judge charged the jury, as the law established by this Court, that expert testimony "is not of the highest quality, and only the necessities of the case have permitted it to be introduced at all in the administration of justice; testimony which is not considered one way or the other of the highest order, yet testimony to be considered honestly by the jury; to be given such weight as it seems intrinsically to have, as delivered by the witnesses upon the stand." While this may be true in some cases, I think it an improper charge to give in this class of cases; and I very seriously doubt its usefulness in any case. It tended to deprive the defendant's testimony of its proper consideration and weight by the jury, and it should not have been given. It usurped to a certain extent the province of the jury.

It is unnecessary to discuss further the questions raised under the fifty-third and fifty-fourth assignments of error.

The remaining errors assigned upon the charge relate to the instructions given to the jury as to how they should answer the special questions submitted to them at the re-

quest of counsel. These instructions were improperly given. They informed the jury under certain circumstances what answers to make to the several questions submitted. I have already had occasion to submit my views to some extent on the questions raised by this exception in *People v. Murray*, post p. 289.

The object of the statute (Comp. L. § 6026; How. St. § 7606) requiring the jury to answer specifically questions giving their conclusions on the facts necessary to be found to entitle a party to recover, was to ascertain whether or not they had found sufficient facts from the evidence to support their general verdict under the law as given them by the court. It is the province of the jury to find these facts from the evidence, without aid or suggestion from the court, and this can never be done if the jury are told in advance what facts are necessary to be found to support the verdict, or what answers to the questions propounded will be consistent therewith, or what they must find in order to answer a question propounded in the negative or affirmative. This practice will make the general verdict control the findings, instead of the findings control the general verdict; and thereby the object of the framers of the statute will be defeated. This was the result of the practice indulged in this case. The effect is to make the court, and not the jury, decide the main issues in the case. *Cole v. Boyd* 47 Mich. 98. The special findings of the jury were sufficient to support the general verdict had the proceedings upon which they were based not been erroneous.

Several minor questions remain unnoticed; but the length this opinion has already reached forbids further discussion; and it can only be excused in view of the important questions involved and the great interests at stake.

Entertaining the views herein expressed, I think the judgment of the Superior Court should be reversed, and a new trial granted.

Afterwards, at the January term 1884, when Chief Justice Graves had retired from the bench and been succeeded

by Mr. Justice Champlin, a motion for a rehearing was made upon grounds which are noticed in the following opinion. Submitted January 15, 1884. Denied January 22.

John Atkinson for the motion. Relationship to counsel disqualifies a judge: *Hasceig v. Tripp* 20 Mich. 216; *Stockwell v. White Lake* 22 Mich. 341; *Peninsular Railway Co. v. Howard* 20 Mich. 18 citing *Queen v. Justices of Hertfordshire* 6 Q. B. 753; *Queen v. Justices of Suffolk* 18 Q. B. 416; *Queen v. Justices of London* id. 421, and Cooley's Const. Lim. 410; *Mich. Air Line Railway v. Barnes* 40 Mich. 383; *Oakley v. Aspinwall* 3 Comst. 547; *Newcome v. Light* 58 Tex. 141: 44 Amer. 604; *Hibbard v. Odell* 16 Wis. 633; *Call v. Pike* 66 Me. 350; *Hall v. Thayer* 105 Mass. 219; *Taylor v. County Commissioners* id. 225; *People v. Cline* 44 Mich. 290; *Bullard v. Trice* 63 Ga. 165; *Hardy v. Sprowle* 32 Me. 310; *Bates v. Thompson* 2 Chip. 96; *Foot v. Morgan* 1 Hill 654; for the attorney has a lien on the judgment: *Reed v. Coots* 43 Mich. 321; *Wells v. Elsam* 40 Mich. 218 citing *Rooney v. Second Avenue Railroad Co.* 18 N. Y. 368; *Dowling v. Eggemann* 47 Mich. 171; *Dennis v. Kent Circuit Judge* 42 Mich. 249; *Pipher v. Lodge* 16 S. & R. 214; *Melson v. Dickson* 63 Ga. 683; *Funk v. Ely* 45 Penn. St. 444; such a state of facts would disqualify a juror: *Quinebaug Bank v. Leavens* 20 Conn. 87; *Jaques v. Commonwealth* 10 Grat. 690; *Georgia Railroad Co. v. Hart* 60 Ga. 550.

Levi T. Griffin and *Otto Kirchner* against.

Cooley, C. J. Motion is made for a rehearing in this case upon grounds which will be noticed briefly.

I. It is said that to meet the testimony that the letter the plaintiff was charged with having written was his, "he or his friends prepared a number of witnesses to testify in his behalf by furnishing them with what purported to be specimens of his handwriting. From these specimens, which they refused to produce, the witnesses thus prepared, testified that they knew his handwriting, and that the letter was not

his. The defendant's counsel, on the hearing, urged the impropriety of this practice, and insisted that it was ground for reversal." And it is complained that in neither of the opinions was the point noticed.

This Court reviews the rulings of the trial courts so far as they have been specifically objected to. Questions of propriety in the conduct of parties, which have not been brought to the notice of the court below and ruled upon, are not in this Court grounds for a reversal. If any witness in the trial court testified to the plaintiff's handwriting without being shown to have knowledge of it, it must be assumed that the trial court on motion would have struck out his evidence. If it was shown that he knew the handwriting, the evidence must stand for what it was worth. But if counsel could convince the jury that the witnesses had been "prepared," as he claims was the case, it is not likely their evidence would have received much attention.

II. It is complained that the Court took no notice of the exception taken to the evidence of an expert, who testified that a letter like the one in dispute could be built up from specimens in the hands of a skillful writer. The question which called for the evidence, it is said, was a hypothetical question, and as there had been no evidence that any one had specimens of the plaintiff's handwriting, there was no foundation laid for asking it. The Court did not consider the objection well grounded in fact, and do not now. There was considerable evidence by witnesses who had seen and possessed specimens of the plaintiff's handwriting, and his profession and public position would render it probable that many other persons must have had them. No member of the Court had any doubt of the question being allowable, and the ruling complained of was passed by without notice as being so obviously correct as to call for no special mention.

III. Two requests for instructions by the defendant, which are said to involve "all that is valuable in the privileges of the press," were not specifically given, namely: *First*, whether in cases where the publication was priv-

ileged, and where it is conceded the plaintiff must prove falsehood and malice, malice may be inferred from falsehood in the absence of any evidence that the defendant knew the publication to be false; *second*, whether there was any evidence in the case to prove malice. Whether the trial court was right or wrong in not giving these instructions has not, it is said, been decided by this Court.

No court has gone further than has this in upholding the privileges of the press, and very few so far. If there has, by oversight or otherwise, been any failure to recognize and support them in this case, the Court would be prompt to make the correction on its attention being called to the need for it. But there has been no such failure. It is true, there was no evidence in the case of a malicious purpose on the part of the defendant to injure the plaintiff, but there were proofs from which the jury might infer that the publication was made in entire disregard of the plaintiff's rights, and from interested motives. The jury drew this inference, and returned a special finding that the publication was made, not from any motive upon which the defendant was privileged to act, but for "sensation and increase of circulation." A false and injurious publication made in a public journal for sensation and increase of circulation is unquestionably in a legal sense malicious. The finding therefore rendered the question whether malice in any other sense might be inferred from the falsity of the publication entirely immaterial. Neither in morals nor in law is the mercenary publication more defensible than if the purpose were to defame and injure. But in respect to the proof of malice the charge of the trial judge could scarcely have been made more favorable to the defendant than it was. He told the jury over and over again that, the article being privileged, the plaintiff must show "that the accusation contained in the article is untrue;" that he must "convince them by a preponderance of testimony;" that it must be "the kind of testimony which the plaintiff is called upon to produce to the satisfaction of the jury;" that "the article is privileged; it is for the plaintiff to remove the privilege, not only by

showing that the article was untrue, but by proving that it was meant to injure;" that if "the plaintiff has failed to prove the untruth of the article, and the maliciousness with which it was published, then, the article being privileged, there would have to be a verdict for the defendant." The jury could not have failed to understand from the charge that the plaintiff was not at liberty to stop with proof of falsity, but that he must give further proof before the jury could be asked to infer malice. The trial judge appears to have been particularly careful and anxious to see that the defendant's privilege, if he had kept within it, should be preserved to him.

IV. A number of special questions were submitted to the jury, and the judge in submitting them said: "Your answers to these questions must agree with your general verdict. If you should find a verdict for the plaintiff and your answer was really for the opposite party, your answers to the questions will overrule the general verdict, so that you must be careful and try to answer those questions intelligently, and have no conflict between your general and your special findings." This instruction is said to be erroneous because it leaves the jury to find a general verdict, and then requires them to make their answers to the special questions conform to it; whereas their duty is first to answer the questions, and then give such general verdict as the answer would require. It is quite probable that the trial judge was a little careless in the use of language in this part of his charge, but if counsel considered it liable to mislead, it is to be supposed they would have called attention to it at the time that the judge might make proper correction before the jury retired. That was not done, and the time for making complaint was suffered to go by. Further than this we deem it important only to refer to *People v. Murray*, post, p. 289 decided at the last term of this Court, where a similar objection was considered and overruled.

V. The point is now made that one of the members of this Court, who was also one of the majority in deciding the case, ought not to have participated in the decision, for

the reason that his son is a member of the partnership of attorneys who were attorneys of record for the plaintiff in bringing the suit. In support of the position, a number of cases are cited in which it has been decided that a judge cannot sit in a cause in which he has a personal interest, or where he is nearly related to one of the parties. They have no relevancy to the point made, and the point itself presents no question of law. How little there is to it in fact, will be apparent when it is stated that neither the son nor his partner ever took any part in the proceedings in this Court, or ever appeared before us in the case, and that the record in this Court upon which the case was decided showed very conclusively that the management of the case in the trial court had been in other hands.

VI. The majority opinion in this case was drawn up at the request and under the assignment of the then Chief Justice, after full and careful examination by him of the record, and under an undoubting conviction that the rulings of the trial judge had been eminently fair to the defendant, and in entire accord with the previous decisions which this Court had made in protection of the just liberties of the press. The opinion was restricted to a succinct statement of the conclusions of the Court on such legal questions presented as seemed either novel or disputable, and did not at all digress from them. The record showed that the twelve neighbors of these parties to whom they submitted their controversy and the vindication of their conduct respectively, had begun their investigation of the facts with all presumptions favoring the defendant, and continuing it on this understanding throughout, had closed it with the verdict that the publication complained of was without legal excuse. The judgment which followed was the judgment of the law, resulting from necessity from the facts thus conclusively determined.

The motion for a reargument of the case will be denied.

SHERWOOD, J. Motion for rehearing in this case is based upon two grounds:

First. That all the points raised by appellant in the case were not passed upon by the members of the Court. This is a mistake; full consultation was had upon all the points made, and patient, careful consideration given to each by every member of the Court.

But to be more specific: under the first ground relied upon by counsel for the motion, it is claimed: 1st. Witnesses who had recently seen the handwriting of plaintiff made were permitted to testify that the Brenton letter was not in the handwriting of the plaintiff, against the objection of defendant's counsel, and that the question thus raised is not passed upon in either opinion filed. All these witnesses testified that they were well acquainted with the handwriting of the plaintiff from knowledge derived from other sources. This made their testimony competent; its weight was for the jury, and the testimony could not be excluded. 2d. An expert was permitted to give his opinion on the part of the plaintiff that a letter might be built up by a skillful penman closely resembling the handwriting of the plaintiff, and this was thought to be incompetent on the ground that it presupposed a hypothesis not in the case. The testimony was not of a character likely to injure, but the defendant's witness, Ames, had testified substantially that he did not think it possible for a person to produce the Brenton letter, resembling so closely the Wardle letter, and the plaintiff's testimony did no more than rebut this, and I think was proper. 3d. The third point under the first ground relates to the vital questions in the case, which were the subject of much discussion among the members of the court; and I have nothing to add to the opinion I have already filed in the case upon those subjects. 4th. The practice of submitting specific questions with the judge's charge, to be answered by the jury, and the duty of the trial judge in submitting the same, has several times been before the Court. There is a difference of opinion among its members upon this question. I have heretofore given my views upon the subject as applied to this case, and do not desire to add anything further.

While it must be regarded as the imperative duty of the Court to consider and pass upon any point properly raised and presented for discussion by counsel in every case, I do not think it useful, necessary or desirable that every question raised should be discussed in the opinion. The amount of business required to be done by the Court and the interest of litigants forbid such a practice.

The second ground relied upon by defendant's counsel raises no question of law, and need not be considered.

The motion should be denied.

CHAMPLIN, J. Inasmuch as I was not a member of this Court when this cause was heard, I had intended to take no part in the determination of this motion; but the retirement of one of the judges, and the refusal of another to sit or take part in the decision, seems to render it necessary for me to examine the case and form an opinion of its merits.

Accordingly, I have considered the brief and argument submitted by the counsel for the defendant, and upon investigation of the record and consultation with my brethren, I am satisfied that all errors alleged to have been committed by the trial court, prejudicial to the defendant, were fully considered and passed upon by them, and I therefore concur with my brothers Cooley and Sherwood in the conclusion reached that the motion for rehearing should be denied.

Mr. Justice CAMPBELL did not sit on the hearing of this motion, or participate in its decision.

DONALD MACLEAN v. JOHN J. SPEED, A CIRCUIT JUDGE FOR WAYNE COUNTY.

Writ of prohibition—mandamus—co-ordinate jurisdiction.

1. When a court of competent jurisdiction has become possessed of a case, its authority continues, subject only to the appellate authority,

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until the matter is finally and completely disposed of; and meanwhile no court of co-ordinate authority is at liberty to interfere with its action.

2. A bill will not lie in one court to cancel a judgment entered in a court of co-ordinate jurisdiction if the latter court was competent to dispose of the case.

3. Mandamus lies to vacate an order made in one court to restrain competent proceedings in a court of co-ordinate jurisdiction.

4. The writ of prohibition issues to stay proceedings begun in one court to cancel a judgment entered by a competent court of co-ordinate jurisdiction.

Application for writs of mandamus and prohibition. Submitted February 5, 1884. Granted February 8.

H. Russel, O. Kirchner and *C. I. Walker* for relator.

Isaac Marston against.

Cooley, C. J. This is an application for a mandamus to vacate a restraining order made by the respondent in a suit instituted in the Wayne circuit court in chancery, by James E. Scripps against the relator, and also for a writ of prohibition to stay further proceedings in that suit. Respondent has filed his answer to the application, and counsel have been heard upon it.

The important facts upon which the application is based may be briefly stated. The relator, in an action instituted by him in the Superior Court of Detroit, recovered against Scripps a considerable judgment. The Superior Court is a court of jurisdiction in matters of law and equity co-ordinate with that of the circuit courts of this State, and limited only territorially. After the recovery a motion was made by the defendant for a new trial, which was argued in the Superior Court and denied. The defendant then removed the case to this Court by writ of error, and at the last October term the judgment of the Superior Court was affirmed. At the present term a motion was made and argued for a rehearing, which was denied. The purpose of these proceedings in this Court was of course to obtain a new trial.

While this was the position of the case, the suit was instituted in the Wayne circuit court. The bill alleges misconduct in the jury in the principal suit, and asks to have the judgment canceled because of it. Though not in terms praying for a new trial, the bill manifestly has that for its purpose, and is as much a bill for a new trial as if that had been the relief expressly prayed. From this statement of facts it will be very evident the circuit judge has made a mistake in assuming jurisdiction of the case and making orders in it. The matter is not one which, under the circumstances, can come under his cognizance; other courts have control of the controversy with all its incidents, and have ample competency to do in respect to it whatever may remain to be done. It is a familiar principle that when a court of competent jurisdiction has became possessed of a case, its authority continues, subject only to the appellate authority, until the matter is finally and completely disposed of; and no court of co-ordinate authority is at liberty to interfere with its action. The principle is essential to the proper and orderly administration of the laws; and while its observance might be required on the grounds of judicial comity and courtesy, it does not rest upon such considerations exclusively, but is enforced to prevent unseemly, expensive and dangerous conflicts of jurisdiction and of process. If interference may come from one side, it may from the other also, and what is begun may be reciprocated indefinitely. The country has witnessed some such conflicts in which Federal and state courts of co-ordinate powers have unguardedly or unadvisedly undertaken to hamper or restrain each other's action; and the mischiefs of which such cases are suggestive are quite as likely to arise when courts existing as part of the same system intrude with their process upon each other's authority.

The writs prayed for should issue.

The other Justices concurred.

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JACOB MICHELS v. HENRY STORK.

Conclusiveness of return of service.

The return, by an officer, of service of process is conclusive, in any collateral proceeding, upon the parties to the suit in which the process issued.

Error to the Superior Court of Detroit. (Chipman J.) Oct. 18.—Dec. 21.

TROVER. Defendant brings error. Reversed.

W. B. Jackson and *Conely, Maybury & Lucking* for appellant. An officer's return is conclusive as between the parties unless in a proceeding in the case itself or an action against the officer for making false return: *Brown v. Davis* 9 N. H. 76; *Bean v. Parker* 17 Mass. 600; *Pullen v. Haynes* 11 Gray 379; *Bamford v. Melvin* 7 Me. 14; *Case v. Redfield* 7 Wend. 398; *Putnam v. Man* 3 Wend. 202; *Morse v. Smith* 47 N. H. 477.

Browse T. Prentis for appellee.

COOLEY, J. The only question important to the decision of this case is, whether an officer's return of service of process is conclusive upon the parties to the suit in which the process issued, when brought in question in some collateral suit or proceeding.

Michels, it appears, on August 10, 1874, procured an attachment from a justice of the peace against the chattels of Stork, and put it into the hands of Constable John Gnau for service. The constable made return that by virtue of the writ he did, on the 10th day of August, 1874, seize the goods and chattels of the defendant mentioned in the inventory annexed thereto, and that on the 12th day of August, 1874, he served upon the defendant a copy of the writ and inventory, duly certified by him, by leaving the same at his usual place of abode with his wife, a person of

suitable age and discretion, whom he informed of its contents. What further was done in the attachment suit does not appear.

The present action is trover for the conversion of the property which the constable returned that he had attached. The plaintiff claims that the constable did not attach the goods at all, but that the officer and the defendant together took them away, and that they were immediately left by the officer with the defendant, and plaintiff never saw them afterwards. The officer was a witness in the case, and testified to having attached the goods and handed them over to defendant for safe-keeping; and the plaintiff in his testimony admitted that the officer told him there was an attachment on the goods at the time he and the defendant took them. It was contended, however, that the constable was not acting in good faith, and that the seizure of the goods was a mere pretense to get them into the possession of defendant.

The question in this Court arises upon the following instructions of the trial judge:

"If Mr. Gnau made a levy upon those goods, seized them under an attachment, and they were in his possession, and he delivered up the possession of them afterwards to Michels, if that is all that took place, then Michels is not liable; he would not be liable in trover, nor would he be liable in trespass. On the other hand, if this was a mere scheme between Gnau and Michels to get possession of those goods, and the writ of attachment was not levied in good faith upon the goods, but the mere determination was to get the goods in Michels' possession, and Michels and Gnau understood it and did it for that purpose and no other purpose, then Michels would be liable.

"So you see, gentlemen, it is a matter of a good deal of importance to determine, in the first place, whether Mr. Gnau really served this writ of attachment on those goods. It does not make any difference whether he pursued the proper steps or not, because Michels would not be responsible for the conduct of the officer in that regard, unless he was an active participant in it and directed the officers to do that which was against the law.

"Now, Mr. Gnau's duty undoubtedly was, when he seized

those goods, to take them in his possession or put them in the possession of somebody who acted as his agent. The object of attachment is to seize the goods and have them forthcoming at the end of suit, provided judgment is taken.

"Now, if he put an attachment on the goods, really seized them, and you find the evidence shows that, that is the end of this case. I don't care what was done afterwards; sufficient for the purposes of this case, neither the action of trespass nor of trover would lie. But if he and Michels went there and took possession of those goods for the purpose of giving them to Michels, and not for the purpose of levying the attachment, and it was not levied, then, never mind what the officer returned, Michels would be liable. That is all there is in it.

"Now, you are to determine whether Mr. Gnau did really levy an attachment on that property or not. If he did, that ends the suits. You are to determine, in the second place, if he did not levy an attachment, whether he and Michels went there to get the goods into Michels' possession simply for that purpose, and not for the purpose of levying the attachment. If Michels thought that Gnau had attached the goods, and Gnau had the proper papers to attach them —and for the purposes of this case I charge you that he did have—then Michels would not be responsible; that is, if he was acting in good faith in the transaction.

"You see the question is a very simple one. It all turns on whether Michels and Gnau went there for the purpose of levying that attachment or whether they went there for the purpose of giving Michels possession of those goods, without any regard to the attachment.

"I charge, as a matter of law, it makes no difference what the officer returned, so far as Michels was concerned; Michels had no direction or supervision over him in making a return; if he never made any return on that attachment at all, that would not hold Michels responsible. The only part or object that any of these matters have in this suit is as coloring the conduct of Michels and the officer together. But if Gnau had levied that attachment without making any return, Michels would not be responsible, because he has no control over the officer. But it is for you to determine, as a matter of fact, whether an attachment was really put on."

The purport of this instruction is, that the return is to be taken as prima facie evidence of the facts stated in it,

but that it may be contradicted by parol evidence, and if the jury are convinced by such evidence that the return is untrue, they are at liberty to disregard it. And the jury in this case did disregard it, and gave judgment for the plaintiff, grounding their action upon a finding that no attachment had in fact ever been made.

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. *Chapman v. Cumming* 17 N. J. 11; *Carr v. Commercial Bank* 16 Wis. 50; *Bond v. Wilson* 8 Kan. 228; s. c. 12 Am. Rep. 466. It has also been held that the officer's return may be contradicted in equity in a proceeding instituted to set aside a judgment founded upon it. *Owens v. Ranstead* 22 Ill. 161; *Newcomb v. Dewey* 27 Iowa 381; *Bridgeport Savings Bank v. Eldredge* 28 Conn. 556; *Bell v. Williams* 1 Head 229; *Ridgeway v. Bank of Tennessee* 11 Humph. 523. See *Fowler v. Lee* 10 G. & J. 358; s. c. 32 Am. Dec. 172; *Leftwick v. Hamilton* 9 Heisk. 310. It is also held that the officer's return is not conclusive as to facts stated therein which he must learn by inquiry of others; as, for example, that the person upon whom the process was served was the incumbent of a certain corporate office, such as that of president of a bank. *St. John v. Tombeckbee Bank* 3 Stew. 146; *Rowe v. Table &c. Co.* 10 Cal. 441; *Wilson v. Spring &c. Co.* 10 Cal. 445. See *Chapman v. Cumming* 17 N. J. 11; *Sanford v. Nichols* 14 Conn. 374; and compare *State v. O'Neill* 4 Mo. App. 221. And a person not a party or privy to the proceeding in which the return is made, is never concluded by it from showing the real fact. *Nall v. Granger* 8 Mich. 450. And where suit is brought upon a foreign judgment, it seems to be competent to disprove jurisdiction by showing, in contradiction of the officer's return, that no service was made upon the party defendant.

Knowles v. Gas-light &c. Co. 19 Wall. 58; *Thompson v. Whitman* 18 Wall. 457; *Carleton v. Bickford* 13 Gray 596; *McDermott v. Clary* 107 Mass. 501; *Gilman v. Gilman* 126 Mass. 26; s. c. 30 Am. Rep. 646; *Bowler v. Huston* 30 Grat. 266; s. c. 32 Am. Rep. 673; *Lowe v. Lowe* 40 Iowa 220.

None of these cases are analogous to the one before us; but it must be conceded that there are cases which are directly in point, and which tend to support the instructions. *Cunningham v. Mitchell* 4 Rand. 189; *Butts v. Francis* 4 Conn. 424; *Watson v. Watson* 6 Conn. 334; *Hutchins v. Johnson* 12 Conn. 376; *Smith v. Law* 5 Ired. 197; *Joyner v. Miller* 55 Miss. 208; *Abell v. Simon* 49 Md. 318; *Gary v. State* 11 Tex. App. 527; *Dasher v. Dasher* 47 Ga. 320; *Elder v. Cozart* 59 Ga. 199; *Jones v. Commercial Bank* 5 How. (Miss.) 43; s. c. 35 Am. Dec. 419. The Georgia cases appear to be based upon a statute. If it were important now to examine the other cases critically, some of them might perhaps be distinguished, but their tendency is unquestionably as above stated.

On the other hand, the ruling of this Court in *Green v. Kindy* 43 Mich. 279 is distinctly adverse to the instructions. It was there held that the return of a sheriff to a writ of replevin, in which he certified that the plaintiff in the suit had not filed a forthcoming bond, was conclusive upon the parties, and would preclude any such bond being set up. This case, which seems to have been overlooked on the trial, is in entire accord with the English authorities. *Anonymous* Lofft 372; *Bentley v. Hore* 1 Lev. 86; *Flud v. Penington* Cro. Eliz. 872; *Rex v. Elkins* Burr. 2129; *Harrington v. Taylor* 15 East 378; *Goubot v. De Crouy* 2 Dowl. P. C. 86. But it is also in accord with the great preponderance of authority in this country. In New York the doctrine was strongly asserted in a case in which a constable had served his own process, which the law of that state allowed. "The constable's return," says the court, "is conclusive against the defendant in the cause in which it is made. He cannot traverse the truth of it by a plea in

abatement or otherwise; but if it be false, the defendant's remedy is in an action against the constable for a false return." See *Allen v. Martin* 10 Wend. 300; *Boomer v. Laine* 10 Wend. 525. In Pennsylvania it was said in an early case: "It is a well-settled principle, applicable to every case, that credence is to be given to the sheriff's return; so much so, that there can be no averment against it in the same action. A party may make an averment consistent with the sheriff's return, or explanatory of its legal bearing and effect, where the return is at large; but he cannot aver a matter directly at variance with the facts stated in return, and contradictory to it, and showing it to be false. If a party be injured by the false return of the sheriff, his remedy is by action on the case against the sheriff who makes it." *Knowles v. Lord* 4 Whart. 500; s. c. 34 Am. Dec. 525. Like decisions were made in *Zion Church v. St. Peter's* 5 W. & S. 215; *Diller v. Roberts* 13 S. & R. 60; and the doctrine is recognized in *Paxson's Appeal* 49 Penn. St. 195. It has also been distinctly and strongly affirmed in Massachusetts cases. *Slayton v. Chester* 4 Mass. 478; *Bott v. Burnell* 11 Mass. 163; *Winchel v. Stiles* 15 Mass. 230; *Bean v. Parker* 17 Mass. 591; *Campbell v. Webster* 15 Gray 28; *Dooley v. Wolcott* 4 Allen 406. In New Hampshire it is said: "As between the parties, the return of the sheriff is conclusive upon all matters material to be returned; and cannot be contradicted by such parties or their privies, or by bail, endorsers, or others, whose rights or liabilities are dependent upon the suit. The remedy for a false return is by suit against the sheriff, and not by defeating the proceedings in which such return is made." *Bolles v. Bowen* 45 N. H. 124, following *Brown v. Davis* 9 N. H. 76; *Wendell v. Mugridge* 19 N. H. 112; *Angier v. Ash* 26 N. H. 99; *Messer v. Bailey* 31 N. H. 9; *Clough v. Monroe* 34 N. H. 381. To the same purport are the Kentucky cases. *Trigg v. Lewis' Ex'rs.* 3 Litt. 129; *Smith v. Hornback* 3 A. K. Marsh. 379. In Vermont and Maine the cases in Massachusetts have been followed with approval. *Eastman v. Curtis* 4 Vt. 616; *Swift v. Cobb* 10 Vt. 282;

Wood v. Doane 20 Vt. 612; *Stratton v. Lyons* 53 Vt. 130; *Gilson v. Parkhurst* 53 Vt. 384; *Stinson v. Snow* 10 Me. 263; *Fairfield v. Paine* 23 Me. 498; s. c. 41 Am. Dec. 351. The decisions in Indiana are to the same effect. *Rowell v. Klein* 44 Ind. 290; *Splahn v. Gillespie* 48 Ind. 397; *Stockton v. Stockton* 59 Ind. 574; *Clark v. Shaw* 79 Ind. 164. So are those in North Carolina, Arkansas, Minnesota and Nebraska. *Hunter v. Kirk* 4 Hawks 277; *Rose v. Ford* 2 Ark. 26; *Tullis v. Brawley* 3 Minn. 277; *Johnson v. Jones* 2 Neb. 126. In Illinois the English rule has been recognized: *Fitzgerald v. Kimball* 86 Ill. 396; though it is said some exceptions are made to it in the furtherance of justice in that state. *Ryan v. Lander* 89 Ill. 554. What the exceptions are is not pointed out in that case; but in the subsequent case of *Hunter v. Stoneburner* 92 Ill. 75, 79, we have the following statement as the result of prior decisions: "It is in rare cases only, that the return of the officer can be contradicted, except in a direct proceeding by suit against the officer for a false return. In all other cases, almost without an exception, the return is held to be conclusive. An exception to the rule is, where some other portion of the record in the same case contradicts the return, but it cannot be done by evidence dehors the record."

These citations are sufficient, and more than sufficient, to justify the previous ruling by this Court. It follows that the instruction complained of was erroneous, and it must be reversed with costs and a new trial ordered.

GRAVES, C. J. and SHERWOOD, J. concurred.

CAMPBELL, J. dissenting. As I understand the controversy in this case, the dispute was not whether the constable took the property, but whether the taking was not by process designed by the parties as a mere pretext for getting possession, and not for any legitimate purpose. The case is one of abuse of process for illegal purposes, in which it was claimed, and the jury must have found, that Michels was active throughout as connected with the constable. I do not

understand that a fraudulent use of process to get possession of property, and for no other purpose is, under any circumstances, a justification to any person concerned in the fraud.

I think the court committed no error, and that the judgment should be affirmed.

AMELIA H. BROWN v. WILLIAM DAY DEAN AND URIEL SPALDING.

Fraudulent transfer—impeaching testimony.

1. Where a person, against whom an action is pending, transfers his real estate, the plaintiff, on recovering judgment, cannot maintain ejectment against the purchaser of the real estate on the ground that it was fraudulently transferred, without showing that the purchaser participated in the fraudulent purpose, or had notice of it.
2. Impeaching testimony can be used for impeachment only, and not to establish the main facts in the case; a fortiori, where the witness impeached is not a party and his impeachment concerns statements by him which in themselves were only hearsay and could not bind a party.
3. Fraud cannot be presumed, but must be proved; and the burden of proof is on the party complaining of it.

Error to Tuscola. (Wixson J.) Oct. 18.—Dec. 21.

EJECTMENT. Defendants bring error. Reversed.

B. L. Ransford and *Parker & Burton* for appellants.

H. P. Atwood for appellee. A plaintiff recovering judgment in a breach of promise case is entitled to have it satisfied from lands conveyed by defendant, without consideration, pending suit: *Beam v. Bennett* 51 Mich. 148; and defendant has the burden of showing consideration: *Godfroy v. Disbrow* Walk. Ch. 260; *Shotwell v. Harrison* 22 Mich. 410; *Atwood v. Bearss* 45 Mich. 469; 47 Mich. 72.

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SHERWOOD, J. The plaintiff brought ejectment to recover possession of 160 acres of land in the county of Tuscola, under a claim of title derived through a sale made upon execution issued on a judgment rendered against one Nathan Clifford for the sum of $500, in a suit against him by plaintiff for breach of promise to marry.

Plea general issue, with notice that at the time the levy and sale were made, Nathan Clifford had no right, title or interest in the land, legal or equitable, and that the sale by the sheriff, under which plaintiff claims title, was made more than one year before the commencement of the suit in this case. No question is made upon the pleadings as to the regularity of the sale. The judgment was rendered against Clifford on the 11th day of September, 1878; execution was issued thereon, and levy made thereunder on the 13th day of the same month upon the land in question; and on the 16th day of May, 1879, the land was sold by the sheriff, in pursuance of the levy, to the plaintiff, for the sum of $125.

It appears from the record that Clifford held the title to the premises in question until the 26th day of March, 1878, when he conveyed them by warranty deed to the defendant Dean, for the expressed consideration of $2400, which deed was recorded on the 4th day of June, 1879.

This suit was commenced on the 27th day of February, 1883, and trial had on the 11th day of May following; and the plaintiff recovered. The plaintiff claims she derived title to the lands in question through the execution sale, and is now entitled to the possession on the ground that, as to her claim, the deed from Clifford and wife to Dean was void for want of consideration.

Several errors are alleged on the admission of testimony for plaintiff. The first and second assignments relate to the admission of the record and proceedings in the case of the plaintiff against Clifford, and those had upon the judgment after it was rendered, to and including the sale of the land by the sheriff and the giving of the bond in pursuance thereof. We think this was proper. It was necessary for

the plaintiff to show a valid judgment and regular proceeding thereunder to sale. And if the deed from Clifford to Dean was void, as plaintiff maintains, these were sufficient to establish her claim to the possession of the property.

The third, fourth, fifth and sixth errors assigned relate to the testimony of witnesses Edson, Richardson and Wheat, offered to contradict Clifford; to show he had sworn differently on another trial from what he did in this. The plaintiff had a right to this testimony. The defendants had placed the witness upon the stand, and it was proper cross-examination for the purpose of impeachment, but it could only be used, after it was received, for that purpose. When Clifford was upon the stand, on his cross-examination, against the objection of defendants' counsel that it was incompetent and immaterial, he was asked if he did not testify in the breach of promise case that "he conveyed the land in question to Dean, so that he could convey it back to his wife, and she could have the benefit of it," and the witness answered substantially in the negative. The impeaching testimony above referred to was then offered. And this is all the testimony there was in the case upon that subject, and the court charged the jury: "If the deed was in fact given simply for the purpose of having Dean make a deed back to witness Clifford and his wife, for the purpose of having the property in different shape, and not for a consideration to be paid by Dean, it would be without consideration in law." The court had previously told the jury that if this deed was without consideration, the plaintiff would be entitled to recover. This charge of the court is excepted to by defendants, and error is assigned upon it, and we think the exception well taken. The charge fails to restrict the effect of the impeaching testimony to impeachment only. It was left by the charge as establishing, or tending to establish, the main fact in the plaintiff's case. This should not have been done. It was error. Clifford was not a party to the suit, and only for its impeaching tendency the testimony would have been clearly incompetent. *Howard v. Patrick* 38 Mich. 804. It would for

any other purpose have been incompetent for another reason. Clifford's statements, after Dean made his purchase and received his deed, would have been clearly hearsay and not binding upon Dean. *Hedstrom v. Kingsbury* 40 Mich. 637; *Frankel v. Coots* 41 Mich. 77.

The theory of plaintiff was that the deed from Clifford to Dean was, as to her, fraudulent and void, and did not affect her purchase of the 160 acres under the execution sale, for $125, and that all she had to do to entitle her to recover was to offer in evidence her judgment against Clifford and the proceedings thereunder to the sale, and the execution of the sheriff's deed; the deed from Clifford and wife to Dean; and the fact that Clifford owned it when he deeded it to Dean. The deed offered showed the consideration to be $2400, which was admitted to be a fair valuation of the 160 acres. The court, in his charge, substantially held that this was all that was necessary to entitle the plaintiff to recover. This was error.

The plaintiff's right to recover rested upon the fraudulent transfer of Clifford's property to the defendant Dean. It is nowhere in the record claimed or pretended that Dean, in making the purchase, had any fraudulent design at the time, or ever had notice of any fraudulent intent on the part of Clifford, in making the sale to him, to defraud the plaintiff. There was nothing upon the face of the transaction or upon the face of the deed tending to show fraud, as the facts appear in plaintiff's testimony. It is true the conveyance was made to Dean by Clifford while a suit was pending against the latter upon a claim for unliquidated damages in an action for a wrong, but nothing further appears in the testimony of the plaintiff to show the fraud charged. This would be the state of the case if the testimony of Clifford was disbelieved entirely. This, I think, we must all agree would be insufficient to entitle the plaintiff to recover. And as the court below told the jury that if they believed Clifford's testimony, she certainly could not recover, it is difficult to see any good reason why, upon all the evidence given in the case, (and we have it all in the

record) the defendants' sixth request might not have been very properly given, directing a verdict for the defendants.

It is very elementary that fraud cannot be presumed, but must be proved. *Miller v. Finley* 26 Mich. 249; *Robert v. Morrin* 27 Mich. 306. The circuit judge held that the burden of proof, when the plaintiff rested, was upon the defendants to show consideration for the deed to Dean. The plaintiff's proofs showed a consideration equal to a fair valuation of the land. If the jury believed Clifford's testimony, a fair consideration was again proved; if they disbelieved him, the plaintiff's proofs remained, still showing a consideration. Take either view, and it seems to us there was error in this portion of the charge. *Darling v. Hurst* 39 Mich. 768; *Brigham v. Fawcett* 42 Mich. 542; *Pogodzinski v. Kruger* 44 Mich. 79. The defendants' fourth, fifth, and tenth requests were proper to be given to the jury.

The plaintiff in this case was not a creditor of the defendant when the conveyance to Dean was made, nor yet when the deed was recorded, and would not be until she had obtained her judgment against Clifford. *Hill v. Bowman* 35 Mich 191; *Dusar v. Murgatroyd* 1 Wash. 13.

It is unnecessary to discuss the case further.

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

GRAVES, C. J. concurred.

CAMPBELL, J. I concur in the grounds of reversal.

COOLEY, J. concurred.

ISAAC L. LYON AND LUCIUS D. HARRIS v. JACOB GUTHARD, RECEIVER OF TAXES.

Personal taxes—Recovery of tax paid under protest—payment by assignee.

1. Payment of a personal tax is not voluntary when made under protest, and for the purpose of avoiding the immediate seizure of goods to satisfy it.

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2. The General Tax Law (1 How. St. p. 1277, sec. 42) in providing for a written protest upon payment of a tax, refers only to taxes on real property.

3. Goods assigned for the benefit of creditors are exempt from levy to satisfy a personal tax during the ten days allowed to the assignees for filing their bond. Act 198 of 1879, sec. 1.

4. Where an insolvent firm has assigned its stock for the benefit of creditors, a personal tax against the firm cannot be satisfied from the stock in the hands of the assignee upon any other terms than any other claim; and if the assignee pays the tax under protest in order to avoid seizure of the stock, he can bring suit against the officer collecting it, to recover it back, so long as it remains in the officer's hands.

5. The Charter of Detroit in providing that city taxes shall be liens upon the property assessed, until paid (Act 486 of 1869: Charter ch. v. sec. 22, subd. 64) did not mean that the lien should attach to personal property.

Error to the Superior Court of Detroit. (Chipman. J.) Oct. 18.—Dec. 21.

ASSUMPSIT. Plaintiffs bring error. Reversed.

A. C. Angell, *Wm. H. Wells* and *Ashley Pond* for appellants. The State's right to priority in payment operates no lien on a tax-payer's personalty and cannot avoid a bona fide transfer thereof on valid consideration: *Anderson v. State* 23 Miss. 459; and this is so of goods in the hands of an administrator taxed before his intestate's death: *Wilson v. Shearer* 9 Met. 506; or chattels of a feme-covert taxed before coverture: *Sumner v. Pinney* 31 Vt. 717; a purchaser of mortgaged property takes it free from the encumbrance of a tax unless it has become a lien when he buys: *Ream v. Stone* 102 Ill. 363; and goods in an assignee's hands cannot be seized on execution against the assignor, the legal title remaining in the trustee, where the deed vested it, till by some proper judicial proceeding it is disposed of: *Garretson v. Brown* 26 N. J. Law 426; *Van Dine v. Willett* 24 How. Pr. 206; payment demanded by an officer under color of process is involuntary: *Boston &c. Co. v. Boston* 4 Met. 181; and the person making it may anticipate

seizure of goods: *Vicksburg v. Butler* 56 Miss. 72; though there must be actual or threatened exercise of power, possessed or believed to be possessed, by the person exacting or receiving the payment, on the person or property of another, for which the other has no other means of immediate relief than by making payment: *Radich v. Hutchins* 95 U. S. 213; *Brumagim v. Tillinghast* 18 Cal. 271.

City Counselor *Henry M. Duffield* for appellee. It is presumed that a receiver of taxes has deposited them in the treasury, and he is therefore not individually liable for their amount and to the person from whom they were collected: Cooley on Taxation 563; *Crutchfield v. Wood* 16 Ala. 702; *Dickins v. Jones* 6 Yerg. 483; *LeRoy v. East Saginaw City R'y* 18 Mich. 239; *Wall v. Trumbull* 16 Mich. 228; *Adams v. Hubbard* 30 Mich. 104; *Bird v. Perkins* 33 Mich. 28; *People v. Rix* 6 Mich. 144; *Watkins v. Wallace* 19 Mich. 57; an assignment is not such a transfer as divests personal property of the State's claim for taxes: *Cones v. Wilson* 14 Ind. 465; *State v. Grover* 37 N. J. Law 175; an assignee for the benefit of creditors does not stand in the position of a bona fide purchaser for a valuable consideration: *Flannigan v. Lampman* 12 Mich. 58.

SHERWOOD, J. Cornwell, Price & Co., a corporation doing business in the city of Detroit, on the 27th day of November, 1882, made a general common-law assignment of all its property, for the benefit of its creditors, to the plaintiffs in this case, who accepted the trust, and entered immediately upon the discharge of their duties as such.

A city tax for the year 1882, in the city of Detroit, was duly assessed against the personal property of Cornwell, Price & Co., and on the day of the assignment, and after the same was made, efforts were made by the Receiver of Taxes to collect the same. On the 22d day of December thereafter he entered the store of plaintiffs and threatened forcibly to take possession of and sell sufficient of the assigned property to satisfy said city tax, which amounted

to the sum of $667.78. The plaintiffs, in order to prevent the forcible taking of the property, paid the tax to the defendant under protest, and on the following day brought this suit in assumpsit, under the common counts, accompanied by a bill of particulars, claiming the amount paid under protest. Defendant pleaded the general issue. The case was tried by the court without a jury. The court made special findings of the facts and of the law, and gave judgment for the defendant. The plaintiffs bring error.

No exception is taken to the findings of fact by either party. The conclusions of law are as follows: "1st. That the corporation of Cornwell, Price & Co. was duly organized, and was existing when the assignment was made; 2d. That the assignment was a lawful one; 3d. That at the time the tax was paid to the Receiver, the plaintiffs were the owners of the property proposed to be taken by the receiver; 4th. That the said tax was not a lien on the goods in the hands of the assignees, and the said goods were not liable to seizure to satisfy the tax assessed to Cornwell, Price & Co.; 5th. That the payment by Harris of said tax was compulsory; 6th. That this suit cannot be maintained against the defendant individually."

Counsel for plaintiffs insist "1st. That the findings do not support the judgment; 2d. That the court erred in making the finding of law numbered six."

It is difficult to perceive upon what ground the judgment given in this case can be sustained under the former decisions of this Court. There is no evidence or finding in the case tending to show that the defendant ever paid over the money collected of plaintiffs to the city before the commencement of this suit. The court finds that when the money was paid the Receiver stood in the store; said he had the goods selected upon which he was ready to make his levy, and threatened to do so and take the goods away unless plaintiff paid the tax demanded; and in the face of such threatened action by the officer, the plaintiffs, under protest, paid the money. Certainly, under the decisions of this Court, heretofore made, such payment was not volun-

tary. *First Nat. Bank of Sturgis v. Watkins* 21 Mich. 483; *Atwell v. Zeluff* 26 Mich. 118; *Detroit v. Martin* 34 Mich. 174.

The Court further finds as a matter of fact, that the assignees took possession as soon as the assignment was made; and that as a matter of law the assignment was valid, and that the Receiver had no lien upon the property; and that at the time the tax was paid the plaintiffs were the owners of the property. If these conclusions are correct, then the assignees held a perfect legal title to the property as soon as the delivery was made under the assignment (which was before the effort of the Receiver to collect) and at the time the money was paid by plaintiffs. Why then should they not have had judgment? Certainly under such circumstances the Receiver would have no more right to levy upon the property than he would have had upon that of any other citizen of Detroit.

But it is claimed by defendant that no effect can be given to the protest made, because it was not made in writing containing the grounds of the protest, as required by sec. 42 of Act. No. 9, Laws 1882, p. 20. There is nothing in this position. That section relates to taxes against real estate only.

It is further claimed by defendant that the title did not pass to the plaintiffs when made and the property delivered, until the statutory bond was filed. It is enough to say upon this point that the bond was filed within the ten days required by the statute; and during that period no valid levy could be made upon the property. Act 198 of 1879, proviso to sec. 1. We do not see how these statutes can, under any proper construction, aid the defendant in this case. The understanding[1] had with the defendant has no bearing

[1] On the day after said assignment, the defendant attempted to levy upon the assigned property for the city taxes due the city of Detroit, assessed for the year 1882–3, and he entered on the premises where said property was situate. Isaac L. Lyon, one of the plaintiffs, requested and obtained a postponement of said levy until the inventory of the assignees should be completed, and said defendant assented thereto, upon the express agreement of said Isaac L. Lyon, that the levy, when made, should be considered as made as of the date of the day after the assignment.

whatever. The officers had no authority to make any such arrangement as that stated in the record, and no valid levy could have been made under such stipulation, or of the date it was made, or one that could be enforced in any court.

The defendant further claims it was his duty as Receiver of Taxes to enforce the collection of this tax against the plaintiffs' property under the assignment; that his act in so doing "was official and had the color of right, therefore he was not personally liable." Several cases decided by this Court have been referred to as supporting this position, but they are not applicable to the facts in this case. This was not the case of a person whose property had been illegally assessed, and against whom the collector's warrant ran, but an attempt to take the property of one person to pay another person's tax. This cannot be done under our Constitution or laws. It would be the grossest injustice, and finds no support in the decisions of this Court.

There is no law in this State for the city of Detroit or elsewhere, which makes taxes a lien on personal property until the Receiver or collector makes his levy. In this case no levy was ever made. The claim for a personal tax stands no other or better chance against the estate of the insolvent than the claim of an individual. The defendant was clearly liable to the plaintiffs in this action under the circumstances of this case. The payment of the tax was made under protest; the amount was neither due nor owing to the defendant from the plaintiffs, nor any part thereof, except under the terms of the trust created by the assignment. It is not claimed by defendant that he had paid the money over to the city. Until he had done this no other party was liable. *Atwell v. Zeluff* 26 Mich. 118; *Erskine v. Van Arsdale* 15 Wall. 75; *Crutchfield v. Wood* 16 Ala. 702; *Hubbard v. Brainard* 35 Conn. 563; *Chapman v. Brooklyn* 40 N. Y. 372; *Preston v. Boston* 12 Pick. 14; *Inglee v. Bosworth* 5 Pick. 502; *Ware v. Percival* 61 Me. 393; *Newman v. Livingston County* 45 N. Y. 676.

Counsel for defendant under their fourth point claim

"that the assignment did not destroy the claim of the city for taxes, and the assignees rightfully paid the same to the defendant." It is true the claim of the city for taxes assessed remains unpaid, but how could the plaintiffs rightfully have paid the same in full so long as the estate they represented was insufficient to pay the claims against it in full? If it is intended under this point to insist upon a lien under the 64th subdivision of section 22 of chapter V of the city charter, then we have only to say that it is quite apparent to us that the Legislature never intended the lien to apply to personal property; and we fully agree with what is said in *Binkert v. Wabash Ry. Co.* 98 Ill. 205: "If it had been the intention of the legislature to create a specific charge upon every article of personal property, to the extent of the tax assessed on its valuation, as it has on each tract of land, some provision certainly would have been made by which the extent of the charge could be definitely ascertained, so as to prevent great hardships and frauds upon innocent purchasers."

We think the court, in its finding number six, erred, and that the findings do not support the judgment, which must be reversed and a new judgment entered for the amount plaintiffs paid and interest with costs of both courts.

The other Justices concur.

THE PEOPLE v. THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY.

Highway—Construction thereof at railway crossings.

1. The Highway Law of 1881, in providing that where any highway is established across a railway the railroad shall open, construct, and maintain the highway and the necessary crossing therefor across its right of way and tracks, cannot be so construed as to compel the company to build that part of a highway which would cross its right of way, if the highway itself is not made necessary by the existence of the railroad.

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2. The right of property to governmental protection does not depend upon whether its owner is a natural or artificial person; nor upon his social advantages, nor on the form of the property, provided it be lawful. And the violation of the duty to protect it is not merely a political non-feasance, but an assault on the owner's right and a breach of that trust which the institution of government implies.

Error to Ingham. (Gridley, J.) Oct. 19.—Dec. 21.

ASSUMPSIT. Plaintiff brings error. Affirmed.

J. E. Nichols and Attorney General *Jacob J. Van Riper* for appellant. Railroad companies may be required by statute to fence their tracks and place cattle-guards thereon and plank their crossings: *Wilder v. Maine Central R. R.* 65 Me. 332; *Bemis v. Connecticut R. R.* 42 Vt. 375; *Commonwealth v. Eastern R. R.* 103 Mass. 254; *Fitchburg R. R. v. Grand Junction R. R.* 4 Allen 198; *Com. v. Essex R. R. Co.* 13 Gray 239, 253; *State v. Noyes* 47 Me. 189; *Indianapolis R.R. Company v. Townsend* 10 Ind. 38; *Kan. Pac. R. R. Co. v. Mower* 16 Kan. 573; *New Albany R. R. Co. v. McNamara* 11 Ind. 543; *Pennsylvania R. R. Co. v. Riblet* 66 Penn. St. 164; *Flint & Pere Marquette Ry. v. Lull* 28 Mich. 515; and such statutes will bind whether passed before or after the organization of the railway company: *Staats v. Hudson River R. R.* 4 Abb. & App. Dec. 287; *Sawyer v. Vermont & Mass. R. R. Co.* 105 Mass. 196.

Ashley Pond for appellee. The ostensible and immediate controversy in this case is with reference to the insignificant sum of ten dollars. But its determination involves an answer to questions of grave and serious import to every railroad company organized under the laws of this State and particularly to every railroad company so organized since the adoption of the Constitution of 1850, to wit: *Whether any such company has any right, property or other, which is within the protection of that Constitution or of the Constitution of the United States, or whether every such company holds its property, lands, tenements, goods, chattels, money and effects, acquired by use of the capital*

contributed by its stock-holders, or otherwise, as, it must be admitted, such companies organized since 1850 hold the rights, privileges and franchises conferred upon them by the sovereign power of the State, solely at the sweet will of that power, as represented from time to time by the wisdom and justice of its legislative department.

I. A definite comprehension of the intent and effect of the statute, the validity of which is in question, will aid in reaching a right conclusion. The intent of the statute is clear. It is to impose upon railroad companies, as a duty, the burden of constructing and maintaining, at their own expense, highways, or portions of highways, for the use of the public; and, if held valid, its effect will be in accordance with such intent. It is material to note that the duty and burden thus sought to be imposed upon each railroad company, in this State, is not limited to the construction and maintenance of such highways, or portions of highway, as have been or may be rendered necessary for the convenience of the public, by the construction and maintenance of its road, or to the payment of such extra cost of constructing and maintaining particular highways as have been, or may be so caused. The cost of constructing and maintaining many highways in this State, which cross railroads, is not increased by the fact of the existence of the railroads, which they so cross, beyond the expense of putting down and maintaining planks between and on each side of the rails; and there are many more, the cost of which is not increased beyond such expense and the expense of constructing approaches to the track. The effect of the statute under consideration is therefore to compel railroad companies to appropriate a portion of their capital or earnings for the benefit of the public, in reference to a matter in no wise directly or indirectly connected with, or growing out of the exercise of the franchises granted to them by the State, or with the manner in which they make use of their property.

II. The property of railroad companies is private property in the same sense and to the same extent and as such is under the same constitutional protection, as is the property

of natural persons: *People v. Salem* 20 Mich. 452; *Detroit v. Detroit & Howell Plank Road Co.* 43 Mich. 140; *Grand Rapids, Newaygo & Lake Shore R.R. Co. v. Grand Rapids & Indiana R. R. Co.* 35 Mich. 265. Authorities may be cited which, it must be conceded, seem to be adverse to the doctrine in this State, as above stated. Thus, *Albany &c. R. R. Co. v. Brownell* 24 N. Y. 345, holds that the Legislature may authorize the construction of highways across the right of way of railroad companies without compensation upon the ground "that the title to the land acquired for such right of way is qualified as being taken for public use;" and hence, for such is the logic of the reasoning, that the Legislature may, in its discretion, subject such lands in the hands of a railroad company to an additional public use; and there are like cases to be found elsewhere. The criticism to be made upon these cases, and it is a fatal criticism, is that they wholly fail to distinguish between the ownership of property, and an obligation resting upon an owner of property to use it for a particular purpose, and in a particular manner; or perhaps more correctly stated, they wholly misinterpret the effect upon the title or ownership of property, of an obligation resting upon the owner to use only for a particular purpose or in a particular manner. When a railroad company acquires by purchase for a consideration, or otherwise, lands for right of way, or property of any kind for use in the exercise of its franchises, unquestionably it becomes under obligation to use such land or other property only for a particular purpose and in a particular manner, to wit: for the purpose for which such company exists and in a manner to effectuate such purpose. But just as unquestionably it becomes the owner of such land or other property, and as such owner entitled to its possession and to the sole and exclusive pecuniary benefit and profit which may be produced by its lawful use. Such obligation as to the purpose and manner of the use the Legislature may enforce, but beyond that it cannot lawfully go. It can no more require that such land or other property shall be made subject to use for any other purpose, or in any other

manner, either by or for the benefit of the public, or otherwise, than it can lawfully require that the money contributed by the stock-holders of a railroad company to its capital, shall be used for the benefit of the public with reference to a matter wholly foreign to the purpose for which the company exists, and to its interests; as for example, to the payment of the cost of constructing a State capitol. For, I submit, that money paid into the treasury of a railroad company by its stockholders, as capital, is neither more nor less the private property of the corporation, nor as such more nor less under constitutional protection than is land or other property purchased and paid for with such money. These distinctions are clear. Yet the failure to recognize them is just now leading to very extraordinary and dangerous theories as to the power of legislatures over railroad companies and their property.

Radical assertions as to the authority of the Legislature over railroad companies and their property, are frequently based upon the fact that such companies are clothed with power to acquire property by the exercise of the right of eminent domain. But such assertions are clearly without force. Property acquired by exercise of the right of eminent domain, is as much acquired by purchase as is property acquired by negotiation and agreement with and voluntary conveyance from the owner. And land acquired for right of way by the one method, is no more and no less acquired and held in trust for public use than land acquired for right of way by the other method.

"It is immaterial in what way property was lawfully acquired, whether by labor in the ordinary avocations of life, by gift or devise, or by making profitable use of a franchise granted by the State; it is enough that it has become private property, and it is then protected by the law of the land." (Cooley, J. in *Detroit v. Detroit & Howell Plank Road Company* 43 Mich. 148.) But this discussion of the nature and extent of a railroad company's title to land which it acquires for use in the exercise of its franchise, and of the nature and extent of the power of the

Legislature with reference to such land, is somewhat outside the necessities of this argument. Because the statute under challenge is in no manner an attempt to exercise power over such land; its requirements are with reference to the use of money of the corporations affected.

III. It being conceded or established that the property of railroad companies is private property, and as such under the same constitutional protection as the property of natural persons, it seems clear that the statute under consideration cannot be sustained. That it is invalid is beyond question, unless it can be justified as a legitimate exercise of the right of eminent domain, or of the taxing power, or of the police power of the State.

That it is not an exercise of the right of eminent domain will be conceded.

That it is an exercise of the taxing power I cannot believe will be suggested. Because, if in other respects it could be held unobjectionable as a tax law, it lacks wholly one element "which is of the very essence of taxation," to-wit: the element of equality and uniformity. The burden which it seeks to impose upon the several railroad companies in the State is not distributed upon any system of apportionment. The burden imposed upon any one of said companies bears no relation whatever to the burden imposed upon either or all of the others. The extent of the burden which each is to bear, is made to depend wholly upon the number and location of the highways which may be established across its right of way.

That the statute cannot be justified as an exercise of the police power seems equally clear. The basis of that power is found in the maxim Sic utere tuo ut alienum non lædas. Cooley's Const. Lim. p. 533. But as I have already shown, the duty sought to be imposed by the statute has no connection with the manner in which railroad companies affected by it have used or are using their property. The case from 24 N. Y., already criticised in another connection, may be brought forward as adverse to this position, as it was there held that a statute which required a railroad

to make at its own expense, the necessary excavations or embankments to carry a highway established after the construction of its road over its track, was valid. The reasoning upon which such decision is based is in the following language, to wit: "*The disturbance of the surface of the ground which has rendered such work necessary was effected by the railroad itself*, and the reservation of legislative authority" (to amend the law under which the company in question was organized) "we may suppose to have been inserted for the purpose of obliging the companies to conform with such directions as subsequent legislatures should discover to be necessary for the public good, or which should be required by public policy." From the part of the quotation which I have italicised, it is evident that the statute here in question goes beyond the scope of the statute there involved, and hence, that the case is not here in point. Moreover, I submit that the language of the opinion as quoted with reference to the purpose of the "reservation of legislative authority" if construed literally, gives a much broader scope and effect to such reservation of authority than sound reason or constitutional principles will permit to be given to it. The authority reserved may undoubtedly be used, in the discretion of subsequent legislatures, to modify, limit, restrict and even to take wholly away rights, privileges and franchises conferred, or to impose new duties and liabilities having relation to the exercise of such rights, privileges and franchises. But to give a broader effect to each reservation of authority, is to place not only the rights, privileges and franchises, but the property of every corporation subject to such reservation—and in this State all corporations organized since 1850 are so subject— wholly beyond the pale of constitutional protection. *Detroit v. Detroit & Howell P. R. Co.* 43 Mich. 148.

IV. It may be contended that as the Legislature can repeal the law under which railroad companies organized since 1850 exist, and thus wipe them out of existence, it can make their right to continue in existence dependent upon the performance of any act or condition which it may

see fit to require to be performed.[1] And it must be conceded that there is much plausibility in this argument, which likens the Legislature to a foot-pad, who demands his victim's money or his life. But in this case it is unnecessary to enter upon the question of its soundness or unsoundness.[2] Because, happily there is this difference between an actual flesh and blood foot-pad and the suggested legislative foot-pad, to wit: That the former, upon refusal to accede to his demands, can not only "put an end to the continued existence" of his victim, but can also despoil the corpse; whilst the supposed legislative foot-pad can take the life only and cannot touch one farthing's value of its victim's property, money or estate. But by the statute under consideration, the demand is not made as a "condition of continued existence," but under penalty of a forcible seizure and confiscation of the property of the victim, to the extent of ten dollars for each day that it shall refuse or neglect to comply with the demand. And it is such forcible attempted seizure and confiscation that the defendant is resisting in defending this action.

GRAVES, C. J. This action was commenced before a justice of the peace to recover the penalty of $10 alleged to have been forfeited by the Railway Company under section twenty-seven of the Act approved June 8, 1881, entitled "An act to revise and consolidate the laws relating to the establishment, opening, improvement and maintenance of highways and private roads, and the building, repairing, and preservation of bridges within this State." The section reads as follows:

"Where any highway may *have been* or *shall be* established across any railroad, the *company operating such railroad* shall *open, construct and maintain* such highway and the necessary crossing therefor *across their right of way and track.* The commissioner may serve a written notice

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[1]It should be noted that this applies not alone to railroad companies, but to all corporations organized in this State since 1850.

[2]High authority has pronounced it unsound. Field, J., in *County of San Mateo v. Southern Pacific R. R. Co.* 8 Am. and Eng. R. R. Cases 1.

on any person in charge of the ticket or freight office nearest to such crossing, requiring such *opening and construction* within thirty days from and after the service of such notice, and in default of such opening and construction as required by such notice, the *company in fault shall be liable* to a penalty of ten dollars per day for every day thereafter during which such highway shall remain UNOPENED, and during which the *same* and the *necessary crossing therefor* shall *remain unconstructed.*" Pub. Acts 1881, pp. 288–295.

The Railway Company pleaded the general issue, and the case was submitted to the justice on the following agreed statement of facts:

1st. That nine years ago defendant constructed its line of railway from Jonesville, Hillsdale county, Michigan, to Lansing, Ingham county, Michigan, crossing the township line which divides the townships of Lansing and Delhi, Ingham county, twenty rods east of the county line which divides the counties of Ingham and Eaton.

2d. That in the fall of 1882 a highway was duly laid out and established on said township line, commencing at said county line and running thence east on said township line one mile.

3d. That the township authorities caused the *timber* on the line of such highway from said county line east to the railroad *right of way* to be chopped and fallen (preparatory to *opening* such highway) immediately after such highway was so laid out.

4th. That thereupon the commissioner of highways of one of said townships served upon the defendant, in accordance with section twenty-seven of Act 243 of the Laws of 1881, a notice stating to defendant the establishment of such highway, and requiring it, said defendant, to *open, construct and maintain such highway across its right of way and track.*

5th. That said highway has never been actually opened to the public or for travel on either side of said railway.

6th. That defendant failed and neglected to comply with such notice, or to open, construct or maintain such highway, and that more than thirty days, to-wit, thirty-one days, have elapsed since such service of said notice.

7th. That defendant's right of way at said point is one hundred feet wide, fenced and *occupied* by defendant, and it would cost to so open and *construct*, as required by said notice, at least one hundred dollars.

8th. For the purpose of this suit no question is made about the regularity of the laying out or establishment of such highway, or as to the contents or service of such notice, each and all being admitted to be in accordance with said section of said session laws."

The justice decided that these facts established the forfeiture sued for, and he gave judgment accordingly. The Railway Company removed the case by statutory certiorari, and the circuit court determined that the facts were not sufficient and reversed the judgment. The public authorities now ask an examination of the case here on writ of error, and contend that the facts well warranted the judgment given by the justice, and that it ought to be restored.

There is no controversy about general principles. The company does not deny that it holds its property, as do all other proprietors, subject to the sovereign power of police and the general authority of government. It sets up no claim to favor, nor any immunity from the acknowledged maxims of justice. It solicits no discrimination. What it contends for is that no exception shall be made against it in the application of these principles.

The sacredness of property does not depend on whether the proprietor is a natural person or an artificial person. Nor does it depend on whether the property itself consists of lands, or shops, or warehouses, or railroads, or cars, or corporate stock. Whether property interests are in farms, or in buildings, or in cheese factory associations, or in other corporate industries, or in some other lawful form, the fundamental rights of ownership are exactly the same. It is one of the first and one of the main objects of government to protect the rights of property wherever they reside, and in case this duty is consciously and deliberately violated in any direction, it is not a mere political non-feasance,—it is a downright assault upon the right vested in every holder of property, and a breach of that trust which the institution of government implies. Whether the proprietor is wise or foolish, rich or poor, weak or powerful, a natural person or a corporation, the rule equally applies.

But in order to administer the requisite protection, and

effectuate, as far as may be, the public safety, utility, and convenience, a great variety of interferences become necessary. And so long as they fairly conform to the principles on which they respectively depend, they cannot be questioned. But if in any instance the reason of interference, which the fact conclusively implies, has no connection with the only reason on which it would be possible to justify that interference, the claim of right by virtue of the police power becomes a mere pretext, and the particular interference is a perversion of authority and an invasion of the right of property.

Admitting this to be an accurate view, how does it bear on this controversy? We are not dealing with a case where the question is as to what a company may be bound to do to fit up crossings and construct approaches and adjustments on a highway either older or newer than the railway. A leading reason for requiring these things of the company is because it has practically rendered them necessary by the way in which it uses its land, and it seems entirely just to demand that as far as the same can be reasonably accomplished it shall reduce the inconvenience, occasioned to the public by its own peculiar mode of enjoyment, to a minimum. But when the reason ceases, the right of interference must cease. The obligation cannot be carried beyond its principle. As we observe, the case under review is not one concerning the construction of approaches or a crossing. But the fact is obvious that it must stand, if at all, on the reason just mentioned. Unless what is required can be justified on the ground that the mode of enjoyment of its land by the company renders it necessary, it cannot be justified at all. Considering what it is that the company is asked to do, no other basis is possible. Can the requirement be supported on that theory?

The township insists that the company shall remove the forest from its land within the limits of the highway, and fully construct the highway in all its parts over the entire hundred feet, and make it fit and ready for travel. Now, there is no such connection between what is here exacted

and the mode in which the company occupies its land, as to let in the reason. The new highway proposed over the hundred feet is not a thing which is wanted in order to fit the railroad to its environments and establish a state of compatibility. It is to be a creation by itself, an independent work; not a contrivance which the existence of the railroad renders necessary, and which otherwise would be needless; not an appendage, not a feature of the railroad nor a thing incident to it. On being made, neither its continuance nor its excellence would be dispensed with if the railroad were removed. It would remain as an independent public work, to be kept up at the public cost. The sole ground, therefore, on which any power can be based for compelling the company to do the particular thing now demanded is inadequate and inapplicable. I agree, therefore, with the circuit judge. The statute cannot be applied in the large sense attempted. This conclusion might be enforced by reasoning in other channels, but I do not deem it needful.

Much reliance has been placed on *Albany Northern R. R. Co. v. Brownell* 24 N. Y. 345. It is enough to say now of that case that it does not apply.

I think the judgment of the circuit court should be affirmed with costs.

COOLEY and CAMPBELL, JJ. concurred

SHERWOOD, J. I am unable to concur in the result in this case as stated by my brother.

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THE PEOPLE v. WILLIAM MURRAY.

Criminal law—Stipulations—Admission of depositions—Assigned counsel—Special findings—Evidence.

1. A conviction cannot be set aside for the admission of a deposition in pursuance of a voluntary stipulation by the parties or their counsel, even if the respondent is represented only by counsel assigned to

him; in making such a stipulation the respondent waives his constitutional right to be confronted by the witness.

2. An appellate court has nothing to review in a case at law if the trial court has made no ruling.

3. Where counsel has been assigned to a person on trial and has acted without objection from his client, the latter's conviction cannot be set aside on the ground that counsel was not of respondent's choice.

4. A trial court cannot interfere with a lawful stipulation which the parties enter into, presumably for their own advantage.

5. An instruction to a jury to answer the special questions put to them, keeping in mind that the answers should be consistent with their general verdict, though carelessly expressed is not necessarily open to the criticism that it requires the jury to conform the findings to the verdict; it may simply mean that the verdict should be in accord with the facts as found.

6. A circus performer went to a dance and was pitched upon by some of the participating citizens. He shrieked "Hey, Rube!" and at this signal a lot of other circus men rushed in and a fight followed in which the town marshal was killed by one of the circus men, as was supposed. *Held*, that on the latter's trial it was proper to exclude as hearsay and immaterial what one of the witnesses had heard of the citizens being drunk and of their having trouble with the marshal.

7. In a trial for murder by assault, the admission of the question "You pride yourself on your muscle, don't you?" could not be prejudicial error if the answer was No.

8. A circus man on trial for a murder committed in a fight, had introduced evidence tending to show that his character and that of his fellows was peaceable. *Held*, that on cross-examination the question "As a member of this circus, how many different fights with outsiders have you been engaged in?" was proper in rebuttal.

Error to Saginaw. (Gage, J.) Oct. 19.—Dec. 21.

MURDER. Respondent brings error. Conviction affirmed.

Trask, Grout & Smith for appellant.

Attorney General *Jacob J. Van Riper* for the People. It is discretionary to permit the questions to be asked that tend to inform the judgments of the triers as to defendant's former life, character and behavior: *People v. Cummins* 47 Mich. 336; *Wilbur v. Flood* 16 Mich. 40; *Clemens v.*

Conrad 19 Mich. 170; *Saunders v. People* 38 Mich. 218; *Arnold v. Nye* 23 Mich. 286; *Hamilton v. People* 29 Mich. 173; *Driscoll v. People* 47 Mich. 417.

COOLEY, J. The respondent stands convicted of the murder of one Emery at Chesaning. The homicide took place while a circus was on exhibition at that place. I shall notice in this case only such errors assigned as, after the full presentation of the facts by Mr. Justice Sherwood, seem essential.

A chief ground of error relied upon is that the prosecution was allowed to put in evidence certain depositions taken out of court of witnesses not present at the trial. The facts seem to be that the attorneys for the respective parties stipulated to put in certain depositions on both sides, and they were put in accordingly. This, it is said, was in violation of the respondent's constitutional right to be confronted with his witnesses. But the court made no ruling in the matter; what was done was voluntarily done by the parties; the defendant had the benefit of the stipulation, and, for aught we can know, it may have been made chiefly in his interest. But however that may be, when the court has made no ruling we can have nothing to review. This Court cannot relieve a party from a criminal conviction because of his own voluntary action on the trial.

It is said the counsel for respondent was counsel assigned to him by the court and may not have been counsel of his choice. We do not know how the fact was, but we know it is customary to allow the respondent to choose for himself. But however that may be, the counsel acted for the respondent without objection, and without complaint that he did not do the best he could for him.

The defendant undoubtedly had a constitutional right to be confronted with his witnesses. He waived that right in this case, apparently for his own supposed advantage and to obtain evidence on his own behalf. It would have been a mere impertinence for the court to have interfered and precluded this stipulation being acted upon. But it would

have been more than an impertinence; it would have been gross error. And it would be palpable usurpation of power for us now to set aside a judgment for a neglect of the court not at the time complained of, but in respect to something where any other course would have been plain error.

Under the view taken by the respondent it would seem that when the evidence had been obtained under his stipulation, the court was put in position where it was impossible to avoid error; for if the evidence was received, he might complain, as he does now, that his constitutional right was violated, and if the court refused to receive it when he was consenting, the respondent would be entitled to have the conviction set aside for that error.

I shall always be ready to preserve in its integrity every constitutional right; but I do not understand that the Constitution is an instrument to play fast and loose with in criminal cases any more than in any other, or that it is the business of courts to be astute in the discovery of technical difficulties in the punishment of parties for their criminal conduct.

A number of special questions were put to the jury, and it is complained that the judge expressed to the jury an opinion on some of the facts covered by them. He was probably not as careful in that regard as he should have been. But we should not be over-critical in such matters, where the circuit judge certainly has some discretion. The judge said to the jury as to these: "Answer the questions put to you, keeping in mind that the answers to these questions should be consistent with the verdict which you find." This, it is urged, required the jury to conform their special findings to the general verdict. But we think the court merely reminded the jury that the general verdict should be in accord with the facts as they found them; an unnecessary caution, perhaps, but certainly not misleading.

I discover no error in the record, and think the conviction should be affirmed.

GRAVES, C. J. and CAMPBELL, J. concurred.

SHERWOOD, J. dissenting. The respondent was convicted of murder in the second degree in the Saginaw circuit court, and sentenced to fifteen years' imprisonment.

The case comes before us on bill of exceptions for review, from which it appears that the person killed was Augustus Emery, who was acting at the time as special marshal in the village of Chesaning; that respondent was connected with a circus troupe which was giving an entertainment that evening in the village; that during the evening, at a place but a short distance from the circus tent, called the Bowery, some citizens of Chesaning and vicinity were having a dance, and about the time the circus closed two citizens had an altercation, which was soon quieted, and shortly thereafter one of the citizens made an assault upon one of the circus men, named Gleason, who immediately cried out, "Hey, Rube!" (a term claimed to be used as a signal by the circus men for help and a fight at the place from which it came,) and thereupon the circus men, to the number of twelve or fifteen, ran to the Bowery, and rushed in upon those assembled, with clubs and missiles. In the melee which ensued, it is alleged the respondent gave Emery several severe blows with the butt of a whip, from the effects of which he died in a few hours thereafter.

The respondent claimed on the trial that he did not strike Emery, but on the occasion did strike one Wentzel, (who was also acting as an assistant officer in keeping the peace,) and that he did not enter the west end of the Bowery at all that night.

It appears that the respondent was poor, and unable to employ an attorney in making his defense, and counsel was assigned him by the court. Other counsel, however, appear for him in this Court.

Nine errors are assigned by respondent's counsel on the record as presented, four of which relate to the ruling of the circuit judge on the admission or rejection of testimony.

The first exception is to the refusal of the court to allow witness Griswold to state on his cross-examination "what he

had heard of the citizens being drunk and having difficulty with Emery." The matter inquired after was clearly hearsay and immaterial, and properly excluded.

The second and third exceptions relate to the admission of the answers given by the defendant to the following questions on his cross-examination, (against objection of defendant's counsel,) viz: *First.* "You pride yourself on your muscle, dont you,—on your strength?" *Second.* "As a member of the circus, how many different fights with outsiders have you been engaged in?" The answer to the first question was in the negative, and could only be construed in his favor. It could certainly not prejudice the respondent if improperly received. *Richards v. Tozer* 27 Mich. 451; *Beebe v. Knapp* 28 Mich. 71; *Davis v. Bush* 28 Mich. 432; *McDonough v. Sutton* 35 Mich. 1; *Lenox v. Fuller* 39 Mich. 268; *Keables v. Christie* 47 Mich. 594. In regard to the second question, it sufficiently appears that the respondent had introduced evidence tending to show the peaceable character of the respondent and of the other circus men, and the People had the right to give evidence in rebuttal of the respondent's testimony upon that subject, and that offered by the prosecution did nothing more and was properly received. The witness being himself the respondent does not vary the rule upon this subject. *People v. Cummins* 47 Mich. 336.

The respondent's fourth assignment of error is based upon the admission of certain depositions taken before the examining magistrate when the respondent and his counsel were both present, and which were returned to the clerk's office at the time respondent was held for trial. The witnesses, at the time of trial, were not within the jurisdiction of the court. One of the depositions used against respondent was taken in behalf of the respondent, and the other in behalf of the People; and a written stipulation was made between the prosecuting attorney and respondent's counsel, by which these depositions were to be read in evidence on the part of the People, and several others (taken in like manner) on the part of the respondent. Under this stipu-

lation they were all read to to the jury without objection; such objection being made to the same for the first time in this Court. The materiality of the testimony given in the deposition does not seem to be disputed. The question raised by this exception is not entirely free from difficulty. Section 28, art. vi, of our Constitution provides that "In every criminal prosecution, the accused shall have the right to a speedy and public trial by an impartial jury, which may consist of less than twelve men in all courts not of record; to be informed of the nature of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and have the assistance of counsel for his defense." The respondent can only be tried by a jury. See Comp. L. § 7947; [How. St. § 9559.] And § 7955 [9568] on same page, says: "No person indicted for a felony shall be tried unless personally present during the trial."

In addition to the provisions in the Constitution above given, section 1 of chapter 243 of the Compiled Laws also provides that "on the trial of every indictment, or other criminal accusation, the party accused shall be allowed to be heard by counsel, and he may defend himself, and he shall have a right to produce witnesses and proofs in his favor and meet the witnesses who are produced against him, face to face." [How. St. § 9072.]

Under these provisions of the Constitution and laws, respondent claims that notwithstanding the stipulation made by the attorney appointed by the court to defend him, and the public prosecutor, he was deprived of his constitutional right of being confronted with the People's witnesses and of meeting those who were sworn and gave testimony against him face to face before the jury which convicted him. The question is thus presented, Could the attorney *appointed* to defend the prisoner waive the constitutional and statutory right of the latter to be confronted with the witnesses against him, face to face?

In civil cases waiver of statutory and even constitutional rights may, many times, arise from the consent of the par-

ties either by stipulation in writing or in open court. *Ship Milwaukie v. Hale* 1 Doug. (Mich.) 306; *Chamberlain v. Lyell* 3 Mich. 448; *Beecher v. Baldy* 7 Mich. 488; *People v. Clark* 33 Mich. 112; *Pierce v. Rehfuss* 35 Mich. 53; *People v. Arnold* 40 Mich. 710; *Mabley v. Judge of Superior Court of Detroit* 41 Mich. 31; *Frankel v. Coots* 41 Mich. 75; *Fraser v. Jennison* 42 Mich. 206; *Stuart v. People* 42 Mich. 255. In civil actions, however, the interests of the parties or litigants alone are involved and to be considered. Not so in criminal cases. In criminal prosecutions other interests intervene, and have to be taken into consideration. The people compose the commonwealth, and the commonwealth has an interest in the lives and liberty of all its citizens, and that interest has been carefully guarded and protected, and the humanity of the law preserved, under an enlightened Christian civilization, in the provisions of our Constitutions, both State and National, and in the statutes enacted thereunder for that purpose. It is truly said by Mr. Justice Strong in *Cancemi v. People* 18 N. Y. 137: "The state, the public, have an interest in the preservation of the liberties and the lives of the citizens, and will not allow them to be taken away without due process of law, when forfeited, as they may be, as a punishment for crimes." Blackstone says (vol. 4 p. 189), the king "hath an interest in the preservation of all his subjects." Courts, in applying the provisions of the Constitution and laws, have ever been very careful that the legal limit intended should not be extended or overreached; and our own Court has said: "It is the duty of courts to see that the constitutional rights of a defendant in a criminal case shall not be violated, however negligent he may be in raising the objection."

In the early history of common-law criminal jurisprudence, while a public prosecutor was engaged to enforce the criminal law against offenders charged with capital crimes, it was made the duty of the court to be counselor of the prisoner, and "see that the proceedings against him are legal and strictly regular." 4 Bl. Com. 355 (Cooley's ed.) And

lest, at any time, through the neglect or caprice of the court, the prisoner should be deprived of the assistance of counsel in making a full defense before the jury, it was enacted by statute 7 Wm. III ch 3 that the prisoner may have counsel in making his defense, not exceeding two in number, to be selected by him and assigned to the service by the court or judge. 4 Bl. Com. 356. The right of the prisoner to be aided by counsel in making his defense has long been regarded, both in England and this country, as essential to a full and proper administration of justice in criminal cases. In this country the right is secured in the Federal Constitution (U. S. Const. Am. 6) and in the organic law of nearly every state. It is a right of which no citizen can be deprived by legislative or judicial action. "No one has a right, by his own voluntary act, to surrender his liberty or part with his life." The interest of the accused and that of the State, therefore, alike require its proper enforcement in all cases. If the prisoner is of sufficient ability he selects such counsel as he desires to defend him; and if he declines the assistance of counsel the court may or may not assign counsel to aid him, but in such case usually intrusts the People's interest to the prosecuting attorney alone. In case the respondent is unable to employ counsel to defend him, his interests and those of the State must be protected and he should be furnished with such aid as may be necessary in ascertaining the truthfulness of the charge made against him, and for that purpose the prosecuting attorney will not alone be allowed to protect him and look after the people's interest, but the court will appoint some suitable member of the profession to assist in his defense. In England it is the modern practice to permit the respondent to make the selection of counsel for this purpose. See statute 6 and 7 Wm. III ch. 114 and decisions thereunder. In this State the court usually designates the person who is to perform that duty. And he is not at liberty to decline (see *Vise v. Hamilton County* 19 Ill. 78;) neither is he at liberty to make a "feeble and heartless defense;" and cases may arise when, notwithstanding the assignment of counsel

to defend, it would become the duty of the court to see to it that the prisoner suffers nothing from inattention or haste of counsel thus assigned, or impatience or overzeal on the part of the prosecution. Cooley's Const. Lim. 335, 336.

In this case it does not appear that the attorney appointed by the court to assist the respondent in his defense was so appointed at the solicitation of the respondent, or that he had any voice in the selection, or that he was willing the attorney should make the stipulation he did, to admit in evidence the depositions which are made the subject of this exception. It is shown affirmatively that the court appointed an attorney to defend respondent eleven days before the trial commenced, and that the stipulation between the attorneys was made before that time; and it does not appear that the prisoner was present when it was made, or that he was ever consulted about it, or, if he had been, that he knew what his constitutional rights were in the matter.

It does not appear that the respondent either signed the written stipulation or knew its contents, or himself admitted in open court that he was willing that the testimony should be read when it was presented to the jury, unless his silence shall be made to speak against him. And while I have no doubt that under certain circumstances, by his own express agreement or that of his chosen attorney, he may make a binding stipulation to waive even his constitutional right to have the testimony of witnesses against him given in open court upon the stand, still, I do not think that such agreement, or the authority of the attorney designated by the court to make the same (as in this case), can be implied from his silence or his failure to object to the deposition when offered before the jury. If this were not so, then the constitutional provisions intended as a safeguard to the accused would become a delusion and a snare to one charged with crime who was not as well versed in the law as the prosecuting attorney or the trial judge. Nothing can be presumed against the prisoner from his silence (while the charge is under judicial inquiry) from the time he is called

upon to plead until its final disposition by the jury. Whart. Crim. Law § 132. The question we are now discussing has been before the courts both in England and in this country. See *Lord Morley's Case* 6 State Trials 770: *Harrison's Case* 12 State Trials 851; *Regina v. Scaife* 17 Q. B. (N. S.) 238; *Drayton v. Wells* 1 Nott & McC. 409; *Williams v. State* 19 Ga. 403; *Reynolds v. United States* 98 U. S. 158. I think the depositions were erroneously admitted.

The defendant's fifth, sixth, and seventh assignments of error are exceptions to the court's refusals to charge as requested. The respondent had testified that he did not strike Emery on the evening of the affray, but did strike one Wentzel, an officer at the Bowery; and the substance of these requests was that if the jury found there was no common understanding among the circus men to do an unlawful act, but that the men assembled at the Bowery upon hearing the signal there, and for a lawful purpose, and that while there respondent struck a man other than Emery because he supposed the man had assaulted one of the circus men, and that he then went away without doing anything else, then the respondent would not be guilty.

We have examined the charge in this case with care and find it very clearly and forcibly gave to the jury what under the law constitutes the offense of which the defendant was convicted, and what under the circumstances of this case was necessary to be proved in order to produce a conviction. The facts alluded to in those three requests were called to the attention of the jury, and while the language of the requests was not given, I think all that was necessary to protect the respondent's rights upon the points made in the requests was plainly stated in the charge of the court.

It is claimed in respondent's tenth assignment of error, that the court erred in submitting to the jury the question whether the signal given was or was not for the purpose of assembling the circus men together to drive the people out of the Bowery. There was no error in this; there was evidence in the case tending to show they assembled for both a

lawful and unlawful purpose, and the fact in the matter was for the jury.

An important question is raised under respondent's eighth and ninth assignments. The circuit judge requested the jury to answer specifically nine questions which he submitted to them, and at the same time gave instructions as to how they should be answered. It is unnecessary in this case to say whether or not it was proper for the jury to bring in special findings, it being a criminal case. The circuit judge evidently regarded Comp. L. § 6026 [How. St. § 7606] as applicable in criminal cases, but the contrary was held by this Court in *People v. Marion* 29 Mich. 32, and I think correctly, for the reasons given by Mr. Justice Campbell in that case. This being the case, it only remains to consider the questions, with the instructions relating thereto, as given by the court as part of the general charge. The questions all call for the decision of the jury upon questions of fact, which is the legitimate and exclusive duty of the jury. It is especially the duty of the court in a criminal case to allow no person to occupy a seat in the panel who has not all the qualifications for the position, and when such jury is obtained, great care should be observed that in all their deliberations they remain uninfluenced by the court as to the view they should take of the testimony.

In submitting the question to the jury in this case for special findings, I do not think such caution was observed. While the charge is in the main fair and correct, I think several of the suggestions of the court in presenting the questions to the jury were objectionable, and encroached upon their province. These questions submitted, and the statements made by the circuit judge in regard to each at the time, and the several answers made by the jury thereto, are as follows:

First. "Did the circus men first enter the Bowery promiscuously and at different points?" *By the Court.* "To the first question you will answer, yes or no, as you find the evidence. As I look at it,—but that is a question for you,—it tends to show that they did enter at different points promiscuously." *Answer by Jury.* "Yes."

Second. "Were the circus men engaged in their work when the signal, 'Hey, Rube!' was given?" *By the Court.* "In regard to the second question, there is evidence tending to show that some, if not all of them, were engaged in their work when the signal was given. You will answer that question, yes or no, as you may find the fact to be. If you find some of them were engaged, and as to the others you are unable to determine from the evidence, answer it according to the fact." *Answer by Jury.* "The majority were."

Third. "Did the defendant, in response to said signal, proceed to the Bowery?" *By the Court.* "Did the defendant, in response to the signal, proceed to the Bowery? He says himself he did. That is the testimony of the defendant; so you will have no difficulty in answering that yes." *Answer by Jury.* "Yes."

Fourth. "Did not respondent go at first directly to the Bowery, and that without consultation with any one until he got there?" *By the Court.* "In regard to the fourth question, there is no evidence that he consulted with any one before he got there. The question should be answered yes." *Answer by Jury.* "Yes."

Fifth. "Did Murray enter the Bowery at the west end, and at the beginning of the affray, with other circus men?" *By the Court.* "In regard to the fifth question, there is evidence in the case tending to show that he entered the west end. You know how many witnesses testified to that. Some of the witnesses testified that he entered at the east end; and you will remember his own testimony on that point. You may answer that question as you find. If he did enter at the east end, and his own evidence is true, then he either entered at the west end and passed out again and entered at the east, or vice versa, and thus he entered at both ends. *Answer by Jury.* "Yes."

Sixth. "Did respondent give the fatal blow to Emery?" *By the Court.* "Answer the sixth question yes or no." *Answer by Jury.* "Yes."

Seventh. "Did respondent strike Emery at all?" *By the Court.* "Answer the seventh question yes or no." *Answer by Jury.* "Yes."

Eighth. "Did respondent strike Wentzel in the Bowery?" *By the Court.* "Did the respondent strike Wentzel in the Bowery? If you believe the prisoner's statement, he did. In that case you will answer yes. If, on the contrary, you do not believe his evidence, and you do not find there is any evidence in the case that authorizes you to find and

answer yes, then you will find and answer no." *Answer by Jury.* "No."

Ninth. "Was not the whip in question the one which respondent had in common use, and did he not have it with him when the signal was given?" *By the Court.* "Answer the ninth question yes or no. The defendant says he had the whip. The other testimony tends to show that he did; that he had it in coming out, and he had it with him when he went to the Bowery. *Answer by Jury.* "Yes."

To the first question, the court says, substantially: "As I look at it, the evidence tends to show sufficiently that your answer should be yes." And the remarks of the court on the second question are substantially to the same effect. It is true, he says, "you will find as *you* find the facts to be;" but they should be permitted to thus find without any expression of his views of what the evidence tends to show upon that point. If there is evidence in the case upon the subject, the court may properly call their attention to that fact; but what it shows, or tends to show, is strictly the province of the jury to determine, when the question comes up, as in this case.

The answer to the third question, if made according to the direction of the court, certainly was against the accused; and whether the jury believed the respondent or not, they were subsequently required to answer the question, "Yes."

The same is true in regard to the fourth question.

The remarks of the court in reference to the fifth special request were clearly improper, and could hardly fail to have done mischief with the jury. Whether the defendant entered the Bowery at the east end or not became very material and important, as he was able to show that, if he entered at that end, he did not strike Emery. From the suggestions and arguments made by the court, the jury must have been led to understand that reasonably only an affirmative answer could be given. All idea that a reasonable doubt could exist as to what answer should be given seems to have been excluded. I think, in these remarks, clearly there was error to the respondent's prejudice.

The peremptory manner in which the court directed the

answers to be given to the sixth and seventh questions also excludes all idea that with the jury there could be any reasonable doubt. In fact, I think the remarks of the court clearly indicate that upon these questions there could be no reasonable doubt. It is highly improper to use any language in instructions to a jury in a criminal case which may be susceptible of such a construction.

I fully agree with Mr. Justice Marston in *People v. Lyons* 49 Mich. 82, when he says: "It is well known in practice that the opinion of the trial judge has very great weight with the jury, and very properly so, and for this reason so much more careful should the court be to not assume a part of their province." I confess I have never felt quite satisfied with the ruling upon this subject in *Sheahan v. Barry* 27 Mich. 217. I am aware that the rule laid down in that case is supported by the English cases cited, and many of the American decisions. Of course, the latter rest entirely upon the former. I regard both, however, as equally in conflict with the object and design of those who gave us our system of trying questions of fact by jury. The object was to submit all questions of fact to the decision of twelve men, whose judgments should be uninfluenced by the court or by fear or favor of parties.

It is conceded by all that the jury watch closely every word that falls from the nisi prius judge in the trial of a cause, and are usually anxious to know his views upon the facts, and his direction as to the law of the case (which they always accept as correct) is seldom held in higher estimation by them than his views upon questions of fact when once ascertained. It is a part of the theory of jury trials that the opinion of the trial judge upon the facts shall in no manner affect or influence that of the jury. But how can it fail to do so (so long as his opinion has their respect) if he is permitted to disclose it to the jury? If it is not intended it should influence the jury, why give it to them at all? In my judgment it is idle to say that the jury are at liberty to do as they please, notwithstanding the views of the judge, so long as the judge has any influence with them.

The average juryman, with his little experience in passing upon closely contested matters of fact, usually has neither the confidence in his opinions nor sufficient firmness of character to oppose his views to those of the circuit judge, coming as they do from one whose learning, experience and position he regards as furnishing superior advantages in arriving at correct opinions on the testimony, and whose decisions and instructions he is not permitted to question. When the judge gives his views upon questions of fact, the mischief has been done, and it is not in his power, by anything he may afterwards say, to fully eradicate the error. This I believe to be the experience of all practitioners; and I think there is no safe way of preventing encroachment upon the province of the jury and making certain the duties of the court in the trial of causes, except in entirely excluding the personal views of the trial judge upon questions of fact.

The suggestions of the court in presenting the eighth and ninth questions are subject to the same objection as the others, in failing to give the respondent the benefit of reasonable doubt, if any existed in the mind of the jury. In none of the instructions of the court concerning any of these questions is it stated what would be a proper answer in case they were in doubt about the fact queried after, or in case they were unable to agree as to what the testimony proved in regard to it. If it were proper to make any suggestions at all, this should have been done. In his statements upon presenting the nine questions the court told the jury that their "answers to these questions should be consistent with the verdict." The court had already suggested, as we have seen, the form of the answers to be given. I think this was erroneous and clearly within the decision of this Court in *Cole v. Boyd* 47 Mich. 98.

The judgment should be reversed and a new trial granted.

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SARAH PERSINGER v. JOSHUA JUBB.

Partition and guardian's sale—Formal defects—Affidavits.

1. A recital in a decree for partition that a specified party is entitled to share cannot be collaterally attacked even though it be an adjudication that ought properly to have preceded the decree, and though the person named be illegitimate and therefore precluded by statute from claiming any part of the estate.

2. Proceedings for partition need not be held invalid on review merely because the petition therefor was made by an administratrix, as such, so long as it appeared that she had a dower interest and was guardian for minor heirs; the misdescription could have been amended at any stage by leave of the judge of probate.

3. Want of venue to an affidavit of the service of notice is not a fatal defect if the venue is indorsed on the notice and the affidavit is properly entitled and sworn to.

4. Partition before expiration of a dower interest is not forbidden by How. St. § 5983; that statute only provides for making partition afterwards.

5. A description in a deed may be sustained if, with the aid of the usual local inquiries, there would be no difficulty in locating the land.

6. A guardian's oath is not defective for being entitled "In the matter of the estate of Henry McVay et al. minors" since this identifies the estate, which is the purpose of the title.

7. Sufficient publication of notice of a guardian's sale may be shown by other evidence than the affidavit thereof, which is for the purpose of a permanent record.

8. Want of an affidavit of the posting of notice of a guardian's sale is not fatal if the fact is shown in the sworn report of the sale and is recited in the order confirming it.

9. The probate judge's approval of the bond given by a guardian before selling his ward's real estate sufficiently appears by the recital of the fact in the order confirming the sale.

10. A guardian's report of the sale, for a round sum, of two parcels of land, one belonging to each of two wards, is not necessarily to be construed as showing that both were sold together for one sum or to impeach the judge's performance of his duty in satisfying himself as to the facts before confirming the sale.

Error to Wayne. (Jennison, J.) Oct. 23.—Dec. 21.

EJECTMENT. Plaintiff brings error. Affirmed.

Conely, *Maybury* and *Lucking* for appellant. Partition proceedings cannot be instituted until a decree shall have been made assigning the property to the persons entitled to take, and naming the proportions to which each is entitled: *Campau v. Campau* 19 Mich. 122; the interest of one petitioning for partition must be affirmatively set forth: *Shipman v. Butterfield* 47 Mich. 487; *Besancon v. Brownson* 39 Mich. 392; notice of the proceedings can not be shown by an affidavit that has no venue: *Gillett v. Needham* 37 Mich. 143; or if it is not properly entitled: *Arnold v. Nye* 11 Mich. 456; a guardian's sale is void unless the requisites prescribed by statute are complied with. *Ryder v. Flanders* 30 Mich. 343–4; *Stewart v. Bailey* 28 Mich. 251; *Toll v. Wright* 37 Mich. 93; *Dexter v. Cranston* 41 Mich. 448; *Ellsworth v. Hall* 48 Mich. 407.

Henry M. Duffield for appellee.

COOLEY, J. Ejectment to recover lands, situate in Dearborn, Wayne county, and constituting part of private claim No. 97.

The plaintiff deduces title from her father, William McVay, who died in 1864, leaving, besides the plaintiff, two children, William and Eliza, and also Henry, the son of a daughter, who had died in 1856. Eliza, the widow of William McVay, Senior, was appointed administratrix on his estate, and she was also appointed guardian to the plaintiff and Henry, who were minors. In 1865, on the application of the widow, the lands belonging to the estate were partitioned between the children and the grandchild, and in 1867 the parcels allotted to the two minors were sold in two separate proceedings, and the defendant in this suit became the purchaser. The plaintiff contests the validity of both the partition and the sales, and seeks to recover her undivided interest as heir at law in all the lands. If the partition is sustained, she claims the land set off to her by it.

Several supposed defects in the partition proceedings are pointed out.

1. It is assumed in those proceedings that Henry was one of the heirs at law; whereas plaintiff claims and introduces evidence to show that he was an illegitimate child, and therefore incapable of claiming a share in the estate, the statute expressly declaring that an illegitimate child "shall not be allowed to claim, as representing his mother, any part of the estate of any of her kindred, either lineal or collateral." Comp. L. § 4310. [How. St. § 5773 *a*.]

It seems to be an answer to this that the statute in terms makes the partition "conclusive on all the heirs and devisees, and all persons claiming under them, and upon all persons interested." Comp. L. § 4512. [How. St. § 5980.] It is argued that it is only conclusive when it is made between the persons entitled; but the order for partition recites that Henry is entitled with the others; and this is an adjudication which cannot be assailed collaterally. It is said that this adjudication ought to precede the order for partition; and regularly that it so; but there seems to be no very substantial reason why they may not be united. No one is harmed by that course, and it is not uncommon in probate courts and other courts for adjudications that immediately succeed each other to be joined in one order.

2. The partition between the heirs was made on the application of the administratrix; and this it is said was incompetent, because she was in no way concerned. It is true that as administratrix she was not concerned; but she was widow with a right of dower, and she was also guardian for the two minor heirs. If she had described herself as guardian, the right would have been apparent. But we are inclined to regard the misdescription as a mere informality. The interest existed, and was apparent to the judge of probate when he received and acted upon the petition which she presented, and he would have had power to permit an amendment to show the fact in any stage of the proceedings. This being so, the proceedings ought not to be held void in another court for the informality.

3. The proof of notice to the parties concerned is said to be fatally defective. The defect consists in this, that the affidavit of service has no venue. But it is indorsed on the back of the notice itself, which is properly entitled, and is sworn to before the register of probate. The venue is thus supplied.

4. The commissioners in partition set off to the plaintiff the reversion in land assigned to the widow for her dower. This, it is said, was incompetent under § 4515 of Compiled Laws. [How. St. § 5983.] But that statute does not forbid partition before the dower expires; it only provides for its being made afterwards. It is applicable when there is occasion for it, and not otherwise.

We find no fatal defect in the partition proceedings, and pass to the proceedings on the sales.

1. The description of the land in the notice of the first sale is said to have been defective. The description is as follows:

"All the right, title, and interest of said minors in and to four and thirty-eight one-hundredths acres of land, assigned to Mrs. Eliza McVay, widow of the late William McVay, of Dearborn, Wayne county, Michigan, for and as a portion of her dower in and to the estate of said William McVay, deceased, assigned to her by the commissioners in dower in said matter, and being a part of said estate next to and adjoining the ridge road, so-called, on the westerly side thereof; also three acres and fourteen one-hundreths on the westerly side of the river road, being in the same condition as first above-described tract, and being a part of the McVay estate in Dearborn, aforesaid."

No doubt this description might be improved, but there could have been no difficulty in locating the land by means of it, with the aid of such local inquiries are as usually needful. It may be assumed that it would not be well known in the neighborhood what part of an estate had been set off to the widow for her dower, but some other particulars are here given to aid in identifying the land intended.

2. The oath taken by the guardian before making the sale is said to be defective because entitled merely "In the matter of the estate of Henry McVay et al., minors." But

this identified the estate, which is the office of the entitling in any case.

3. The affidavit of publication of notice of sale in a newspaper showed a publication for three weeks only, when six were required. It was shown by other evidence, however, that sufficient publication was had, so that the defect in the affidavit became unimportant in this suit. The affidavit is for the purposes of a permanent record; but if the record is not made, the facts may nevertheless be shown.

4. There was no affidavit on file of the posting of notices of sale as required by law, but the report of sale, made under oath, showed that the posting took place, and the order confirming the sale recites the fact. This is sufficient.

The supposed defects in the second sale are:

1. The bond given by the guardian on the sale does not appear by any indorsement to have been approved by the probate judge. But the order confirming the sale recites an approval, and the fact may as well appear by the order as in any other manner.

2. The guardian reports two parcels of land sold, one belonging to each of her wards, for a round sum named. This, it is said, is a report that the two were sold together for the one sum. But, while this may be the most natural and obvious construction of the report, it is not a necessary construction. The report was made to a judge having power to inquire into the facts, and who was required in the performance of his judicial duty to do so; and we cannot say that he did not find that the parcels were separately sold. He seems, at any rate, to have satisfied himself in respect to the sale, and to have confirmed it accordingly; and we discover nothing that should necessarily have precluded this action.

We agree with the circuit judge that the plaintiff made no case, and the judgment must be affirmed with costs.

The other Justices concurred.

ADELLA B. GARDNER v. GEORGE B. WARREN, JR., JOHN A. MANNING AND JOHN B. PIERSON, EXECUTORS, LYMAN D. NORRIS ET. AL.

Cloud on title.

A decree compelling a release by executors was sustained by a divided court where one of two joint-owners, acting with the other's verbal authority, had made a contract of sale the terms of which, after various transfers, had been fulfilled, but where the executors and legal representatives of the other joint owner, who had died meanwhile, claimed to retain their decedents' original interest.

Appeal from Mecosta. (Fuller, J.) Oct. 23.—Dec. 21.

BILL to compel release of claims against realty. Defendants appeal. Affirmed.

E. A. Maher for complainant.

Norris & Uhl for defendants appellant.

SHERWOOD, J. The bill in this case is filed to compel a release by the executors and Lyman D. Norris, of their interest in the north half of lot 14 in block 7 of Warren and Bronson's second subdivision of the city of Big Rapids. Separate demurrers were filed by the executors and the defendant Norris; and the demurrers having been overruled the bill was taken as confessed by all the defendants; and the circuit judge after the hearing decreed to the complainant the relief prayed in her bill. From that decree the executors and the defendant Norris took an appeal to this Court.

The complainant shows by her bill that in 1867 George B. Warren, whose residence was at Troy, New York, and Chauncy P. Ives owned in common a tract of land in the city of Big Rapids, including said lot 14, Warren owning two-thirds and Ives owning the other one-third of the same; that on the 16th day of October, 1867, Ives conveyed

his one-third interest in the said lands to Stephen Bronson, of Big Rapids, and after the purchase by Bronson he agreed with Warren that they would sell said lands to persons who should desire to purchase, and give their joint executory contracts on such sales when made; and it was further understood between them, and in pursuance of such understanding, Warren directed Bronson to sign and execute such contracts on his behalf, as he might deem for the best interests of the parties; that a large number of sales of lots were thus made by Bronson for himself and said Warren, he acting as the agent in making the same for Warren; and that among the sales made and contracts given was one to William T. Latham, of the north half of lot 14, it being the lot in question. It was made on the 1st day of March, 1871. By the terms of this contract, Latham was to have immediate possession of the premises. Upon the execution thereof he took such possession and made valuable and permanent improvements thereon. He was to pay $300 for the parcel ($125 at date of contract, and the remainder in three equal annual payments thereafter, with annual interest at ten per cent.); and Warren and Bronson, on receiving full payment of the purchase price and interest, were to execute to Latham a good and sufficient warranty deed of the premises. The terms of the contract were to apply to the heirs and assigns of the parties. Warren's name was signed by Bronson.

On the 15th day of June, 1872, Latham sold the lot and all his interest therein under his contract with Warren and Bronson to Elwood Graham, who took possession of the lot and made valuable, expensive and permanent improvements thereon.

The bill further avers that Stephen Bronson, on the 2d day of October, 1872, conveyed his interest in the lot to the Big Rapids Improvement & Manufacturing Company, and that such conveyance was with the full knowledge and consent of George B. Warren, and under an agreement with him that all of the contracts executed by Bronson for himself and Warren, including the contract with Latham,

should have full force and effect by all parties interested therein, as the joint contract of said Warren and said company; that all the terms and conditions of the Latham contract were fully performed on or about the 7th day of December, 1874, by paying all principal and interest accrued thereon to Warren and the company.

It further appears by said bill that said Company did, on or about the 16th day of August, 1875, convey its undivided one-third of said lot to said Elwood Graham, who then held the interest of said Latham in the contract for the purchase of said lot; that Elwood Graham entered into possession of said lot, and so continued until about the 20th of January, 1880, when he sold the same to Ursula Graham, and she immediately took possession thereof under said sale and made valuable and permanent improvements thereon; that on the 17th day of August, 1882, Ursula Graham sold and conveyed the premises to the complainant, and that she went into possession of the lot, and was so in possession at the time of filing her bill of complaint, and she avers she is the equitable owner thereof.

It is further stated in the bill that George B. Warren, on the 8th day of May, 1879, died, leaving a last will, and that defendants, George B. Warren, John A. Manning and John B. Pierson were appointed executors, and received their letters from the judge of probate July 9, 1879; and that they qualified and entered upon the discharge of their duties as such; that the deceased devised all his real estate interests to his executors in trust for certain purposes, and that the said George B. Warren, Jr., Emily Warren, Charles S. Warren, John E. Warren and Mary Manning are the beneficiaries under the declaration of trust in the will, so far as relates to the real estate; that said executors claim to own in fee the undivided two-thirds of said lot, and threaten to dispossess complainant by taking legal proceedings.

The bill further avers that on the 16th day of October, 1867, Bronson gave a mortgage to Ives upon his interest in the property purchased, which mortgage covered the east tier of lots in block seven, the same being numbered from

9 to 16; that on the 15th of July, 1869, said Ives released, among others, lot 14 from the operation of said mortgage; that on September 1st, 1875, George B. Warren became the owner of the mortgage and debt secured thereby, and subsequently commenced a foreclosure of the same, and in describing the property in the bill of complaint, excepted out-lot 14; that said foreclosure was completed after Warren's death by his executor, and that on or about June 20, 1880, a sale was made thereunder of the mortgaged property, said defendant Lyman D. Norris being the purchaser thereof; that said Norris claims no beneficial interest in the premises purchased by him on said sale, but claims to hold the title to the same in trust for the estate of George B. Warren. The bill further charges that said Norris claims that under and by virtue of his purchase at said mortgage sale he has an interest in an undivided one-third part of the north half of lot 14; and that such claim is a fraud upon complainant and a cloud upon her title. Complainant further claims she has requested said defendant Norris and said executors to release to her their claims upon said premises, and they refused so to do.

The defendants who have appeared rely in this court upon the points made in their demurrers to sustain their defense.

It will be noticed that the complainant does not ask that defendants be decreed to give a deed with warranty, but simply a quitclaim or release of their interest; and it is difficult to see why the case made by the bill is not an equitable one and one entitling complainant to the relief she prays. It is said complainant does not seek a conveyance to her of the land, but only a release of defendants' claim thereto. The bill states the claim made by defendants is, by defendant Norris, the title to one-third of the lot; and by the executors, the title to the other two-thirds. Such a claim under our statute [How. St. § 5653] can be released only by deed.

The relief prayed is not inconsistent with the facts stated in the bill; neither is it contrary to the practice of a court of chancery, upon the facts stated, to grant relief.

The company conveyed to Latham's assignee the interest transferred to it by Bronson, as it was equitably required to do, and as it had promised to do in pursuance of the arrangement between Bronson and Warren, when the company bought the property, and it was a fraud upon the rights of the complainant, who is assignee of Latham, when the representatives of the Warren interest refused to fulfill Warren's agreement to convey. It appears he, as well as the company, had received the consideration paid by the complainant and her assignors for the lot. She held the equitable interest in the premises, was in possession of the property under her equitable interest, and was entitled to have from the defendants the evidence of her legal title. But instead of receiving it when she made her request, the defendants not only refused to make it to her, but actually denied her right thereto, claiming to be themselves owners of the property.

The statements in the bill relating to the mortgage sale and the interest purchased by Norris show a claim made to the property in question without any sufficient foundation. We see no difficulty, under the facts stated in the bill, in bringing the case within a very familiar and well-recognized head of equity jurisdiction. The fraud charged is alone sufficient upon this point.

It is claimed here that Bronson was not legally authorized to make the Latham contract for Warren. This objection comes entirely too late. Equity will not allow a party to receive the full benefit of a contract made by another for him, and then permit him to repudiate the contract thus made. It appears from the bill that Warren not only knew all about the contract made, but had verbally authorized Bronson to make it; had recognized it as his arrangement with the company, and had actually taken all the benefit he could derive from it. It nowhere appears he ever repudiated the contract while living, and his executors cannot be permitted to do it now that he is dead.

The case as stated in the bill does not fall within the Statute of Frauds referred to by counsel. We think the

bill sufficiently avers possession in plaintiff at the time of commencing the suit; that the bill is sufficiently specific in all its material averments, and is not subject to the infirmities specified in the demurrers.

The decree of the circuit court must be affirmed with costs.

CAMPBELL J. concurred.

GRAVES, C. J. I am not able to concur in this opinion.

COOLEY, J. I think there was a fatal defect of parties in this case, but as the decree must stand affirmed I do not deem it necessary to comment on the case.

SCHOOL DISTRICT NO. FIVE OF DELHI v. WILLIAM E. EVERETT.

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[See 49 Mich. 432.]

Lease to school district conveying a base fee.

1. A lease to a school district, to hold the property "during the time it is used for school purposes," is a lease in perpetuity at the will of the lessee; and as the lessee is a corporation, and words of inheritance are not required, the lease, if a present consideration is paid, really operates as a bargain and sale, and conveys a base or determinable fee. This is sufficient to satisfy the provisions of the school law, which requires a title in fee or a lease for ninety-nine years where land is to be secured for erecting a stone or brick school-house.
2. After the lapse of a dozen years it is too late to disturb the title to a school-house site by mere questions of regularity in the proceedings to designate it.

Appeal from Ingham. (Gridley J.) Oct. 25.—Dec. 21.

BILL to compel delivery of deed in fee simple. Complainant appeals. Affirmed.

S. T. Kilbourne for complainant.

Edward Cahill for defendant.

COOLEY, J. The statute which defines the powers of school-district boards provides, among other things, that

"They shall purchase or lease a site for a school-house, as shall have been designated by the district, in the corporate name thereof, and shall build, hire, or purchase such school-house out of the fund provided for that purpose, and make sale of any site or other property of the district, when lawfully directed by the qualified voters at an annual or special meeting; provided, that the district shall not in any case build a stone or brick school-house upon any site, without having first obtained a title in fee to the same, or a lease for ninety-nine years; and also that they shall not in any case build a frame school-house on any site for which they have not a title in fee, or a lease for fifty years, without securing the privilege of removing the said school-house when lawfully directed so to do by the qualified voters of the district, at any annual or special meeting." Comp. L. § 3629.

In September, 1867, the complainant in this suit was owner of a school-house and lot, and was in the occupation of the same, but the ground was low and needed drainage, and the question of procuring a new site for either temporary or permanent occupation was agitated among the voters. The place talked of for the purpose was on the land of the defendant, and some understanding with him concerning it appears to have been arrived at, but the parties do not agree what the understanding was. At the annual meeting held September 2, 1867, the meeting "voted to raise tax money sufficient to repair school-house and pay for a new site for the same, the amount to be ascertained and the job let by the following persons who were appointed a committee for that purpose by the moderator: D. S. Price, C. Haag and Philip Beal." In January, 1868, the following instrument was executed by defendant and the members of the district board.

"Know all men by these presents that William E. Everett of the township of Delhi in the county of Ingham and State of Michigan, of the first part, for the consideration herein mentioned, does hereby *lease* unto school-district No. 5, in the township, county and State aforesaid, party of the second part and their assigns, the following parcel of land, to-wit: Commencing at a certain stake in the center of the

Lansing & Eaton Rapids State Road, running at a right angle of said road eight rods; thence parallel with said road ten rods; thence at a right angle with said road eight rods; thence on the line with said road ten rods to the place of beginning,—being on that portion of W. ½ of S. W. ¼ of section 5 lying east of the Lansing & E. R. State Road in town 3 N. of range 2 W.; with all the privileges and appurtenances thereunto belonging, to have and to hold the same for and during the time it is used for school purposes. And the party of the second part, for themselves and their assigns, do covenant and agree to pay the said party of the first part for the said premises the sum of forty ($40) dollars, and to keep the said premises fenced in a good and substantial manner.

In testimony whereof the parties have hereunto set their hands and seals this ninth day of January, A. D. 1868.

Wm. E. Everett, Lessor [L. S.]
D. S. Price [L. S.]
S. Drumm [L. S.]
Philip Beal [L. S.]
District Board of School-district No. 5 of the aforesaid Township.

Revenue Stamp, 50c. C. H. D., Register. March 4, 1868.

Signed and sealed in the presence of
Miles Gillett,
W. Drumm,
C. Haag."

The sum named in this instrument was paid, and the district took possession of the land described, and has ever since been occupying it for school purposes. The instrument itself was placed on record in the office of the register of deeds for the county.

In the year 1881, the district having in contemplation the erection of a stone or brick school-house on the lot described in the instrument above given, question was made whether the title conveyed was such as would warrant it; and it was claimed on behalf of the district that by the understanding when the instrument was given, a title in fee-simple was to have been and should have been conveyed. The officers accordingly called upon defendant and requested that he execute to the district either a deed in fee-simple or a lease for ninety-nine years. He refused to execute either, and denied that there was ever an understanding for any

different instrument than the one which was executed and delivered. The present suit was then commenced. The purpose is to enforce the specific performance of the oral understanding alleged to have existed in January, 1868, and the bill alleges that by inadvertence a different instrument was then received by the officers of the district than the one bargained for.

The defendant answered, denying the equity of the bill, and proofs were taken. The affirmative showing on behalf of the complainant is very strong, but considerable evidence is put in by the defendant that in the negotiations with him he declined to convey an unqualified fee, and the instrument which he executed and which the school officers received and recorded must be considered as supporting very strongly the case made by the defense. On the whole we cannot say that complainant has established its case with sufficient certainty to justify a decree in its favor. This was the view taken of the case by the circuit judge, and his decree must stand affirmed with costs.

Another view might be taken which would lead to the same result. It is fully conceded by the defendant that the understanding was that the district should have the land so long as it should be occupied for school purposes; and the instrument which he gave shows this intent very conclusively. The instrument was therefore at the very least a lease in perpetuity at the will of the lessee. *Folts v. Huntley* 7 Wend. 210; *Effinger v. Lewis* 32 Penn. St. 367. But it was more than this. The grantee being a corporation, words of inheritance were not needed to convey a fee; and though the instrument given is spoken of as a lease, yet, as it was given for a present money consideration, it operated as a bargain and sale: *Jackson v. Alexander* 3 Johns. 484; s. c. 3 Amer. Dec. 517; *Jackson v. Fish* 10 Johns. 456; *Feoffees &c. v. Andrews* 8 Met. 584; *Beach v. Haynes* 12 Vt. 15; and it conveyed a base or determinable fee, which we think answers all the purposes of the statute. *Arms v. Burt.* 1 Vt. 303; s. c. 18 Amer. Dec. 680; *Stevens v. Dewing* 2 Vt. 411. The statute does not

require a fee-simple; its purpose is to make sure that public school moneys shall not be expended in permanent buildings on land to which the district has a right which is less than a leasehold interest for ninety-nine years. In this case the right is perpetual, though subject to terminate by abandonment of school use.

Some question was made whether the new site had ever been legally designated by a vote of the school-district; but after this lapse of time no question of regularity in the designation could be tolerated. School-districts, unfortunately, are apt to act with great informality in their corporate matters; and it is a sound rule to let general acquiescence cover the errors.

The other Justices concurred.

JOHN M. HOFFMAN v. HENRY MCMORRAN.

Relief in equity depends on case made in bill.

Where a purchaser under a second mortgage seeks relief against one who holds under a first mortgage, on the ground that the first was not filed and recorded until after the second, he must establish the case made by his bill or he cannot have relief.

Appeal from St. Clair. (Stickney, J.) Oct. 25.—Dec. 21.

BILL to quiet title, etc. Defendant appeals. Reversed.

A. E. Chadwick for complainant.

Atkinson & Stevenson for defendant.

GRAVES, C. J. In 1876 one Thomas J. Dunford was the owner of one-third of the vessel called the "Fred J. Dunford," and on the 6th of January of that year he gave a mortgage on that interest to defendant McMorran for the nominal consideration of $4000; and on the 23d of Febru-

ary following he gave another mortgage on the same interest to Thomas S. Skinner for the nominal consideration of $2600. Both mortgages were subsequently foreclosed by advertisement, the defendant becoming the purchaser under his own and complainant becoming the purchaser under the other. It being claimed by Hoffman that his right was preferable in equity to that of defendant, and that the claim set up by the latter was virtually a mere cloud which ought to be removed, he proceeded to file this bill. The court decreed in favor of complainant and defendant appealed.

At the time McMorran received his mortgage, in January, he was asked by Dunford to withhold it from record until further notice, and he assented, and it was not left for record until the same day on which the Skinner mortgage was executed and recorded; and as matter of fact the cause of its being handed in for record just at that time was that Dunford then told McMorran either that he had then given, or was going that day to give, the mortgage to Skinner. Whether he gave McMorran to understand that the mortgage was already executed, or on the other hand that he was going to execute it, is a subject of dispute. Both mortgages were noted by the proper officer of the customs as having been received for record on that day, but at different hours,—the McMorran mortgage as received at 2 P. M., and that to Skinner as at 4:20 P. M.; but they were copied into the records in the contrary order with some other papers between them.

The controversy is of that class where the rule is very material that the complainant must abide by the case which he makes in his bill, and recover relief, if at all, in virtue of the very premises on which he has staked his demand for it. *Livingston v. Hayes* 43 Mich. 129.

The inquiry first in order is, therefore, to ascertain precisely the specific case on which the bill counts. It avers in the first place, positively, that the Skinner mortgage was recorded in liber "C" at page 164, on the 23d of February, 1876, at 4:20 P. M., and that Skinner had no notice until subsequently, of the existence of the prior mortgage to defendant. It admits that the note in the record and the note

on the back of defendant's mortgage represent that mortgage as having been filed for record at 2 P. M., or two hours and twenty minutes ahead of the other; but avers that, as matter of fact, it was not in the office until after 4:20 P. M., the time at which the Skinner mortgage was filed, and in truth was not filed until after that mortgage. This exhibits the vital issue made by the pleadings.

The complainant's allegation that the Skinner mortgage was filed at 4:20 P. M. is not controverted, and it becomes a datum of fixed value. The questions then are *first*, whether the McMorran mortgage was filed after that time, so that the Skinner mortgage had priority of record; and if so, then *second*, whether Skinner had notice of the other before the delivery of his own. If either of these questions is answered adversely to complainant, the case alleged in the bill fails, and there seems to be little room for doubt in regard to the first. The showing is too strong to be resisted that the McMorran mortgage was on file and entered for record at 2 P. M., and in advance of that given to Skinner.

The line of investigation prescribed by the pleadings has not been adhered to either in the production of evidence or in the argument of the cause.

Much attention has been given to conditions of fact and inductions more or less credible which are not at all justified by the bill. These matters will not be discussed.

The decree should be reversed and the bill dismissed with costs.

The other Justices concurred.

City of Port Huron v. Anson E. Chadwick.

Conditions to opening street—Obstructions—Costs.

1. One who has opened a street which the public authorities have accepted and improved, has no right, after much time has gone by and

rights have grown up, to shut it up again on the ground that the authorities have not performed an oral condition which was made with them at the time of opening the street; but he may have a remedy at law for breach of condition.

2. Costs were denied upon the affirmance of a decree on the merits where appellant showed that he had received injury which excused though it did not justify his own action.

Appeal from St. Clair. (Stevens, J.) Oct. 26.—Dec. 21.

INJUNCTION of nuisance. Defendant appeals. Affirmed.

City Attorney *S. W. Vance* for complainant. A city's acts in grading, improving and draining a road as a public street and the use of it as such by the public for seven years would clearly be an acceptance of a dedication thereof: *People v. Beaubien* 2 Doug. (Mich.) 256; *People v. Jones* 6 Mich. 182–3; *Tillman v. People* 12 Mich. 401; *Lee v. Lake* 14 Mich. 12; *Detroit v. Detroit & Milwaukee Ry. Co.* 23 Mich. 209; *White v. Smith* 37 Mich. 296; *McMillan v. McCormick* 38 Mich. 693; any talk one may have with individual members of the council or officials of a city cannot bind the city unless authority was given them by the Common Council or the matter brought to its attention and their act ratified: Dillon Mun. Corp. §§ 419-449, n.; Sackett on Instructions to Jurors 338–345; *Bouton v. Supervisors* 84 Ill. 384; *Dart v. Hercules* 57 Ill. 446; after standing by for seven years with full knowledge that a city is expending money on a street and improving it, and that it is being traveled and recognized as a public highway, it is too late to recall its dedication. *Hathaway v. New Baltimore* 48 Mich. 251.

William M. Cline for defendant. In *Long v. Battle Creek* 39 Mich. 323, the principle was settled that a verbal agreement between private citizens and a municipality, for improvements for the joint benefit, and at the joint expense and contribution might be enforced; if offered dedication is not accepted in a reasonable time it may be revoked and the donor resume possession of the land. *Field v. Village of Manchester* 32 Mich. 279; *Baker v. Johnston* 21 Mich. 319 and 345; *Lee v. Lake* 14 Mich. 12–18.

COOLEY, J. The purpose of this suit is to enjoin a public nuisance. The bill was taken as confessed by the defendant Vanderburgh. Chadwick defended, and upon a hearing upon pleadings and proofs the circuit court awarded the injunction as prayed.

The nuisance consists in obstructing Tenth street in the city of Port Huron by building fences across it. Chadwick denies that any street exists at the point where he has erected fences. The facts seem to be that Tenth street at this point was never laid out as a public street by the authorities, but in the year 1874 Chadwick and other landowners opened it as a street to the public, and possession of it was immediately taken by the city authorities and the street graded. It remained open and was traveled and used by the public until 1882 when defendants built fences across it with a view to closing it up. The city threw down the fences and then filed this bill.

So far the parties do not differ essentially in respect to the facts; but Chadwick claims that when he opened the street to the public in 1874 he did so upon a condition, orally expressed by him to the city authorities and by them assented to, that the city should lay a drain along Tenth street to Military street, sufficient to take the water off the street and off his abutting land. This condition, he alleges, has never been complied with; and the result has been that the grading of the street has thrown water upon him, to his serious detriment, instead of taking it off. The showing of injury appears to be very conclusive.

On the other hand it is shown by the evidence of the person who was president of the city board of works when the street was opened, that he did at that time, after consultation with Chadwick, all that he understood him to ask for or desire; and this evidence has considerable corroboration. It also appears that Chadwick, though he has sometimes found fault with the failure to properly drain the street, has never made any formal complaint before the common council, or in any manner distinctly brought the failure of the city to comply with the understanding had

with him, to the attention of those who would be empowered to give redress.

Under these circumstances the closing up of the street by Chadwick can hardly be justified. The understanding between him and the city authorities was in no proper sense a condition; there was no writing about it, and the utmost that can be said is that the public faith was pledged to the making of the drain. But the street was given in reliance upon the pledge; and as the legal remedies would be ample in case the pledge was not observed, we must suppose that they were relied upon. At least we cannot import into the negotiations of the parties an unexpressed condition that at any time in the future, when it should be found that the oral understanding of the parties was not kept, the gift might be recalled. This would leave a very important public easement on which the city had expended considerable money in improvements, to rest upon the uncertain and contradictory recollections of witnesses. And no such easement could be recalled without a likelihood of seriously affecting the interests of individuals who had bought, built or made other arrangements in reliance upon it.

The talk which is relied upon took place in 1874, and the street has ever since remained open. Whatever failure there was on the part of the city was known the following season, and if it was intended to insist upon any forfeiture because of it, Chadwick should have moved promptly. The delay has been unreasonable if any such purpose existed. It has become an old transaction, and uncertainty has been cast over it, as is plain to be seen on reading the evidence. But the understanding itself was of a sort that might be very often set up in case of dedications to the public, for it is very seldom that all the expectations of the donor in respect to his gift are made good by the public authority. Public policy requires that things of such a permanent character as the streets of a city should not be held by so frail a tenure in any case as the defendant would have us find that this was. If he meant to avoid his gift he should have moved more promptly.

But though we affirm the decree on the merits, it is a very proper case for exercising our discretion to deny costs. The city has not protected the defendants against the flooding of their lands from the grading of the streets, as it was its business to do irrespective of any agreement to that effect, and there was undoubtedly very much to excuse the action of the defendants, though not to justify it. Order will be entered accordingly,—but it will be without prejudice to any remedy at law which Chadwick may have for the injuries he complains of.

The other Justices concurred.

CHARLES C. COMSTOCK v. CHARLES P. MCEVOY.

Variance—Technical irregularities—Mechanic's lien.

1. Such a variance in the caption of a demurrer or other unsworn pleading or paper as to call the court in which it is filed "The Superior Court of the city of Grand Rapids," when it should be "The Superior Court of Grand Rapids," is of no consequence when there can be no doubt what court is meant.
2. Technical regularity is required in a pleader who objects to a mere technical irregularity.
3. A motion to strike from the files is the proper proceeding for getting rid of a defective demurrer; it is not good practice to move that it be not heard.
4. One who seeks to enforce a mechanic's lien for material furnished is required by statute to file an affidavit of the amount due within thirty days after furnishing the material, and also proof of service of notice of the lien. If he does not, it is provided that the lien shall cease as to all persons except the owner of the premises. It is further provided that the lien shall not continue more than sixty days *after the filing of the affidavit* of amount due, unless proceedings to enforce the lien have been begun. *Held*, that if no affidavit is filed at all, the lien will be lost after ninety days have passed since the material was supplied.

Appeal from the Superior Court of Grand Rapids. (Parrish, J.) Oct. 26.—Dec. 21.

Mechanic's lien. Petitioner appeals. Affirmed.

Comstock & Rogers for petitioner.

Henry P. Fallass and *Charles W. Fallass* for defendant.

GRAVES, C. J. On the 29th of November, 1882, Comstock filed his petition under the provisions for enforcing mechanics' liens (Comp. L. ch. 215, as amended by Act 258 of the session of 1879) [How. St. ch. 290] on the equity side of the Superior Court of Grand Rapids. It was ordered to be presented on the 9th of December. December 6th an amendment was filed, and on the same day the petitioner took a subpœna to answer, returnable in twenty days from the 18th of December. It was teste'd in the name of the judge of "the Superior Court of Grand Rapids, at the city of Grand Rapids," and was served the same day. January 6, 1883, the defendant entered his appearance by solicitor and required service of a copy of the petition. January 30, 1883, the defendant put in a general demurrer. It was headed as follows: "STATE OF MICHIGAN—THE SUPERIOR COURT OF THE CITY OF GRAND RAPIDS—*Charles C. Comstock, petitioner v. Charles P. McEvoy, defendant.*"

The petitioner thereupon gave notice that on the 28th of April he would "call up in said court for disposition a certain paper writing purporting to be a demurrer," etc., "which writing had found a place in the files of the Superior Court of Grand Rapids in chancery," in the "cause of *Charles C. Comstock v. Charles P. McEvoy.*" April 30th the following order was made: "This cause being brought on before the court upon *objections on the part of said petitioner to the hearing* of a certain demurrer on file herein, for the reason *that said demurrer is not entitled in this court*, and counsel having been heard for the respective parties,—Everett D. Comstock, of counsel for said petitioner, in support of said objections, and Henry B. Fallass, of counsel for defendant, in opposition thereto,—and due deliberation being thereon had. Thereupon it is ordered, adjudged and decreed, and this court doth hereby order, ad-

judge and decree, that said objections are not well taken, and that said demurrer is sufficiently entitled in this court, and that said defendant is entitled to be heard thereon; whereupon it is ordered that the hearing on the said demurrer do now proceed." May 3d the court allowed the demurrer with costs. The order made no provision in terms for dismissing the petition, but it seems to have had the effect to put an end to the proceeding. So both parties have regarded it. The petitioner appealed, and stated in his claim that he appealed as well from the order of April 30th as from that of May 3d dismissing his petition.

The objection that the caption of the demurrer was erroneous, because in giving the style of the court three superfluous words were inserted, is the merest technicality. Whenever a party proposes to hold his adversary to the utmost strictness in a matter of practice he virtually demands the application of the same stringent rule to himself, and if he would take advantage of a harmless deviation he must be certain that his steps therefor are absolutely faultless. The rule is here applicable. If the inaccuracy pointed out was sufficiently serious to be made the object of a motion, it was not perfect practice to move that the demurrer should not be heard. It was not precisely regular to ask for such relief. The proper application was to have the demurrer taken off the files. The assumption to deal with it differently was, technically speaking, an implication that it had a place in the cause, and if it had the court could not regularly disregard it. But the objection had no merit under any view.

Had the variance appeared in an affidavit or in some other sworn paper, and where it would be possible for questions to arise under the law against perjury, it may be that the matter would stand on more important reasons than any which exist now. The paper was an unsworn pleading. There was no ambiguity. There was no halting between two courts. The court described was the very same court from which the subpœna emanated. The laws creating the courts are public, and we know that Grand Rapids has only one Superior Court and that it is a municipal court; and

virtually, as styled by the demurrer, "the Superior Court of the city of Grand Rapids." The added words did no harm. No one could be misled and the court might well consider them as surplusage. With great propriety they might have been stricken out.

Passing to the causes of demurrer we have no occasion to notice more than one, and that is that in the case stated by the petition, the supposed lien had become extinct several months before the petition was filed. The basis of the lien was the furnishing of lumber for respondent's building.

The statute regulating the subject provides—*first*, that the claimant must file in the office of the register of deeds the notice specified in Comp. L. § 6790 [How. St. § 8378] and serve a copy; *second*, that within thirty days succeeding the furnishing the material he must make an affidavit of the amount actually due him over and above all set-off, and for which he claims such lien, and file it in said office, and at the same time file therewith proof by affidavit of due service of the notice of lien on the other party. But immediately following this emphatic requirement we find a clause which looks to a non-compliance with it, and undertakes to determine what shall be the effect. The words are "and unless such affidavits are so filed such lien shall cease and determine as to all persons *except* as to such owner, part owner, lessee, or person holding under any land contract or otherwise." *Third.* Then comes another section, which declares positively that the lien shall not continue more than sixty days after the filing of the foregoing affidavit of amount due, unless proceedings have meanwhile been commenced for the enforcement of the lien. See Pub. Act No. 258 of 1879.

It appears from the petition that the claimant's debt was due and payable on the 8th of April, 1882, and that the lumber which formed the consideration was furnished prior thereto. And we have seen that this proceeding was not commenced until November 29th, or nearly eight months afterwards. Neither of the affidavits provided to be filed has been made. And this fact, it is claimed on the part of

the petitioner, takes the case out of the operation of the sixty-day clause altogether, and confers perpetuity on the lien as between the original parties.

This is not a correct construction. No doubt all parts of the statute are to be consulted, and as far as may be harmonized, and every clause be so interpreted, if practicable, that it may have some real efficiency. If the thirty-day clause stood alone, it may be admitted that the effect would be to allow the claimant to withhold the affidavit and maintain his lien indefinitely against the debtor, or at least for the period allowed by the general statute of limitations. But the case is changed by the addition of the second provision. There the terms are positive. No discretion to the claimant is given or implied. True, the language is not as guarded as it should have been, but the sense is not fairly doubtful. The design is not hard to discover. The period of sixty days is fixed unconditionally. But according to the verbiage of the statute the days are to be counted from the filing of the affidavit, although, according to the words of the provision for that proceeding, the claimant may always, as in this case, omit to file the affidavit entirely. If the letter of the law is adhered to, the claimant may elect, in virtue of the prior clause, to make no affidavit, and thereby deprive the sixty-day period of any time to begin, and thus practically destroy it.

This sixty-day-provision was designed to protect the debtor or party sought to be charged, and it was not intended that the claimant should have the option to say whether it should or should not have substantial operation. The purpose was to prescribe a positive limit beyond which no proceedings could be newly commenced. But according to the argument in favor of the petition, the position of the claimant is just what it would be if this provision had not been inserted. It includes a permission to him to render it futile, and in so doing to perpetuate his hold upon the debtor's realty indefinitely or until cut off by some extrinsic provision. This brings the matter to a result which is most evidently untenable. Further reasons are at hand, but it is scarcely necessary to present them.

The provision in question confers no discretion on the claimant, and he is not invested with any dispensing power. The sixty-day period must run whether he files the affidavit or not. If he does file it, the sixty days will begin then; if he does not file it, it may be ascertained and allowed by going back to the time of the furnishing the materials, and including ninety days therefrom. In that case the two periods may be combined, and the essence of the provision will be preserved.

The conclusion is that the lien had ended before the petition was filed, and that the decision of the court below was correct and should be affirmed with costs.

The other Justices concurred.

The Dutch Reformed Church cases.

Affirmance by division.

A decree dismissing a bill is affirmed if the appellate court is equally divided as to reversing it; but the affirmance may be without costs.

[Wieger W. Haisma et al. v. Lammert J. Hulst et al.]

Appeal from Kent. (Montgomery, J.) Oct. 26–30.—Dec. 21.

Injunction bill filed by certain members of the "Society of the Fourth Reformed Church of Grand Rapids, Michigan," to restrain the defendants, who are the minister and other members of the consistory of that church, from dissolving the society and diverting its property from the support of public worship according to the doctrines and usages of the Reformed church. Bill dismissed. Affirmed.

Champlin & More and *James W. Romeyn* and *Theodore Romeyn* for complainants.

Thomas B. Church for defendants.

[The Consistory of the First Dutch Reformed Church of Holland, Harm Broek et al. v. Teunis Keppel et al.]

Appeal from Ottawa. (Arnold, J.) Oct. 26-30.—Dec. 21.

BILL filed by The Consistory and by certain members of the church society to establish the right of complainants as elders, deacons and members of the consistory to the exclusive possession of the church property and to declare those members of the society who have remained loyal to the Reformed church in America to constitute the society of the First Church of Holland; and furthermore to restrain defendants, who are accused of schism, from interfering with the church property. Bill dismissed. Affirmed.

Stone & Hyde, *Champlin & More* and *Theodore Romeyn* for complainants.

J. C. Post and *W. B. Williams* for defendants.

COOLEY, J. In these cases, after the fullest consideration the members of the Court find themselves equally divided upon the question of reversing the decrees appealed from, and they must therefore stand affirmed but without costs.

We deem it not improper to say under the circumstances that in view of the very peculiar facts it is on many very obvious grounds desirable that the parties to this deplorable litigation should make earnest endeavor, by any necessary concession in matters of feeling, to restore and perpetuate friendly and brotherly relations.

The other Justices concurred.

THE UNITED STATES MANUFACTURING COMPANY v. ELLEN STEVENS.

Pleading—Form of action—Removal of tenant's goods.

1. The form of action is determined by the subject-matter of the pleading, and not by what the pleader calls it; and there can be no recovery for alleged matters of aggravation, unless the main cause of action is made out.

2. The relation of landlord and tenant is material and must be shown in an action of trespass brought by the tenant for the removal of his goods by the landlord if the plaintiff counts upon the relation as still subsisting and as a constituent fact.

3. One who is entitled to the possession of premises can remove the property left there by a previous tenant, if he exercises such care in doing so as the nature of the property demands; and if he leaves it in such a condition that the owner, by reasonable diligence, can take it uninjured, he is not bound to house it or otherwise protect it until the owner sees fit to take possession.

Error to Wayne. (Speed J.) Oct. 30.—Dec. 21.

TRESPASS. Defendant brings error. Reversed.

Moore & Canfield for appellant. Trespass cannot be maintained unless an unlawful entry is shown: *East v. Cain* 49 Mich. 473; 2 Greenl. Ev. § 613; a tenant whose term has expired is not entitled to notice to quit: *Allen v. Carpenter* 15 Mich. 43; *Benfey v. Congdon* 40 Mich. 283; 1 Washb. R. P. 409; *Young v. Smith* 28 Mo. 65; Wade on Notice § 592; a landlord on termination of the tenancy, may peaceably re-enter and remove the tenant and his goods: *Hoffman v. Harrington* 22 Mich. 52; *Hyatt v. Wood* 4 Johns. 150; Taylor's L. & T. § 523; *Sterling v. Warden* 51 N. H. 217: 12 Am. Rep. 80; 4 Am. L. Rev. 430; *Low v. Elwell* 121 Mass. 309: 23 Am. Rep. 272; *Stearns v. Sampson* 59 Me. 568; *Curtis v. Galvin* 1 Allen 215; *Manning v. Brown* 47 Md. 506; *Overdeer v. Lewis* 1 W. & S. 90; *Kellam v. Janson* 17 Penn. St. 467; *Rich v. Keyser* 54 Penn. St. 86; *Todd v. Jackson* 26 N. J. L. 526; *Mugford v. Richardson* 6 Allen 76; *Moore v. Mason* 1 Allen 406; *Meader v. Stone* 7 Met. 147; *Fuhr v. Dean* 26 Mo. 116; *Young v. Smith* 28 Mo. 65; *Witt v. Mayor, &c.* 5 Robt. 248, 261; *Stone v. Lahey* 133 Mass. 427; and in England, even though he be subjected to a criminal prosecution if he use unnecessary force to eject the tenant, he

is not subject to a civil action for damages. *Harvey v. Brydges* 14 M. & W. 437; *Blades v. Higgs* 10 C. B. (N. S.) 713; *Pollen v. Brewer* 7 C. B. (N. S.) 371; *Davison v. Wilson* 11 Q. B. 889; *Burling v. Read* id. 904; *Turner v. Meymott* 1 Bing. 159; *Laws v. Telford* L. R. 1 App. Cas. H. of L. 414 16 Eng. 74.

George H. Prentis and *William P. Wells* for appellee. An incoming tenant must take possession and exclude the outgoing tenant and his property with due care and caution, which involves due notice to remove the property, and due care in removing it, if notice is not acted upon. Wood's Landlord and Tenant 17; 2 Waterman on Trespass 420 § 968, and 422, § 970; *Overdeer v. Lewis* 1 W. & S. 90; *Kellam v. Janson* 17 Penn. St. 467; *Barrett v. White* 3 N. H. 210; *Whitney v. Swett* 22 N. H. 10.

Graves, C. J. In 1878 the plaintiff received a lease of building No. 232, situate on Congress street west, corner of Fourth street, in the city of Detroit, for the term of eight months from the 31st of August of that year. The property was then owned by the defendant, and she has continued to be the owner since.

The plaintiff was engaged in manufacturing wagon hounds, and it made use of the building as a place to store them. It retained possession for that purpose until near the middle of March, 1880, when it had in store some 10,500, besides 100 castings, at which time the transaction occurred to which this litigation is to be traced.

Sometime prior to that date the defendant was of opinion that the plaintiff's right was ended, and that she was entitled to possession, and in February she made a lease to one McDonald, and they desired the plaintiff to give possession to him. The company, by its manager, Mr. Hall, denied that its right to hold had terminated, and insisted that under the bargain made with it the time would not expire until the following September. Hall and McDonald met several times for the purpose of agreeing on some arrangement by which McDonald would be enabled to go in and occupy

without opposition, and by which the property stored in the building might be removed without expense or loss to the plaintiff.

In March, Hall went to Washington on business. No one was left on the premises, but the goods remained stored there. McDonald wanted possession, and his business necessities therefor were urgent. On the 13th of March he entered quietly and unopposed, and removed the plaintiff's property to the open enclosure, where it was exposed to the weather. The removal was effected with due care, and the articles were placed in good order. No injury was done, and the position in which the things were put and left was unobjectionable. The exceptional fact was the exposure. McDonald immediately forwarded a written notice to Hall, and his wife received it and mailed it to him. It speedily reached him in Washington, but he deferred returning until his business was completed. He came back the forepart of April. The property was allowed to remain without any protection from the weather for about three months, and it suffered damage by the exposure. The plaintiff then sold it for $237.50. The original value was estimated at upwards of $5000. This action was afterwards brought, and the jury returned a verdict in favor of the plaintiff for $3362.25.

Among the subjects of controversy before the trial court was the question whether the right of the plaintiff to retain the possession and enjoyment had not expired; and also whether it was not agreed between Hall and McDonald that the removal might be made substantially as it was. On the latter point the testimony of these persons was directly opposed.

First. A query occurs at the outset in regard to the form of the action. In the commencement of the declaration it is called "trespass on the case;" but this is an obvious misnomer. The action does not take its form from the name assigned to it by the pleader. It is determined by the matter. *Cornes v. Harris* 1 Comst. 223, and authorities. The case is set forth in four counts, and each count is distinct-

tively in trespass quare clausum. In every one the fundamental charge is the breaking and entering. But this fact is not averred without anything to characterize it. It is made part of the averment and an element of substance that the plaintiff was at the very time a tenant of the defendant. The substantive cause of action laid in each count is the tortious entry by the landlord on the demised premises during the existence of the tenancy; and the further circumstances of injury, including the putting out and exposure of the wagon hounds, are only matters of aggravation. They are not original and additional causes of action. Their office is purely subsidiary. They can have effect only in case of recovery for the breaking and entering, and their function is then to expand the right to damage which that wrongdoing has raised. *Taylor v. Cole* 3 Term 292: 1 H. Bl. 555; *Dye v. Leatherdale* 3 Wils. 20; *Gelston v. Hoyt* 3 Wheat. 246, 326, 327; *Eames v. Prentice* 8 Cush. 337; *Knapp v. Slocemb* 9 Gray, 73; *Merriam v. Willis* 10 Allen 118; *Howe v. Willson* 1 Den. 181; *Herndon v. Bartlett* 4 Porter (Ala.) 481. Unless the pivotal charge of injury is established, or in other words, unless the breaking and entry is made out, the action must necessarily fail. The case described is not made out. It is not competent to desert the substantive ground of action described and make use of those elements laid as simple accessories, as though they were counted on as primary and distinct grounds of recovery. See cases last cited.

Again, the plaintiff had seen fit to count on the relation of landlord and tenant as one which was actually subsisting when the breaking and entry occurred, and as being a constituent fact of the transaction, and of such importance as to give it character. It was thus rendered material, and a circumstance necessary to be shown. It was a descriptive fact. Buller's N. P. 65; 1 Stark. Ev. 624 et seq.; 1 Chit. Pl. 140, 141, 147, 402. The learned judge disposed of the case, however, on other principles. He gave it to the jury on the theory that it was immaterial whether the parties stood in the relation of landlord and tenant, and immaterial

whether a tortious entry was made, and he advised that a recovery was admissible for part of the matter laid as accessory only, whether the entry was wrongful or innocent. I think this was error.

Second. As the case appears in the record, the first and second counts were entirely unsupported, and as the controversy went to the jury the only matter in either the third or fourth counts which received any backing from the evidence, was the claim that the hounds were put where they were exposed to the weather. Now, Mr. Justice Cowen in the course of his opinion in *Seneca Road Company v. Auburn & Rochester Rail Road Company* expressed himself as inclined to the view that a declaration, though palpably in trespass, might yet be sufficient to entitle the plaintiff to recover on the theory of the action of case, provided it contained enough for a declaration of that sort. 5 Hill 170. Without admitting or denying the tenability of what is thus mentioned, and without going into several points which seem to be involved, let it be granted that the plaintiff was at liberty to have the third and fourth counts of the declaration operate on the trial as counts in case. It was the theory of defendant, on which there was evidence, that the plaintiff was holding without any right whatever, and that she was entitled to enter in the very way in which the entry was effected and was entitled to the entire possession; but all this the circuit judge ignored.

The case must be considered now upon the assumption that the facts were as claimed by the defendant. The matter then comes to this: the plaintiff was occupying without any right whatever and was subject to be dispossessed, and the defendant, being entitled to enter and have full and absolute possession and enjoyment, did enter peaceably and without opposition and in accordance with her right and thereupon took the plaintiff's wagon hounds which were encumbering her possession and trespassing on her right and prudently and without injury to them put them out and piled them in proper shape. And now the plaintiff says that this exposure of his wagon hounds operated in the

course of time to cause them injury. Under this conception of the facts it is not easy to discover any valid ground of liability.

On what foundation can it be claimed that the defendant, under the hypothetical view here taken, was under duty to do better by the plaintiff than she did? The articles were not frail or delicate. They were capable of being put out of the room, to which the defendant was fully entitled, without immediate or early damage. They might fairly be expected to bear exposure in the open air for a considerable time without appreciable injury, and it might justly be supposed that the plaintiff, by the exercise of any diligence, would be able to take care of them in season to avoid loss. But the ruling of the circuit judge would seem to imply that the defendant was, after all, bound to house or otherwise protect the property from injury until the plaintiff should be able to take care of it, however long the period. I cannot concur in this view. *Low v. Elwell* 121 Mass. 309; *Canavan v. Gray*—Cal.—: 22 Am. L. Reg. (N. S.) 718, and note.

On this aspect of the case, and also in view of some of the underlying facts, the authorities cited in defendant's brief are very important.

Further discussion is unnecessary. I think a new trial should be granted, but before it occurs no doubt the pleadings will be revised.

The judgment is reversed with costs and a new trial granted.

The other Justices concurred.

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LOUISE VANDERPOOL v. JEREMIAH O. RICHARDSON.

Breach of promise—Letters in evidence—Exemplary damages.

1. It is not clearly error to permit a father to testify in a breach of promise

suit brought by his daughter that after he had given his consent to defendant upon the latter's telling him that the lady had consented to marry him, the pair conducted themselves towards each other as though they were engaged. This is not to show the mutual promise but to show that defendant trifled with plaintiff's affections.

2. Surmises and conclusions of witnesses, based on what they have observed of mutual behavior, are not sufficient to prove a promise of marriage; the facts observed should be shown.

3. Where plaintiff in a breach of promise suit has put her letters to defendant in evidence, defendant may put in evidence the replies.

4. In a suit brought by a woman for breach of promise, the plaintiff may show that she has no independent means, and may put in evidence the letters written by her to defendant before he broke the engagement. And the jury may consider the length of the engagement, and give damages for injury to her feelings or reputation, or any circumstances of indignity.

Error to Kalamazoo. (Mills, J.) Oct. 30.—Dec. 21.

CASE. Defendant brings error. Affirmed.

George M. Buck for appellant.

Henry F. Severens for appellee. In a breach of promise suit the whole conduct of the parties from the beginning of their relations to defendant's refusal to marry is res gestæ. *Baldy v. Stratton* 11 Penn. St. 316; *Tubbs v. Vankleek* 12 Ill. 446; *Wade v. Kalbfleisch* 58 N. Y. 285; *Reed v. Clark* 47 Cal. 194; injury to feelings or reputation, and any circumstances of indignity or disgrace to plaintiff may be considered: *Bennett v. Beam* 42 Mich. 346; *Grant v. Willey* 101 Mass 356; *Smith v. Woodfine* 1 C. B. (N. S.) 660; *Berry v. DaCosta* L. R. 1 C. P. 331; Sedgwick on Damages [369]; so may the fact whether plaintiff has a home of her own or has to live upon others: *Miller v. Rosier* 31 Mich. 475.

COOLEY, J. This suit was instituted for breach of promise of marriage. The plaintiff recovered judgment, which is now brought here by writ of error.

The promise is alleged to have been made in 1878 while plaintiff was residing with her father in California. The

father testified on her behalf that early in January, 1879, the defendant came to him and, after remarking that he supposed his attentions to the plaintiff must be known to the witness, went on to say that he had her consent to become his wife, and now desired the consent of her father. The consent was given, and defendant said he should go to Michigan in a few days to attend to business, but would return in the following May, and remain until just before Christmas, and would then take plaintiff back as his wife to spend the holidays with his folks. The witness was then asked whether from that time he observed whether the defendant and the plaintiff conducted themselves towards each other as though they were engaged to be married. This was objected to, but the objection was overruled and he answered that they did.

The objection to such evidence is said to be that it submits to the jury the conclusions of the witness upon the facts, instead of giving them the facts themselves from which it is to be supposed they are as competent to draw conclusions as the witness is. *Leckey v. Bloser* 24 Penn. St. 407. Here the fact to be proved was the mutual promise, and we agree with counsel for defendant that this ought to be made out on better evidence than the surmises and conclusions of witnesses, based upon what they observed of mutual behavior. It is not their province to draw deductions from the facts, but they must submit the facts to the tribunal appointed by law to judge of them. But in this case we have something more than the deductions of the witness. His evidence upon the main issue was very important and very positive, and what he said about conduct did not so much tend to prove a promise—for which, indeed, it was not needed if his other evidence was believed—as to show that after the promise the defendant trifled with the plaintiff's affections. The witness was not inferring a promise from conduct, but he was noting the conduct in the light of the promise which had been disclosed to him; and in connection with his other evidence we cannot say there was error in permiting him to answer the question put to him.

The court also permitted the plaintiff to put in evidence letters which she had written to the defendant before, as she claimed, he had done anything to terminate the engagement. This was entirely proper. The defendant might have put the replies in evidence had he seen fit to do so.

The plaintiff was also suffered, in answer to the question whether she had any property of her own, to say that she had none. *Pennsylvania Co. v. Roy* 102 U. S. 451, is relied upon as authority against this evidence. The suit in that case was brought to recover damages for a personal injury, and the court very properly held that these damages did not at all depend upon the wealth or poverty of the plaintiff. But when the suit is for the loss of a marriage and of an expected home, the fact that the plaintiff is without the means to provide an independent home for herself is not entirely unimportant. It may be supposed to be one of the facts which both parties had in mind in making their arrangements; and it is not improper that the jury should know of it also and take it into account in making up their verdict.

In his charge to the jury the judge told them they might take into consideration the length of time the engagement had continued between the parties. Exception was taken to this, but it was a very proper direction. He also told them that if they should find that the defendant wantonly, willfully and causelessly broke the engagement, they might in their estimation of damages consider the injury to the plaintiff's feelings and reputation, and any circumstances of indignity under which the wrong was done, and the consequent public disgrace to the plaintiff, together with any other circumstances belonging to the wrongful act tending to the plaintiff's discomfort. This is complained of as having no evidence to support it. But we do not think the case is entirely without evidence to justify such a charge. The proofs tended to show that the engagement was made known to the lady's immediate friends; that it was broken without cause or warning by a marriage with another, and that then the defendant denied ever making it. There were certainly in these facts circumstances of

mortification, and their tendency was to bring the plaintiff into public disgrace. We find no error in this or in any of the other rulings complained of, and

The judgment must be affirmed with costs.

GRAVES, C. J. and CAMPBELL, J. concurred. SHERWOOD, J. did not sit in this case.

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NATHAN H. VINCENT v. THE BOARD OF SUPERVISORS FOR MECOSTA COUNTY

Sheriff's fees.

1. Supervisors cannot be compelled, in the absence of statutory authority to allow a sheriff ten cents a mile for travel in bringing back goods seized on a search-warrant, where they have already made that allowance for going to the place of service.
2. A sheriff is not entitled to payment for merely colorable attendance in court, when he can produce no certificate from the court showing his attendance, and when he has in fact, been employed elsewhere. But he should be paid for any substantial performance of his duty
3. A board of supervisors cannot be restrained in its method of business in the disposition of claims if the claimant has not been deprived thereby of an opportunity to be heard.
4. Where a board of supervisors has permitted the sheriff to draw periodically from the county treasurer the amount of his actual expenses, leaving the rest of his account for future audit, they may properly, upon the final audit, refuse to allow credit for such of the expenses as they find improper, and may deduct the treasurer's payments to that extent from what would otherwise be due.
5. A board of supervisors cannot delegate the auditing of accounts to the county treasurer.

Mandamus. Submitted Oct. 30. Denied Dec. 21.

Michael Brown for relator. Supervisors cannot charge back against the sheriff money already allowed by them to be drawn by him: *Supervisors v. Birdsall* 4 Wend. 460; *Onondaga Supervisors v. Briggs* 2 Den. 41

Frank Dumon for respondent. The decision of the board of supervisors is final upon compensation for services to or claims against the county: Const. art. x, § 10; Act 165 of 1877; the fees to be paid the sheriff for services not provided for by statute are determined by them: Act. 286 of 1881; public powers or trusts devolving by law upon a body like a board of supervisors, to be exercised by it in such manner as it shall judge best, cannot be avoided, or delegated to others: *People v. St. Clair County Officers* 15 Mich. 85; *Thompson v. Schermerhorn* 6 N. Y. 92; *Gale v. Kalamazoo* 23 Mich. 344; Cooley's Const. Lim. 204; *Ruggles v. Collier* 43 Mo. 359; *East St. Louis v. Wehrung* 50 Ill. 28; *State v. New Brunswick* 1 Vroom 395; *Meuser v. Risdon* 36 Cal. 239; when it has exercised its discretion and passed upon the account, has allowed a part and disallowed a part, a court of review will not undertake to control that exercise of discretion by mandamus: *Kuhn v. Auditors* 10 Mich. 307; *Macdonald v. Muskegon Supervisors* 42 Mich. 546; *Clark v. Ingham Supervisors* 38 Mich. 658; *Abels v. Ingham Supervisors* 42 Mich. 526; *Stamp v. Cass County* 47 Mich. 331; *Peck v. Kent County* 47 Mich. 477; the board should not allow illegal accounts: *Kennedy v. Gies* 25 Mich. 83; *Mixer v. Manistee Supervisors* 26 Mich. 423; and where it has passed upon the account and given the relator an opportunity of presenting and establishing his case, and the relator has in fact gone before the board and been heard, its decision is final: *Baldwin v. Board of Supervisors* 12 How. Pr. 204; *Wilson v. Supervisors of Albany* 12 Johns. 414; *Hull v. Supervisors of Oneida* 19 Johns. 260; *People v. Supervisors of Dutchess* 9 Wend. 508; *People v. Supervisors of New York* 1 Hill 362; *People v. Supervisors of Fulton* 14 Barb. 52; *Louisville v. Kean* 18 B. Monroe 9; *Commonwealth v. Henry* 49 Penn. St. 530; *Magee v. Supervisors* 10 Cal. 376; *Weeden v. Town Council* 9 R. I. 128; *Appling v. Bailey* 44 Ala. 333; *Exparte Crane* 5 Pet. 190; *Dixon v. Feild* 10 Ark. 243; *Exparte Newman* 14 Wal. 152; *McDiarmid v. Fitch* 27 Ark. 106; *State v. Warmoth* 23 La. Ann. 76.

CAMPBELL, J. Relator, as under-sheriff of Mecosta county, asks a mandamus to compel the allowance of part of an account rejected by respondents. It is not claimed that the whole bill was not considered, but the complaint is of the rejection of some items, and the deduction of some moneys previously paid to him from the amount otherwise due and recognized. It is also claimed that some charges and restatements were made after he had been heard, and without an opportunity for further hearing.

This last suggestion is not in our view admissible. It appears that relator had an opportunity of being heard, and was heard upon his whole claim. It does not appear that any testimony was afterwards submitted against him. We cannot, therefore, hold that he was deprived of the opportunity of showing any right which he had, and the supervisors cannot be restrained as to their methods of business which shut out no such opportunity.

The excluded items called to our notice are a charge of ten cents per mile for bringing back certain goods on a search-warrant, (a similar amount having been allowed for service of the writ and travelling to the place of service, 93 miles,) and a further series of charges for a daily allowance of $2.50 for attending court.

As no statute has been called to our attention by relator, fixing charges for such services as were rendered in regard to removing the goods in question, we assume that our diligence will not find any. In the absence of a statute the board cannot be compelled to make the allowance claimed.

In the case of the charges for attendance on the court the record does not show that any court certificate or other determination of the fact of relator's attendance was produced. It further appears that the board looked into the facts and did not think the services had been rendered as claimed, or at any rate had been fully rendered. The relator's petition contains no such averment. We cannot hold the supervisors in fault without a distinct showing of something which they had no right to determine as they did. We cannot tell from this record that any particular charges have

been improperly thrown out. They certainly had a right —as the record stands—to inquire into the facts.

But it is proper to refer to one consideration that apparently entered into the action of the board. They point out that in one case where a charge was made for attendance, relator was earning money for services of a different nature incompatible with such attendance. While it may be true that an officer will not be held to lose his per diem by not being for every moment of the day in court or doing business relating to the session, yet we do not think the statute was designed to pay sheriffs or deputies when their attendance is merely colorable, and when in fact they are occupied most of the time elsewhere. There has been much abuse practiced in making constructive charges, and we do not think supervisors can be censured for scrutinizing such charges with some care. Every reasonable allowance should be made for services which have been substantially, though not literally, performed. But this is all that should be exacted. And when the court itself does not certify to the officer's attendance in court, the facts must be open to inquiry.

The principal dispute arises out of a peculiar practice, by which the supervisors provided that the sheriff might draw periodically from the county treasurer the amount of his actual expenses, leaving the rest of his account for future audit. A considerable sum was so drawn, but the board, when the accounts were finally audited, refused to allow credit for some of these expenses and deducted the treasurer's payments to that extent from what would otherwise have been coming to relator.

We think their course was proper. The board of supervisors have no right to delegate the auditing of accounts to the treasurer, and we do not suppose they meant to. They certainly ran some risk in allowing moneys to be drawn in advance of credit, but they probably understood that under the restrictions imposed there would be no ultimate overdraft. It was their duty before balancing the accounts, to see that relator received no more than was justly receivable.

It is not now shown that the moneys charged back were for services or outlays which they could not question.

We think no case is made out for a mandamus, and it must be denied with costs.

The other Justices concurred.

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FREDERICK RAMSEY, ASSESSOR v. CLERK OF EVERETT TOWNSHIP.

School-districts.

Mandamus lies on relation of a school-district assessor to compel the clerk of a township to which the district formerly belonged, to certify to the supervisor of the township to which it now belongs the amount ascertained by the school inspectors as due to the relator's district from what remained of the old district out of which it was erected.

Mandamus. Submitted Oct. 30. Granted Dec. 21.

M. Brown and *J. H. Palmer* for relator. Section 3044 of the Compiled Laws of 1871, as amended by sec. 19 of the laws of 1881, Act 154, provides that when a new district is formed in whole or in part from one or more districts possessed of a school house or entitled to other property, the school inspectors shall determine the amount due to such new district from any district out of which it may have been formed, as the proportion of such new district of the value of the school house and other property belonging to the former district, at the time of such division: *Brewer v. Palmer* 13 Mich. 108; *People v. Davidson* 2 Doug. (Mich.) 121; no appeal having been taken, the action of the inspectors should be considered acquiesced in, both as regards the division of the district and the apportionment thereunder, and it is no answer to an application for a certificate of the amount determined,

that the inspectors did not comply with all the directions of the statute. *Clement v. Everest* 29 Mich. 22.

GRAVES, C. J. In the winter of 1880 certain proceedings were taken to erect a new school-district out of territory then belonging to district No. 3 of Everett, and the board of school inspectors carried out the scheme and identified the new district as No. 7. They further ascertained and decided that there was justly due to said new district from the residue of the old one the sum of $1679.32, as its proportion of the value of the school-house and other property of the former district. Subsequently the board of supervisors erected the township of Wilcox from territory belonging to said township of Everett, and the new school-district was included, and was afterwards identified as district No. 1 of Wilcox.

At the October term for 1881 the relator applied for a mandamus to require the clerk of the township of Everett to certify to the supervisor the amount liquidated as aforesaid by the board of school inspectors as due to the new district from the old one. The petition set forth the proceedings in general terms, and alleged that the clerk had refused to certify to the supervisor. The usual order to show cause was allowed, and the respondent subsequently filed a sworn answer. It was manifestly evasive, but out of deference to the public interests connected with the case the Court was induced to prescribe a finding on such questions as the papers indicated to be of any importance in this inquiry, and at the April term for 1881 they were sent down for trial. They were afterwards determined by a jury, and the answer to each proposition was adverse to the contention by respondent.

The case is now before us on the order to show cause. Abundant opportunity has been given, but no showing of the least importance is made. The application stands substantially undefended. No brief is furnished for the respondent, and no one answers for him. And relator's counsel suggests that it is his understanding that the respondent intends to go no further.

Under these circumstances greater delay would not be excusable. The application seems to be prima facie sufficient, and the failure to show any cause against it after so much time and opportunity is very near to a confession of its propriety.

The peremptory writ must issue.

The other Justices concurred.

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ELISE A. HOBAN, EMILIE A. PIQUETTE SANDS, THE SISTERS OF CHARITY OF THE CITY OF DETROIT, THE HOUSE OF PROVIDENCE AND THE HOME FOR THE AGED OF THE LITTLE SISTERS OF THE POOR, PROPONENTS v. THOMAS S. CAMPAU AND FANNY E. PIQUETTE, GUARDIAN OF MARIE E. M. PIQUETTE AND CHARLES J. PIQUETTE, CONTESTANTS.

Wills—Testamentary capacity—Acknowledgments.

1. Average mental capacity is not required for the making of a will; power to buy and sell, to deal in property on the basis of contract, to give deeds and leases and make gifts by delivery, implies sufficient capacity to devise property.

2. The facts that one is an invalid, nervous, reserved and disinclined or even hardly able to read and write, do not of themselves prove anything against one's testamentary capacity.

3. Proof of such imbecility of mind as disqualifies one from making a will should be shown, if it does not amount to idiocy, by the testimony of witnesses who have had personal knowledge of the facts within twenty years before the will was executed.

4. A notary public or justice of the peace cannot properly take the acknowledgment of a person to a deed if he believes him mentally incompetent to make a will; nor may he take an acknowledgment through a third person.

5. Where the contestants of a will attack the competency of the testator but make no case entitling them to go to the jury on that point, they cannot be injured by any rulings as to the admission of rebutting evidence.

6. Whether the contestant of a will can raise the issue that the testator was unduly influenced after appealing from the probate of the will on the sole ground that he lacked testamentary capacity—*Q.*

Error to Wayne. (Speed, J.) Oct. 30–31.—Dec. 21.

Appeal from probate. Contestants bring error. Affirmed.

James Caplis, William B. Moran, John Logan Chipman, John Atkinson and *Alfred Russell* for appellants, cited as to undue influence: *Parish v. Delafield* 25 N.Y. 35; *Chess v. Chess* 1 Penrose & Watts 41; *Waters v. Cullen* 2 Bradf. 357; *Paske v. Ollat* 2 Phill. 323; *Middleton v. Forbes* 1 Hagg. 395; *Ingram v. Hyatt* 1 Hagg. 384; *Baker v. Batt* 1 Curt. 125; 2 Moore P. C. 317; *Butlin v. Barry* 1 Curt. 614; *Durnell v. Canfield* 1 Robert. Ecc. 51; *Durling v. Loveland* 2 Curt. 225; *Croft v. Day* 1 Curt. 782; 3 Moore P. C. 136; *Mitchell v. Thomas* 10 Jur. 461; 12 Jur. 967; 6 Moore P. C. 137; *Raworth v. Marriott* 1 M. & K. 643; *Jones v. Godrich* 5 Moore P. C. 16; *Mynn v. Robinson* 2 Hagg. 169; *Crispell v. Dubois* 4 Barb. 393; *Carroll v. Carroll* 1 Milw. 445; *Murphy v. Fitzgerald* id. 403; conduct of relations towards one is the best evidence of their opinion of his mental soundness: *Jacox v. Jacox* 40 Mich. 473.

C. J. O'Flynn, Henry D. Barnard, Don M. Dickinson and *Ashley Pond* for appellees, cited as to undue influence: *Deas v. Wandell* 1 Hun 120; *Cudney v. Cudney* 68 N. Y. 148; *Gardiner v. Gardiner* 34 N. Y. 155; *Seguine v. Seguine* 3 Keyes 663; *McMahon v. Ryan* 20 Penn. St. 329; *McLaughlin v. McDevitt* 63 N. Y. 213; *Tyler v. Gardiner* 35 N. Y. 559; *Leeper v. Taylor* 47 Ala 221; *Tyson v. Tyson* 37 Md. 567; *Rutherford v. Morris* 77 Ill. 397; *Society v. Loveridge* 70 N. Y. 388; *Wittman v. Goodhand* 26 Md. 95; *In re Jackman* 26 Wis. 104; *Alltmon v. Pigg* 82 Ill. 157; *Baldwin v. Parker* 99 Mass. 85: *Boyse v. Rossborough* 6 H. L. Cas. 2; *Rabb v. Graham* 43 Ind. 1; *Parfitt v. Lawless* 2 Pr. & Div. 462; *Pierce v. Pierce* 38 Mich. 413; *Latham v. Udell* id. 238; *Wallace v. Harris*

32 Mich. 398; *Harring v. Allen* 25 Mich. 508; *Blanchard v. Nestle* 3 Den. 37; Redf. Wills 526.

COOLEY, J. The writ of error in this case brings before the Court the proceedings had in the circuit court for the county of Wayne on the probate of the will of Emilie Campau, late of the city of Detroit, who had died March 25, 1881. The will with a codicil thereto had been duly probated in the probate court for Wayne county, and the contestants had appealed to the circuit court, assigning as the sole reason for appeal, "that the said will was obtained by undue influence exercised upon said testatrix." The trial in the circuit court occupied the attention of that court for seventeen days, and resulted in a verdict sustaining the will. The contestants assign for error eighty-seven rulings on the admission of evidence, twenty-five refusals to instruct the jury as requested, and twenty-four instructions actually given or remarks upon the evidence. Most of the exceptions appear to be relied upon in this Court, and will be considered so far as they seem to have importance.

The trial judge in his charge to the jury gave a personal history of Miss Campau, as it was disclosed by the evidence, and as this summary was objected to in some few particulars only, it may be assumed to have been in other particulars correct, and it is accepted as such in the statement which follows. It appears from this that Miss Campau was a daughter of Barnabas Campau, Senior, an old French resident of Detroit, who died about the year 1845 leaving a considerable estate which he divided by will equally among his four children, Alexander M., Barnabas, Jr., Emilie and Angelique. The mother, who was of another French family, the Cicottes, had died before he did, and Angelique was married to Charles Piquette. At an early day, but exactly when does not appear, Emilie went to reside with her sister Mrs. Piquette, and continued to reside with her after the father's death until the sister herself died as hereinafter stated. Two boys named John and Charles L., were born to Mrs. Piquette after her father's death, and two girls,

Elise and Emilie. Mrs. Piquette's husband appears to have died early: the date is not important.

Miss Campau is described by the witnesses as a feeble and somewhat sickly person from her earliest days, but the full significance of these terms, as they make use of them, it is difficult to gather. It is plain, however, that as a child she was not as strong as an ordinary child of her age, and that as a woman she was not as strong as an ordinary woman of her age. She was tall, and perhaps her somewhat slender and attenuated form, together with the fact that she was pale and sallow, may have given the impression that she was sickly, and sickly would perhaps describe her appearance to a person using ordinary language; but she apparently was not in general sick in the ordinary sense of the term. At the same time she was not so strong physically as other persons commonly are.

Miss Campau went to school as other children did. Witnesses speak of having been in school with her from 1825 to 1828, when she appears to have been from sixteen to nineteen years of age. She learned to read and write, but how much more she learned we are not informed. The intimations in the evidence are that she was backward in her studies, and that she was favored somewhat by her teacher on account of her poor health. All the evidence tends to show that she was timid and shy in the extreme, and hesitated to meet strangers, and this continued to some extent through life. One of the witnesses for the contestants, who perhaps knew as much of her as any one except the immediate family of her sister, describes her as a recluse who did not seem inclined to talk much and did not talk much and did not visit, or go into society, or attend public entertainments. She was a pious lady, and devoted to her church, which was the Catholic.

The Piquettes, together with Miss Campau, lived in Springwells, adjoining Detroit, a number of years; afterwards they moved into Detroit and occupied a house on Jefferson avenue next to that of Judge Moran, where they lived ten or twelve years. They then moved across the way

into a house known as the Beattie or Field House. In 1870 Elise Piquette was married to Major Mitchell of the United States army, and for a time lived with him at Fort Washington, but he resigned his commission after a time, and brought his wife to Detroit, where he entered upon the study of the law occupying while doing so an office adjoining that of Mr. Levi L. Barbour who will be further mentioned hereafter.

In 1872 Mrs. Piquette died. In 1874 Emilie Piquette went to Europe under the protection of Governor Baldwin, expecting to meet a lady friend who was then there. In the spring of 1875 Major Mitchell was advised by his physician to take a trip to Europe for his health, and he and his wife decided immediately to go. When this decision was communicated to Miss Campau, she said at once, "Why can I not go with you?" When Mrs. Mitchell went to Miss Campau's rooms a day or two later, she found that preparations by her aunt to accompany them were already under way. Before this time John Piquette had died, and Charles L. Piquette had married the lady who is now one of the contestants, and had taken his wife to Europe. This last event seems to have taken place in May, 1874, and Miss Campau, if she had remained at home, would have been unattended by any of the family.

Major Mitchell and his wife, (she being one of the proponents of the will) left for Europe in March, 1875, taking with them their two children. Miss Campau went with them, taking along Mrs. Duggan as attendant and companion. They landed in Liverpool, where they remained a few days for rest, and where Miss Campau and Mrs. Duggan drove about together to see what they could see from the carriage. They then went on to London, where they remained several days, and from there they went to Paris. In Paris they met Emilie and her friend who had apartments together, while the Mitchells and Miss Campau had apartments in another part of the city. There Miss Campau remained until April, 1876, and Mrs. Mitchell also most of the time, though she seems to have made a visit in the mean time to Switzerland and Italy.

While the Mitchells and Miss Campau were on their way to Europe, Charles L. Piquette and his wife passed them on the ocean, returning. In the fall of that year Charles and his wife went back, and joined the Mitchells and Miss Campau in Paris the latter part of December. In April the Mitchells and Miss Campau returned to Detroit, leaving Charles and his wife in Paris, where they remained until July or August following, when Charles died, and his wife immediately returned to Detroit with his body. Two children had been born to Charles previous to his death, only one of whom survived him. Another was born the following December.

In July, 1876, Miss Campau had a somewhat serious illness, and was attended for a number of days by Dr. Morse Stewart. About that time she determined to make her will which she seems to have had in contemplation before, and to have spoken of her intention to some persons. Mr. Levi L. Barbour had transacted some business for the Mitchells before they went abroad and while they were absent, and she sent for him to consult him on the subject. Previous to this time Mr. William B. Moran had been acting for Miss Campau, and her papers were in his hands; but Miss Campau with the aid of maps and memoranda was able to give descriptions of her property, and after several conversations a will was drafted which was afterwards copied and executed. The description of one or two parcels of land was not accurate, but the errors were perhaps not important. The date of this will is August 17, 1876, and it was witnessed by Mr. Barbour and Dr. Stewart. By it she gave property valued at $30,000 in trust for Thomas S. and Albert Campau; about $25,000 to Alexander M. Campau; about $5000 to Mrs. Duggan, and the remainder, in three equal shares, was given to the two daughters of her sister and the children of her deceased nephew Charles. There were also gifts of $500 each to the Catholic organizations known as the Sisters of Charity, the House of Providence, and the Little Sisters of the Poor. Mr. Barbour was named executor, and with him was associated Francis P. B. Sands,

of Washington, D. C., in the expectation, as the will states, that he was soon to marry Miss Emilie Piquette. This expectation was fulfilled soon afterwards.

The body of Charles L. Piquette was brought to Detroit shortly after this will was executed. It seems that the marriage of Charles had been somewhat hasty and private, and that none of his family knew the lady except his sister Emilie, who had barely been introduced to her. The bride was not French and not a Catholic, but Miss Campau when she was presented, greeted her kindly, and as Mrs. Piquette who testifies to the interview, says: "I told her I was not a Catholic, but I would do my duty by Charles Piquette, and she said, 'I know you will.'" Miss Campau also greeted her kindly on her return from Europe on this last occasion.

For some reason which is left wholly to conjecture, for the evidence does not tend to explain it, Miss Campau soon decided to make a new will. She sent for Mr. Barbour and had several consultations with him on the subject, and according to his evidence he took from her full memoranda for the purpose, and after considering these in detail with her, drew a will which he left for her examination. This in some particulars was not satisfactory to her, and he drew another, which she finally executed October 26, 1876. The property which the will undertakes to dispose of is supposed to be of the value of $150,000. The important changes made by it from the first testamentary disposition are that it reduced considerably the gifts to the children of Charles L. Piquette, and increased those to Mrs. Sands and Mrs. Mitchell. That this will was executed with full understanding and deliberation is testified very strongly and clearly by Mr. Barbour; and Dr. Stewart, who witnessed it with Mr. Barbour, is equally clear that the will was executed with full capacity. Mr. and Mrs. Sands, Mrs. Mitchell and Mr. Barbour were named in the will as executors and trustees.

After the marriage of Mr. and Mrs. Sands, Miss Campau and Mrs. Mitchell—then a widow—followed them to

Washington, and took apartments at the Ebbitt House. Mrs. Duggan and the children of Mrs. Mitchell accompanied them. In the summer of 1877 they went for a time to Atlantic City; the next summer they went to Sweet Springs, Virginia; in 1879 they went to Coburg in Canada and in 1880 to Deer Park. At Deer Park Miss Campau had a shock of paralysis, from which she recovered wholly or partially and returned to Washington. She had another attack in January, 1881, from which she never recovered, and she died March 25, 1881. In January, 1879, she had executed at Washington a codicil to her will, which was witnessed by James Hoban, Mary A. Long and Mr. Barbour. By this codicil a farm in Washtenaw county and $8000 in cash were given to Alexander M. Campau in lieu of the gift to him before made, and a change was made in the devise for the benefit of Thomas S. and Albert Campau, to provide for a mortgage which Miss Campau had given. The due execution of this codicil is testified to by Mr. Hoban and Mr. Barbour.

Such is a brief summary of the life history of this lady as the circuit judge gathered it from the evidence. It should be added, as contestants attached much importance to the fact, that Miss Campau all her life-time made use of an amanuensis for her correspondence, as well that of a family as of a business nature, and that she is not shown to have made much use of books at any period of her life. When it is further stated that Mrs. Mitchell by a second marriage has become Mrs. Hoban, we have perhaps sufficiently completed the family history so far as it has importance in this controversy.

That the prima facie showing on behalf of the will and codicil is very full and complete is scarcely open to question. When the case was given to the contestants they directed their attention at once to the question of testamentary capacity, and they called witnesses by whom they undertook to show that Miss Campau had never been mentally competent to manage her own affairs; "that from birth she was feeble in body and stunted in mind, necessarily,

from the mere absence of communication with her fellow-creatures;" that "she was practically under guardianship all her life,—first, under that of her sister and then under that of her niece;" that "actual letters of guardianship were not necessary to obtain the care of her person or property, or to prevent waste, all this being secured without letters, and the troublesome necessity of accounting being avoided;" in short, that from lifelong defect of will and intellect she was incapable of a testamentary act, and was of necessity a mere puppet in the hands of others.

Whether it was competent for the contestants to go into evidence to disprove testamentary capacity under the issue made by them for the circuit court, is a question which seems not to have been made in the circuit court, and will therefore not be discussed now. The statute (Comp. L. § 5219) requires the party appealing from the probate court to assign the reasons for his appeal; and the sole reason assigned in this appeal was "that the said will was obtained by undue influence exercised upon said testatrix." Under that allegation it was undoubtedly competent to show weakness of intellect and feebleness of will, because these are commonly the conditions of undue influence; but that the contestants might go further and dispute testamentary capacity after restricting their appeal as is above shown, is a question upon which, under the circumstances, opinion is reserved. A summary of the evidence given for the contestants on the point of capacity is here given, so far as is needful to show its bearing and tendency.

Dr. Samuel Truedell was the first witness. He gives us to understand he was a family friend; a claim, however, for which little support is found in his evidence. He saw the decedent four or five times in all; the last time being some twenty years before the will was executed. He never had more than a few words with her, but was impressed with her weakness of intellect. Two occurrences in particular seem to have influenced his judgment of her mental powers. One was when one morning he came upon her unexpectedly in the house when her toilet was incomplete, and she ran and hid herself; and the other when,

being ill in bed at the time of a call made by him upon the family, she said immediately without waiting for any question, "I am better," and turned her face away from him. It was this last occurrence that especially impressed the doctor unfavorably, and he does not think Miss Campau was capable of dictating a will, or of doing any difficult business. The premises given seem very narrow for so broad a conclusion. The doctor never visited Miss Campau, professionally or otherwise; he never prescribed for her; but possibly she may have feared he was proposing to do so when she turned her head away so promptly and with so pointed an intimation that medical aid was not needed. In that case the act would have indicated will, even if wanting in wisdom. On his cross-examination this witness gives very strong if not conclusive evidence that his real opinion concerning her capacity was not at the time so low; for he testifies that at one time as justice of the peace he took and certified the acknowledgment of a deed executed by her, and this, as an honest man, he would never have done had he deemed her mentally incompetent.

J. B. Delisle had seen the decedent in 1856 and again in 1868. On the first occasion she signed a lease for him, which he seems not to have been afraid to take, and on the second he endeavored unsuccessfully to make a purchase from herself and her sister. Mrs. Piquette, we are informed, was willing to sell, but after Miss Campau had said to her a few words in a voice so low that he did not distinguish the words, Mrs. Piquette informed him that her sister refused to sell. Mr. Delisle "judges" from what he saw, that Miss Campau was incapable of transacting business in relation to property; a very singular judgment in view of the fact that she actually did transact business in relation to property on both occasions, and on the second exercised a controlling mind in respect to the matter in hand, not only for herself but for her sister.

Josette Conner went to school with Miss Campau when they were girls, and last saw her forty-four years before the will was executed. She testified that Miss Campau as a girl was timid and sedate,—not as lively as others; that she

answered questions sometimes, but appeared sickly and left conversation mainly to her sister. She got along with her studies apparently with some indulgence, was kind to her friends and was liked by them. The witness did not think her competent to do business, but she states no fact which can lead anybody else to that conclusion.

E. C. Abbott saw Miss Campau twice, the last time apparently being prior to 1842. On the first occasion the witness had gone to Mr. Piquette's to take "refreshments" with him. The refreshments he took there, we are told, were sometimes cider and sometimes "a little good old whisky." He thinks on that occasion the refreshments were not yet brought in. Mr. Piquette was about to give him an introduction when she turned right about and left the room, so that he did not speak to her at all. If Miss Campau knew what he was there for—as there is reason to infer from his evidence that she did—her conduct might have been somewhat impolite, but the indications of sense in it are unmistakable.

Alexandrine M. Willis, mother of Thomas S. and Albert Campau, testified to having been acquainted with Miss Campau from her youth. She speaks of her as having been always an invalid, very nervous and very shy, seldom going out except to church, very generous in gifts and very pious. Mrs. Willis had taken part with her in business transactions, especially in the partition of valuable lands, which she thinks Miss Campau understood, and would not have hesitated to take a deed from her. The following is an extract from the cross-examination of this witness.

"*Counsel.* Mrs. Willis, do you wish to be understood, from your knowledge of Miss Campau, that you would not have accepted a deed from her of a piece of property?

Witness. I think generally I would have accepted.

Counsel. Now Mrs. Willis—

Witness. Although I want you to understand that I do know there is a very great difference between a deed and a will.

Counsel. No doubt.

Witness. A will is very different.

Counsel. Then you think she might have had capacity to

execute a deed and understand it, but not a will. Is that right?

Witness. Yes sir. It does not involve anything like a will. I think she could have understood that."

It is very evident it is not the case of the contestants that is supported by this testimony.

Sylvester Larned, who was born in September, 1820, and was therefore ten or eleven years younger than Miss Campau, went to school with her and had an acquaintance which ceased when he was in his fourteenth year. As he remembers her when he was six or seven years of age "she was in many respects the direct opposite of her sister Angelique both in person and in mental faculties; the one being very bright,—Angelique,—the other very infirm and a kind of clouded and obscured intellect; an infirm intellect I would rather say." He had seen her in Labbie Campau's store, and when persons would come in who were strangers she would exclude herself, draw aside; would go into another room, and if we children were playing together, she would not join in our plays; she was exceedingly quiet, talked but little, and had a very singular peculiarity of hanging down her head." She seems to have got along with her lessons in school, though her scholarship was poor; and the witness gives us his deliberate judgment, which he had from his sixth year to his thirteenth, inclusive, to form, that "from my knowledge of her capacity I did not deem her at the time that I knew her, competent to make a will, or to make this will." This application of the very clear but somewhat precocious judgment to the particular will in controversy is deprived of some of its force by the subsequent concession of the witness that perhaps Miss Campau, during the forty-seven years when he had not known her, might have acquired due capacity; and possibly the jury might not have been so strongly impressed as the witness was with the evidence of a "clouded" or "infirm" intellect afforded by the want of interest of a young woman of sixteen or eighteen in the plays of boys of six or seven.

Louis Cicotte testifies to nothing of importance except that in making a purchase of land from Miss Campau and

Mrs. Piquette, Miss Campau said she would do in respect to the trade what her sister did.

Catharine Sanders was nurse for Mrs. Piquette during her last illness. She had not known Miss Campau before, but saw her there three times, but did not hear her speak until she took leave of her in going away. The first time Miss Campau sat "scrooched" down upon the stairs with a calico garment on and her face to the wall; the other two times the witness merely saw her come into the room. To say that one is "scrooched" down, as we infer, is to express in somewhat contemptuous language the idea that one has sat down without proper regard to dignity of appearance; and this or the calico dress, or something else not explained, but which was certainly nothing said by Miss Campau, so impressed this woman that she informs us "from my knowledge she did not look like she had sound senses." The only conversation that took place between them is then given by the witness. After Mrs. Piquette had died, the witness went to Miss Campau's room to bid her good-bye. "I told her I was going. 'Oh,' she says, 'stay.' I said, 'No; I must go.' 'Well,' she says, 'stay another month;' and I said 'No; I must be going home;' and she said nothing more." Nothing unnatural appears in this; nothing indicative of the absence of "sound senses."

H. N. Brevoort testified to having gone at one time to take Miss Campau's acknowledgment of the execution of a deed, and to having certified to it "through Miss Emilie Piquette," without seeing the grantor or having any personal communication with her. The unfavorable deductions from this evidence affect the officer rather than the party. We can understand a woman in sickness, or from mere personal convenience, requesting another to act for her in such a case if she supposed it admissible; but how the officer, who of course knew better, could consent to make the untrue certificate, is not so readily understood.

Theodore G. Williams testified to having transacted a large amount of business as the agent of Miss Campau, and to having paid out for her over $50,000. The business was transacted through Mrs. Piquette or Charles Piquette, and

when he went to the house he did not ask for Miss Campau herself. Nothing in his evidence, however, indicates that he did not consider Miss Campau competent while he was acting as her agent, and he at one time asked of her an important business accommodation, which we cannot for a moment suppose he would have solicited from any one not fully competent to judge what was for her interest.

The contestant *Fanny E. Piquette*, now by a second marriage Fanny E. Van Dyke, gave an account of her friendly relations with Miss Campau in Detroit, Paris and Washington. Miss Campau, as she shows, was tenderly attached to her first husband, to whom she gave "a handsome chest of silver" on his marriage, and she was also fond of his children for whom the contestant is now acting. One purpose of taking her testimony would seem to be to show that Miss Campau might naturally have been expected to make these children the objects of her bounty. Mrs. Van Dyke speaks of Miss Campau as a kindly woman, feeble in body and intellect, and who once, when she had dyspepsia, sobbed and acted like a child because they would not let her have the food she wanted. The witness owned a one-twelfth interest in Belle Isle, near Detroit, and joined the other owners, including Miss Campau who owned a fourth, in selling it to the city of Detroit for $200,000, and it did not occur to her at the time, or when they united in a lease of fisheries, that there was on the part of Miss Campau any want of competency. Both the sale and the lease were later in date than the codicil to the will.

E. V. Cicotte testified that in his opinion Miss Campau was incapable of executing with proper intelligence the will in question. He had not seen her except, perhaps, to bow to her for thirty years before her death, and he testifies to nothing within his personal knowledge as constituting a basis for his opinion, except an impression derived from observation that in health she was feeble, and in mind below the standard of ordinary women.

Such was the evidence introduced by the contestants to show want of testamentary capacity. Much evidence was

given by the proponents in rebuttal, some of which was taken under exception, and the trial judge gave instructions on this branch of the case of which the contestants complain. If the evidence for contestants shows, or fairly tends to show, a want of capacity, they were entitled to take the sense of the jury upon it; but if they produced no evidence which tended to meet and rebut the case made for the proponents, and which, standing by itself, would support a verdict in their favor, it is very plain that they could not have been injured by any rulings against them on this branch of the case.

So far were the contestants from meeting the case made by the proponents, that they gave it support by nearly every witness. We see in their evidence the picture of a lady, never strong in body and at times decidedly an invalid, kindly in manner, generous to friends, but shy and reserved in the presence of strangers, reserved in her conversation and without a taste for literature or public amusements, who lived a long life of quiet goodness in the practical assertion of equal legal rights and powers with others, and passed away without the question of her legal equality being ever made. She had a considerable fortune, which came from her father, and the trial judge remarks upon it as an important fact in the family history, that while the father by his will appointed trustees for the estate given to Mrs. Piquette, he seems to have made no such provision in the case of the property given to Miss Campau, but left it without restrictions to her disposal. It remained at her disposal for thirty-five years or more; she had in respect to it large business transactions; she appointed in succession three business agents; she made deeds and leases which no one hesitated to accept, and she made numerous gifts. The last important transaction was with the city of Detroit, and required a payment to her of fifty thousand dollars, and we hear of no question being made respecting the propriety or legality of the payment.

These facts do not tend to show incapacity; they show the reverse most distinctly and unmistakably. Only a perverse or a misguided jury could have found for the contest-

ants upon them. The physical weakness which was shown, the nervousness and reserve, and the disinclination to make use of the pen, prove by themselves nothing to the point, for they are perfectly consistent with great mental powers, and are sometimes met with when such powers unquestionably exist. But if it be conceded that this woman was below the mental capacity of average women, which is all that the evidence tends to prove, the case for contestants is still far from being made out. There is no rule of law which prescribes average capacity for a testamentary act; if there were it would disable a large portion of every community; perhaps one-half of it.

No witness for the contestants ventured to say that Miss Campau was an idiot. No one expressed the opinion that she was insane. No one said her faculties were impaired by old age. No one thought her incapable of dealing in property by deed. The conclusion of the whole matter as respects capacity is best given by Mrs. Willis, who, while conceding the competency to make a deed, denies the competency to make a will. "That," she informs us, "is different."

There is probably little doubt that this remark embodies an opinion, or at least an impression that is far from being uncommon. It is an impression for which the law is not accountable, though the manner in which the law is sometimes used and abused may give it some countenance. In law one who is competent to deal in property on the basis of contract is competent to dispose of property by will. With surviving relatives there is often a very different rule; and persons who have gone through an active life with business competency unquestioned, are denied testamentary capacity the moment a will is produced which does not meet the desires or expectations. Something will then be brought forward to show that the testator was, as respects the particular act, an imbecile. He was perhaps below the general average in intellect, or he had some idiosyncracy which, when presented in the proper light, may be thought to resemble or to indicate insanity, or there was a taint of insanity in the family blood, or something in his history

was so peculiar or mysterious as to afford ground for a hope that if properly handled a jury may believe or imagine or guess there was something wrong about him, and refuse to sustain the will. The grounds for a contest are as likely to be found in the case of a man of strong mind as any other, if he had his peculiarities, as most such men do. *Fraser v. Jennison* 42 Mich. 206. But they would be abundant in the case of a lady like Miss Campau, as the enormous record of over seventeen hundred printed pages conclusively shows. The simple, kind, reserved, domestic, benevolent and pious lady while living, becomes the imbecile as soon as her will is opened. But the law regards her case with different eyes. If she could buy and sell, and give deeds and leases, and make gifts by delivery, she could make gifts by will also.

We have not commented upon the fact, which of itself would be conclusive against the case of the contestants, that not one of the witnesses who ventures to express an opinion against the mental capacity of Miss Campau, pretends to base the opinion upon personal intercourse or observation had or made within twenty years of the time when the will was executed. The witness Sanders might be considered an exception if the opinion she expressed, when taken with the grounds for it, were not so manifestly preposterous. A woman even though wealthy may wear a cheap garment in the privacy of her own home if she pleases, and she is not to be judged as to "sound senses" on two casual views of her face, even though she does, when some great calamity is impending, like that of the death of an only sister, seat herself upon the stairs with her face to the wall. Some of the evidence it is difficult to treat with seriousness; and one might suppose that the circuit judge, fatigued with the long trial, admitted it from a sense of humor and by way of recreation and relief. This is particularly the case with the evidence of Mr. Larned, who at the ripe age of sixty-two gives to court and jury the sage criticisms he mentally made of the powers and capacities of his elders at that period of life when others of corresponding age would be just entering upon easy lessons in reading and spelling. If Miss

Campau could be supposed to have known that she was being made the subject of such profound judgments by youthful critics on the one side, and such summary judgments by strange nurses on the other, her shyness, and hanging down of head, and avoidance of human society would not seem so mysterious or so unreasonable as it appears to contestants now.

If there were any pretense that the evidence tended to show idiocy, it would not be so important that the witness did not see the decedent in her later years; for an idiot is not supposed to acquire capacity in the lapse of time. In this case idiocy is not only not pretended, but is disproved by the contestants. What they claim is that Miss Campau was mentally weak and feeble; and this they attribute to the lack of bodily vigor and health. Imbecility of mind from such a cause might pass away; and evidence concerning it ought to be directed to the time when the act was done which made the mental state important. Such was not the case with the evidence given on behalf of these contestants. The witnesses who knew Miss Campau in her later years bore testimony to her capacity. But it was not needful, because the capacity was not successfully assailed.

The other branch of the case concerns the alleged undue influence. The charge, as has been said, imputes the wrongful influence to Mrs. Mitchell, now Hoban. As complaints are made of the rejection of some evidence by the court, it will be proper to consider the case as it would have stood if contestants had given all the evidence they professed to offer. It would then have appeared that by reason of Miss Campau's residence with her, and her very quiet and reserved habits of life, Mrs. Mitchell had every opportunity to reach Miss Campau with selfish and improper influences; that she was made a medium in Miss Campau's business communications with agents; that the business agent of decedent was changed, and the same person employed who had before been agent for Mrs. Mitchell; that Mrs. Mitchell was aware of the contents of the two wills contemporaneously with their execution, and did not dis-

close their contents to others; and that she paid the legacy of $8000 to Mr. A. M. Campau, who thereupon took a trip abroad, instead of staying to contest the will, as he was expected to do. All these things, taken severally, seem innocent enough. It was certainly not improper for Mrs. Mitchell to pay A. M. Campau the money which she conceded was his of right; and if he was in fault for going abroad afterwards, she was not to be blamed for it, unless she was in some manner connected with or responsible for his going; and of that there was no evidence whatever. Moreover, Mr. A. M. Campau or any other member of the family was under no obligation, legal or moral, to take part in such a litigation; and if he purposely turned his back upon it, a presumption of good motives may very properly arise in his favor. If Mrs. Mitchell knew the contents of the two wills and failed to disclose them, she may well be excused for doing so, irrespective of any desire the testator may have expressed to that effect. The family quarrel over testamentary dispositions comes soon enough if it is postponed until the person making them has been decently laid in the grave. There was not a particle of evidence that Mrs. Mitchell or any one else actually did influence or attempt to influence the making or altering of a will by Miss Campau, or that she had anything to do with the employment of Mr. Barbour to draft the will, or for any other purpose, or that she resorted to any trick or artifice to keep friends or relatives of Miss Campau away from her, or that any of them were kept away, in fact, or that the will and codicil, as drawn, represented anything else than the desires of the decedent, deliberately formed and carefully dictated by her to the scrivener. What contestants can forcibly urge on the facts is that Mrs. Mitchell had every opportunity for abusing her aunt's confidence; but if we were to suspect improper conduct whenever there was opportunity for it, nobody could be secure against suspicion at any time. But ground for suspicion and ground for judgment are very different things. Judgment must be based upon evidence, and of evidence of undue influence there was none in this case.

The judgment sustaining the will I think should be affirmed with costs.

The other Justices concurred.

52 365
63 490
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87 111
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140 704

JESSE SPALDING v. ALFRED A. ARCHIBALD AND THE CHICAGO & NORTHWESTERN RAILWAY COMPANY.

Statute of frauds—a void sale valid as a license.

1. If the parties to a sale that would be void under the statute of frauds, choose to treat it as valid, it will be so as to them, and may become effectual for all purposes.
2. An oral sale of the stumpage on cedar land, though void under the statute of frauds, is valid as a license to cut the timber, until it is revoked; and when the timber is cut the title to it passes because the right thereto has become a chattel interest.
3. It is for a jury to decide whether an oral authority has been correctly construed.
4. A licensor's actual knowledge that his consent has been acted on is not necessary to the protection of the licensee; he is bound to assume that it has.

Error to Menominee. (Grant, J.) Oct. 31.—Dec. 21.

REPLEVIN. Plaintiff brings error. Affirmed.

B. J. Brown for appellant. A sale essentially differs from a mere license: *Greeley v. Stilson* 27 Mich. 157; a contract of sale of standing timber is a sale of an interest in real estate: *Russell v. Myers* 32 Mich. 522; and the contract cannot be available as a contract unless an action can be brought upon it: *Carrington v. Roots* 2 M. & W. 248; a license must be acted on by both parties: *Haskell v. Ayres* 35 Mich. 90; *Wetmore v. Neuberger* 44 Mich. 366; *Pierrepont v. Barnard* 6 N. Y. 279 cited in 2 Am. Lead. Cas. 565; authority to an agent to sell an interest in land must be written: *Wallace v. McCollough* 1 Rich. Eq. 426

B. C. Cook and *H. O. Fairchild* for appellee. Sales of stumpage with the privilege of entering on the lands to cut and remove the timber are not within the statute of frauds as sales of an interest in realty; *Morrill v. Mackman* 24 Mich. 283; *Wetherbee v. Green* 22 Mich. 311; *Greeley v. Stilson* 27 Mich. 153; *Sovereign v. Ortmann* 47 Mich. 181; *Detroit, Hillsdale & Ind. R. R. Co. v. Forbes* 30 Mich. 165; *Erskine v. Plummer* 7 Greenl. 447; *Claflin v. Carpenter* 4 Met. 580; *Tyson v. McGuineas* 25 Wis. 656; *Lockhart v. Geir* 54 Wis. 133.

Cooley, J. Replevin for eleven hundred cedar telegraph poles.

The plaintiff in the years 1880 and 1881 was engaged in the business of getting out ties, posts and telegraph poles from lands belonging to himself and others in the vicinity of Spalding in Menominee county. The poles in question were cut in the winter of 1880–81, and as plaintiff claimed were delivered to him by one Leon Lacroix under a verbal contract whereby Lacroix had engaged to cut poles for plaintiff on lands owned by him on section six in township thirty-eight north of range twenty-six west. The poles, however, were not all cut on section six, but some were cut on the southwest quarter of section eight, and some on the south half of the northwest quarter of section eight. The defendant Archibald, on the other hand, claimed that eight hundred of the poles were cut by Lacroix from the northwest quarter of section eight, and that the remainder were bought by Lacroix from one Poquin, who had cut them on some part of section eight. It is not disputed that all the lands from which poles were taken belonged to the plaintiff.

Lacroix was a witness for defendant, and testified that he got out 800 of the poles on the northwest quarter of section eight, and that he bought the others of Poquin. He was then permitted to state, under objection by the plaintiff, that he went to Spalding to see if he had cedar land for sale, or jobs to give; that Spalding said he did not know whether there was cedar on the land or not, but told him to

go to Hagerson and what Hagerson said would be all right; that he did go to Hagerson, who sent one Allen with him to look at a forty on section eight; that Allen made his report to the office, and witness then went to Hagerson and told him he had seen the cedar and would take it at a price which had been talked about, and Hagerson said "All right"; that witness had dealings with Spalding and had a pass-book, and Hagerson took the pass-book and made an entry as follows: "Dec. 30, 1879. Stumpage on N. ½ of N. W. ¼ of sec. 8, $85." The Allen mentioned was foreman for plaintiff, and showed people land when they wanted to buy.

Similar evidence was given of a purchase by Poquin of cedar trees on another part of section eight, but it was testified by Poquin that after he had cut for a time Hagerson told him to stop cutting, because the trees cut were in the way of other persons who were using a wood road. Poquin interpreted this as leaving him at liberty to cut, provided he did not obstruct the road, and he continued to do so, and sold what he cut to defendant. He cut ties on the same land at the same time, and delivered them to the railroad company with directions to pay the price to Spalding.

Plaintiff's objection to all this evidence was that it tended to show a parol sale of an interest in lands. Such a sale, it was truly said, would be void under the Statute of Frauds: *Russell v. Myers* 32 Mich. 522; *Putney v. Day* 6 N. H. 430; s. c. 10 Am. Dec. 470; *Owens v. Lewis* 46 Ind. 488: s. c. 15 Am. Rep. 295, where numerous authorities are collected. This position is not disputed by the defendant.

But it does not follow, because a sale is void under the Statute of Frauds, the purchaser can derive no title under it. Such a sale is void only at the option of the parties concerned; and if they elect to treat it as valid, it may become effectual for all purposes. And commonly, even if not wholly affirmed, it will operate as a license which will protect the purchaser against liability for anything done under it prior to any act of revocation.

A license very often assumes the form of a sale, and it only fails to become a sale because of not being put in legal form. If we believe the testimony of Lacroix and Poquin, such was the case here; they bargained for a purchase from Spalding with his agent Hagerson, but the subject of the bargain was an interest in lands, and to render it effectual a deed was necessary but was not given. The whole transaction was therefore invalid from the first, and either party might have refused to recognize or act upon it. If they had done so, no rights could have sprung from the negotiations. But Lacroix and Poquin went on and cut the poles, without objection or protest, except as hereinbefore mentioned, and the question now is, what rights were acquired by them or what liabilities incurred thereby? Had they done the cutting under an oral permission given as a mere favor to them, or for the benefit of Spalding himself, the permission would have been a license which would have given them ample protection; but it was not the less a license by reason of having assumed the form of a sale, and been paid for. The essence of the license is in the permission to do what was done; the purpose or consideration of the permission is commonly of no importance.

But the attempted sale was not restricted in its force to the protection of the parties from being held trespassers for what they may have done under it; for to the extent that trees were cut under it before revocation it took effect as a sale, and passed the title to the licensee who thereby became purchaser under it. The permission to cut and remove must be understood as continuous until actually recalled; and as fast as the trees were severed from the realty by the cutting, the contract of sale attached to them as chattels, and the parties cutting were entitled to remove them as their own. This doctrine is abundantly affirmed in our own decisions: *Greeley v. Stilson* 27 Mich. 157; *Haskell v. Ayres* 35 Mich. 90; *Wetmore v. Neuberger* 44 Mich. 362; and is also generally recognized elsewhere as a reference to a few of the leading cases will show. *Yale v. Seely* 15 Vt. 221; *Claflin v. Carpenter* 4 Met. 580; *Erskine v. Plummer* 7

Me. 447: s. c. 22 Am. Dec. 216; *Pierrepont v. Barnard* 6 N. Y. 279; *Owens v. Lewis* 46 Ind. 488: s. c. 15 Am. Rep. 295. It was suggested on the part of the plaintiff that to give the transaction this effect it should be shown that he had actual knowledge that the cutting was proceeding; but this was not important: he was bound to assume his consent would be acted upon.

The plaintiff contends that whatever authority Poquin had to cut poles was revoked; and we have seen how he construed what was said to him on that subject. Whether he was right or wrong in this construction was a question for the jury: *McKenzie v. Sykes* 47 Mich. 294; but the plaintiff did not request that it be specifically submitted to the jury, and there is no ruling of the circuit judge in respect to it for us to review.

It is, as we think, of no importance in the case that the invalid sale was made by Hagerson instead of by Spalding in person. Had Hagerson, without authority to sell interests in lands, assumed to grant such licenses at his own instance, they would have been void even as licenses; but here the case which the jury believed was that the parties who bargained with Hagerson were sent to him for that purpose by Spalding himself; and if that was the case the licenses granted stand on no different footing than if Spalding in person had given them.

Some other points are made in the brief for the plaintiff, which we have considered and do not think are well taken. They rest so exclusively upon the peculiar facts of the case that their discussion could do nothing towards settling any general principle, and is therefore unimportant.

We find no error in the record, and the judgment must be affirmed with costs.

The other Justices concurred.

JANUARY TERM 1884.

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HENRY SMITH AND JOHN SMITH v. RICHARD PEARCE.

Justice's jurisdiction—Mechanic's lien.

Where a mechanic, suing for his wages, makes the owner of a building on which he works a joint defendant with the contractor who hired him, and sues them in an appropriate form of action before a justice of the peace, the justice has jurisdiction to try the issue; and though he cannot enforce a mechanic's lien, an error in rendering judgment therefor, or in holding the owner personally liable, will not destroy his jurisdiction or make his judgment void and open to attack in a collateral action; and unless reversed on appeal or certiorari, it must stand.

Error to Houghton. (Williams, J.) Jan. 8.—Jan. 15.

EJECTMENT. Defendant brings error. Affirmed.

T. L. Chadbourne and *T. F. Powers* for appellant. In a proceeding to enforce a mechanic's lien it must appear that the statutory prerequisites have been met: *Clark v. Raymond* 27 Mich. 456; *Clark v. Adams* 33 Mich. 159; presumptions cannot be indulged to make out jurisdiction in an inferior court: *Saunders v. Tioga Mf'g Co.* 27 Mich. 520; it must appear: *Wight v. Warner* 1 Doug. (Mich.) 384; *Clark v. Holmes* id. 390; *Elliott v. Dudley* 8 Mich. 62; *Goodrich v. Burdick* 26 Mich. 39; a plea to the merits does not waive jurisdictional irregularity: *Woodruff v. Ives* 34 Mich. 320; a recital of service of notice does not necessarily mean statutory notice: *McCaslin v. Camp* 26 Mich. 390; and a mere return of personal service where there are two defendants does not show service on both: *Campau v. Fairbanks* 1 Mich. 151; and if such service does not appear there can be no joint judgment: *Sherman v. Palmer* 37 Mich. 509.

Chandler & Grant for appellees. A justice's judgment cannot be collaterally attacked for irregularities: *Reed v. Gage* 33 Mich. 181; *Maltby v. Greene* 1 Keyes 548; *Donnelly v. Libby* 1 Sweeney (N. Y.) 259.

Cooley, C. J. Ejectment. The plaintiffs claim the land under a purchase made by them under an execution sale. The judgment upon which the execution issued was in their favor, and against the defendant in this suit and one John Meyer. The defendant contests the purchase, and claims that the judgment was void for want of jurisdiction in the court to render it.

The judgment was rendered by a justice of the peace. The summons by which the suit was commenced was an ordinary summons in assumpsit, and the declaration was on the common counts. The amount sued for was within the jurisdiction of the justice, and the judgment rendered was the proper judgment in such an action. There would therefore seem to be no question whatever that the justice had full jurisdiction to consider and dispose of the case.

It appears, however, from the docket of the justice that the demand which the plaintiffs proved in the case was not a claim against this defendant and Meyer jointly, nor in fact against this defendant at all, but was a claim against Meyer individually. But Meyer was contractor for the erection of a building for defendant, and it appears to have been claimed that the plaintiff's demand constituted a lien upon the building, and the justice deemed it proper to render a judgment for the amount against the defendant and Meyer jointly. In that way the lien upon the defendant's building would be enforced against the defendant personally. In this the justice erred. Mechanics' liens are not enforced in justices' courts, and defendant was not personally liable for the amount.

But this error did not deprive the justice of his jurisdiction. He had unquestionable authority to consider and pass upon the issue, to decide upon the admissibility of the evidence offered under it, and to render judgment upon such

evidence as he received. If he erred in any of his conclusions upon the offer of evidence, or upon its competency to establish a demand against the defendants, the error would render the judgment liable to reversal on appeal or certiorari, but could not render it void. The judgment should be assailed in the regular way, and not attacked collaterally. The principle is familiar and was correctly applied by the circuit judge.

The judgment should be affirmed with costs.

The other Justices concurred.

GREGORY HOFER v. SAMUEL F. HODGE.

Bailment for hire—Ordinary care—Master and servant.

Where the owner of a team, after hiring it out and binding himself to furnish a driver, makes a temporary arrangement with the other party whereby the latter takes the team into his own charge and promises to furnish a driver himself if he has occasion to use it, the transaction, being for the benefit of both parties, amounts to a bailment for hire, and the party in possession of the team is bound to take such ordinary care of it as a prudent owner would take. And the driver whom he furnishes is his servant and not that of the owner of the team.

Error to Houghton. (Williams, J.) Jan. 8.—Jan. 15.

CASE. Defendant brings error. Affirmed.

T. L. Chadbourne and *Lillibridge & Latham* for appellant.

Chandler & Grant for appellee.

CHAMPLIN, J. The plaintiff brought an action against the defendant to recover the value of a horse, harness and damages to a wagon, under the following circumstances: On the 26th day of September, 1882, and for some time prior thereto, the defendant was the owner of and operated

a foundry and machine shop situated on the shore of Portage lake in the county of Houghton. Plaintiff was under a contract with defendant to do certain team work for him at his foundry, in the execution of which he employed his horse, harness and wagon. He also furnished a teamster to drive the horse. This contract to do teaming was from month to month. On the 26th of September, 1882, his teamster being sick, he took his horse and wagon to the office of defendant and informed defendant's agent of the fact of his teamster's illness. The plaintiff testifies that Mayworm, the defendant's agent, told him to leave the horse there and they would take care of him; that probably they would not use him; but if they did, they would find a driver themselves. Mr. Mayworm says he told the plaintiff that he could drive the horse up and if they found they had to do any driving they could, as he suggested, let one of their men go along and do the driving; they could accommodate him to that extent.

Having occasion to use the horse to draw some castings, the agent took an employee from the shop and directed him to drive the horse. The testimony shows that this person was incompetent to have the care and management of a horse; that he was inexperienced in driving horses, and so informed the agent, Mayworm, at the time. He says he told Mr. Mayworm that he had never driven a horse but once before. The record discloses the fact that the castings to be hauled were situated on the dock and within a few feet of the waters of the lake; that to receive the load it was necessary to back the horse and wagon within about three feet of the water; that there was no protection along the margin of the dock to prevent the horse and wagon from being backed into the lake. The person selected by defendant's agent proceeded to do the work designated, and having hauled one load, in placing his wagon in position for another backed the horse off from the dock into the lake and the horse was drowned.

There was a verdict and judgment for the plaintiff in the court below and defendant assigns error here. There are

twenty-two assignments of error, seventeen relating to errors in the admission or exclusion of testimony, and five to the action of the court in charging the jury.

We perceive no error either in the admission or exclusion of testimony.

The main contention, aside from the question of negligence, was whether, under the facts above stated, the driver in charge of the horse at the time of the accident was the servant of the plaintiff or that of the defendant.

The defendant's position is that the plaintiff, being himself employed under a contract to do the work in the execution of which the accident happened, the person selected by the defendant was, under the circumstances, the servant of the plaintiff; that in the light of the contract it was merely an act of accommodation to plaintiff, and that defendant assumed no risk or liability in respect thereto.

We do not think this is a correct view of the law. It is true that defendant was under no obligation to furnish a driver for plaintiff or to assist him in any manner in carrying out his contract with him. But when the defendant received the horse and wagon in his possession and put them to use in his business, it was incumbent upon him to use them with ordinary care and to furnish a competent person as driver. And we think that, under the facts of this case, the driver employed at the time of the accident was clearly the servant of the defendant. He was subject to his direction and control, could be withdrawn or not from that duty at his option, and his possession of the property in question must be deemed the possession of the defendant while engaged in the defendant's business.

Complaint is made that the judge charged the jury that the degree of care required of defendant, Hodge, or his authorized agent in this business, was ordinary care, caution and prudence; that he was held to that degree of care, caution and prudence that an average man of good sense exercises about his own affairs; and counsel for defendant insists that the court should have charged the jury that slight care was all that was required of the defendant upon the plaintiff's own theory of the case.

The charge of the court was correct. The bailment being beneficial to both parties, the duty of the defendant in keeping the property was substantially the same as in a bailment for hire. He was bound to keep and preserve the property with ordinary care—that care which a prudent man ordinarily takes of his own property. This duty called upon him to select a careful and competent driver if he saw fit to employ the property in his own use.

We think the case was fairly submitted to the jury by the court and we find no error in his rulings, and

The judgment is affirmed with costs.

The other Justices concurred.

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ALATHAEA CAMP v. ESTHER CARPENTER AND THEODORE GRIMSON.

ESTHER CARPENTER v. ALATHAEA CAMP.

Notary's certificate—Bona fide holder of forged mortgage.

1. A notarial certificate is prima facie but not conclusive evidence of the authority of the instrument to which it is attached; and its force may be rebutted by the testimony of the person who appears to have executed the instrument.

2. A forged mortgage cannot be valid even in the hands of a bona fide holder, unless, indeed, the latter came into possession of it under circumstances which establish an equity in his favor against the party apparently liable upon it.

3. One who takes a mortgage signed only by a married woman, with knowledge that it does not relate to her separate property, and that its execution is clandestine, can hardly claim any equities against her if the mortgage should turn out to be forged.

Appeal from the Superior Court of Grand Rapids. (Parrish, J.) Jan. 8–9.—Jan. 15.

BILL to foreclose, and CROSS-BILL to cancel a certain mortgage. Esther Carpenter appeals. Reversed; original bill dismissed; decree entered in accordance with the cross-bill.

Mark M. Powers for Alathaea Camp. The facts of the acknowledgment of a deed and of the identity of the person acknowledging are essential parts of a notary's certificate and must be stated: Martindale's Conveyancing 221; a statute requiring identification is mandatory, not merely directory: *Pinckney v. Burrage* 31 N. J. L. 21; *Heeter v. Glasgow* 79 Penn. St. 79; *Jamison v. Jamison* 3 Whart. 457; no evidence can be received to contradict a certificate of acknowledgment for the purpose of making the deed ineffectual: *Greene v. Godfrey* 44 Me. 25; *Barnett v. Shackleford* 6 J. J. Marsh. 532; parol evidence cannot, in the absence of fraud, be admitted to contradict a fact expressly stated in the certificate of acknowledgment of a deed, and which the law requires the acknowledging officer to state: *Harpending's Executors v. Wylie* 14 Bush 380; 1 Jones on Mortgages (3d ed.) § 538; a certificate is not invalid or affected by the grantor's want of recollection: *Tooker v. Sloan* 30 N. J. Eq. 394: the officer cannot impeach his own certificate: *Homœpathic Mut. L. Ins. Co. v. Marshall* 32 N. J. Eq. 103, note; a defective certificate cannot be aided by the parol testimony of the officer taking the acknowledgment, even to validate and make regular the deed: *Jourdan v. Jourdan* 9 S. & R. 268; nor to invalidate it: *Marston v. Brittenham* 76 Ill. 611; *Russell v. Bapt. Theol. Union* 73 Ill. 337; *Kerr v. Russell* 69 Ill. 666; *Johnson v. Van Velsor* 43 Mich. 219; *Hourtienne v. Schnoor* 33 Mich. 274.

Fred A. Maynard for Esther Carpenter.

CAMPBELL, J. The original bill was to foreclose a mortgage alleged to have been made by Mrs. Carpenter to complainant, and the cross-bill was filed to have the same mortgage declared void as a forgery and discharged from the registry of Kent county.

The parties live at Grand Rapids, and are both married women, living with their husbands. The note and mortgage purport to have been given on the 26th day of July, 1881, for $500 payable in three years with interest at eight

per cent. payable semi-annually. The mortgage purports to have been acknowledged on the same day before Henry Grinnell, a notary at Grand Rapids, and witnessed by him and George Thomson. The note is not witnessed, and there is no proof of its execution except by comparison of hands.

The facts in regard to the origin of the mortgage seem to be that about the date of the mortgage one Freeman Lathrop, a land-agent, had in his possession a note purporting to have been made by Mrs. Carpenter in the preceding March at six months, for $300, payable to the order of Lewis Gale, which Gale had negotiated on his own account. Gale applied to Lathrop, stating that Mrs. Carpenter wanted to raise a loan, on mortgage, of $500 on the property in question. Lathrop arranged with Gale to obtain the money from complainant, and drew up the papers. Gale intimated that it would be more convenient to have the papers executed somewhere else, and took them and afterwards brought them back executed. The $300 was held for the benefit of Mr. Powers, complainant's present solicitor, and was not secured, but Powers claimed it was understood it would at some time be secured, but that Mrs. Carpenter would have to watch her opportunity to do it without her husband's knowledge. On the return of the papers Lathrop reserved $25 for his charges, and gave Gale the $300 note and $175 in money.

As already stated, there is no proof of the execution of the note. The mortgage was acknowledged before Grinnell at his office. Gale came in and told Mr. Grinnell that a lady who was with him desired to acknowledge a mortgage. Grinnell has testified on different occasions and his recollection does not agree in some important particulars at the different depositions. It appears beyond question that at the time of the acknowledgment he did not know the person acknowledging. It appears also that at a comparatively early date, when he first deposed, he could not recognize Mrs. Carpenter as the person. At his last deposition his impressions were that she was the person. There is also

a similar change in his recollection as to his having seen the mortgage signed. The subscribing witness has no recollection of the matter at all, beyond the mere fact of signing for unknown parties. Grinnell's recollection, at its strongest, as to the signature, only includes the mortgage and substantially negatives any other signature at that time. He does not claim to have seen the note.

Mrs. Carpenter positively denies the execution of either of the notes and of the mortgage. No witness who knows her handwriting was called to prove the signatures, and the testimony of so-called experts was confined to a comparison of her signature on some genuine papers shown to them, with the note and mortgage. No witness claimed that the signatures were identical, as they manifestly are not, but some thought there were such indications as showed them to have been written by the same person, while others thought differently. The experts do not seem to have had their attention called to the signed papers forming part of the records of this case. We have before us several of these signatures in addition to the exhibits.

The court below sustained the validity of the mortgage, upon the ground, chiefly, that the notary's certificate imported such verity as not to be overthrown legally by the testimony of the alleged maker of the mortgage, and held that there was no other testimony in the case of importance except an alleged alibi at the time of the acknowledgment, on which he did not regard the proof as conclusive. The judge did not express himself on the other questions of fact, beyond holding that the conviction of Gale for the forgery was not evidence against complainant.

The testimony is long, but we do not think it necessary to discuss it at large. We have no doubt whatever that the papers were forged. And we should confine ourselves to this single conclusion, except for the fact that in our view the rules of law heretofore laid down in similar cases by this Court seem to have been misapprehended.

The notary's certificate is made prima facie evidence. It is claimed by complainant that such a certificate is of a con-

clusive character, and especially so in favor of an innocent mortgagee.

There is no rule which could lawfully make any officer's certificate of acknowledgment conclusive evidence of the identity of persons or of the execution of a conveyance which would not have the effect of depriving a person of his property without his own act or fault. Such a transfer would very clearly be beyond legislative authority. The question must necessarily be open to proof whether the instrument relied on is genuine. In *Hourtienne v. Schnoor* 33 Mich. 274, and *Johnson v. Van Velsor* 43 Mich. 219, it was intimated that such official action must, where had before an officer knowing the parties, receive great consideration. In both of those cases the officers swore to such facts as raised a distinct issue of veracity, and in both, his testimony was accompanied by strong corroboration. In the present case, when the notary swore he did not know the person whom he certified he knew, he deprived his certificate of all the foundation on which the law allows the presumption to be raised, and the subscribing witness, who testified to his own ignorance, destroyed also the presumptions that in some cases attend the action of such witnesses in the absence of suspicion. It would be very absurd to allow a certificate such weight as is claimed for it here, when the notary himself contradicts his own statements, and shows its want of truth. It is not a very satisfactory state of things when a forgery can gain even presumptive credit from the action of an officer who has certified without foundation for his action.

No other question of law is involved in the case. As already stated we have no doubt at all that Gale made or procured the forgery of the securities in controversy, as well as of the note made earlier. If forged, no amount of good faith would profit the holder, who has no equity against the party whose name is forged. Mrs. Camp is unquestionably innocent of any fault. But we do not think the record indicates much caution in parties who take a married woman's notes which they have reason to suppose

were not given for her own purposes, or advance money belonging to her to a person whose agency they take no pains to inquire into, and who gives them to understand the matter is not intended to be made public.

The decree must be reversed with costs of both courts; the original bill must be dismissed and a decree rendered on the cross-bill for the cancellation of record and delivery up of the note and mortgage.

The other Justices concurred.

ABRAM J. KNISELY v. CHRISTIAN STEIN.

Statute of limitations—Conversion.

The rule that one who has taken part in the conversion of timber may be held as a joint wrong-doer with any one who thereafter does anything in pursuance of such conversion, does not prevent the Statute of Limitations from running in favor of one who took such part without any knowledge that any wrong was intended, and did not participate in subsequent acts of conversion.

Error to Berrien. (A. J. Smith, J.) Jan. 9.—Jan. 15.

TROVER. Plaintiff brings error. Affirmed.

Edward Bacon for appellant. The several liability of a defendant in trover is the same as in trespass, and he need not be joined with others: *Kenyon v. Woodruff* 33 Mich 315; *Weber v. Weber* 47 Mich. 571; his liability in this form of action is for the natural consequence of his acts irrespective of intent: *Allen v. Kenyon* 41 Mich. 284; and to render wrong-doers jointly liable it is not necessary that their acts should be simultaneous or at the same place: *Cuddy v. Horn* 46 Mich. 604; *Brown v. Perkins* 1 Allen 89; *Stone v. Dickinson* 5 Allen 31; *Cook v. Hopper* 23 Mich. 515; *Dreyer v. Ming* 23 Missouri 434; *Cram v. Thissell* 35 Maine 86; in misdemeanors all aiders and abettors before

the offense were principals; *Shannon v. People* 5 Mich. 87; and in felonies, accessories before the fact become guilty by separate acts at different times and without agreement by any form of contract: *Reg. v. Barber* 1 C. & K. 442; the statute of limitations is no defense to an accessory if an action for the wrongs done by the principal is not barred: *Saunders v. Edwards* 1 Siderfin 95; *Wilhoit v. Hancock* 5 Bush 567; *Troy v. Cheshire R. R. Co.* 23 N. H. 101; *Bowyer v. Cook* 4 C. B. 236; *Whitehouse v. Fellowes* 10 C. B. (N. S.) 765, 786.

George S. Clapp for appellee.

Cooley, C. J. Trover for the conversion of saw-logs. The facts appear to be that in the winter of 1873–4 Knisely was owner of land in Berrien county, which was occupied by one Morris as tenant; that Morris without authority cut logs upon this land and employed Stein who was not shown to have been aware of any intended wrong, to assist in getting them out. The logs were banked on the shore of Lake Michigan, and in May, 1874, Morris sold them to one Graham for $120. When Graham went to make payment for the logs Morris was sick, and gave directions that the money should be paid to Stein, which was done accordingly. From the amount Stein retained $60, which was something less than was due him for his labor, and paid over the balance to Morris. Stein, so far as appears, had nothing whatever to do with the logs from the time they were placed on the shore of the lake. This suit was brought May 26, 1880, which was more than six years from the time when the logs were banked and from the time when they were sold. The circuit judge was of opinion that the action was barred by the Statute of Limitations, and the defendant had judgment.

It is contended for the plaintiff that Morris and Stein were joint wrong-doers in getting out the logs, and that when they banked them, it must have been under a supposition that they would be sold and rafted away to market. Each must therefore be deemed to have assented to what was done by the other subsequent to the banking, and the

plaintiff, under the authority of *Final v. Backus* 18 Mich. 232, might elect to proceed for a conversion evidenced by the act of hauling out and banking the logs, or for one evidenced by the acts of either of them or of any one to whom they or either of them had transferred the logs afterwards. We do not concur in this view.

If it had been shown that Stein had been a party to any purpose on the part of Morris to transport the logs to any other point for the purpose of manufacture or sale, and they had been so transported in pursuance of such purpose, it would no doubt have been competent for Knisely to proceed against the parties as for a conversion evidenced by such subsequent transaction, and to have recovered against both whether both were or were not present and participating. But in this case there was no such showing. Stein probably rendered himself liable by what he did in delivering the logs on the lake shore, but he does not appear to have had any purpose to be concerned in them further, and if not he was legally and morally as innocent of any wrong in what was done with them afterwards as if he had never known of their existence. And the subsequent acts of Morris or of Graham, with which he was not connected, could not keep alive the cause of action against him. He was responsible for what he did and for what he advised or consented to, but for nothing further.

Under the view of the law taken by the plaintiff, a cause of action for the conversion of property might never be barred. Every intermeddling with the property, which standing by itself would give a cause of action, might be treated as a new conversion, and all parties who, at any prior time, had contributed to placing the property where it then was, or in the hands of the party then wrongfully intermeddling with it, might be joined in the action as joint wrong-doer, though he may have been wholly ignorant of what was done, and never purposely a wrong-doer at all. But this would defeat the purpose of the limitation law.

The judgment must be affirmed with costs.

The other Justices concurred.

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JULIA C. ABERNETHY v. TOWNSHIP OF VAN BUREN.

Township bridges—Defects—Negligent Driving—Damages.

1. A township can hardly be held liable for injuries caused by latent defects in a bridge over a mill-race where they do not affect the traveled part of the way and where the miller has apparently not been negligent in performing his statutory duty of looking after the condition of the bridge.
2. There is contributory negligence in driving across a bridge so recklessly and turning off from it so abruptly as to suffer injury in consequence of catching the wheel in or upon some crack or obstruction not in the traveled part of the way. And it is no excuse that others are similarly careless, especially if one is not familiar with the bridge and cannot, therefore, rely upon such carelessness in others.
3. Damages cannot be recovered, whatever the proof or the ad damnum clause, in a greater amount than the aggregate of the items of injury specifically alleged, unless other causes of injury are stated in the declaration.

Error to Wayne. (Speed, J.) Jan. 9.—Jan. 15.

CASE. Defendant brings error. Reversed.

Samuel W. Burroughs and *Moore & Moore* for appellant.

Simon R. Harris and *Henry M. Cheever*, for appellee, cited as to the township's liability: *Merrill v. Kalamazoo* 35 Mich. 211: *Medina v. Perkins* 48 Mich. 67; *Dotton v. Albion* 50 Mich. 129; *Grand Rapids v. Wyman* 46 Mich. 516; *Burnham v. Byron* id. 555; one who crosses a bridge has a right to presume all parts of it safe: *McGuire v. Spence* 2 N. Y. 214.

CAMPBELL, J. Plaintiff sued for damages from personal injuries claimed to have resulted from defects in a bridge. The declaration sets up that the township had the care and control of it, but does not locate it specifically except as a bridge in a "public street highway" in the township. It turned out on the trial to be a bridge over a mill-race cross-

ing a street in the village of Belleville, within the township of Van Buren.

The declaration further sets up that the bridge was allowed to remain out of repair, in unsafe condition, after reasonable time to have repaired it, and various planks with which it was laid, to be and remain broken, unfastened and removed, whereby the injury was occasioned. The injury was set out as caused by one of the front wheels of the vehicle in which plaintiff was riding, dropping through a hole in said bridge in the traveled part or track of the bridge, caused by one of the planks being broken, unfastened and removed.

The damage sued for was based on certain injuries caused by plaintiff's being thrown out of the buggy in which she rode, whereby her shoulder was put out and her knee pan injured, with other injuries resulting in sickness and disability for a long time and until suit brought, "during all which time she thereby suffered great pain and was hindered from transacting her affairs, to her damage one thousand dollars," and was obliged to lay out money amounting to one hundred dollars for board, lodging, care and medical treatment, to her damage ten thousand dollars.

An error is assigned against allowing a judgment to be entered for $3500 under this declaration, and it seems to us well assigned. There is no allegation of any causes of damage not included within the two sums of one thousand dollars and one hundred, which are given as the sums at which she fixed her claim for the various injuries and consequences. Injuries were allowed to be shown of a different character from those alleged, and this was seasonably objected to. Whether admissible or not, they could not, under the declaration, be allowed to swell the damages beyond the sums claimed.

The facts shown by plaintiff indicate that on August 22, 1882, plaintiff was in a buggy driven by her husband across the bridge in question, in the latter part of the afternoon in broad daylight. The buggy was somewhat shackling, and the shafts large for the horse. The bridge is a double-

track bridge across the mill-race, with two tiers of plank meeting in the middle and covered at the junction, with a plank ridge-board dividing them. It was built many years before the statute of 1879, and the ends of the planks, where they met, were not all sawed even, but left wedge-shaped spaces, one of which at the end of the bridge, when the ridge-plank was shoved aside, allowed the fore wheel of the buggy to sink about an inch and stick fast. The only defect complained of was the loosening at one end and partial displacement of this ridge-board, which covered the joints when in place.

The plaintiff approached the bridge on a downward grade, at a trot fast enough, when the speed was suddenly checked at the further end of the bridge when they had crossed it, to throw both passengers over the front upon the bridge. Instead of driving on either of the two separate tracks the buggy was driven across the middle of the bridge, and the wheel caught as they were turning upon the road on the other side. The whole bridge was plainly visible.

There was some conflict as to when the plank was loosened, but it appeared without contradiction that the mill-owner who was legally bound to keep the bridge in repair, had every few days fastened down this plank as it got loosened by vehicles driving over it, and it did not appear that any township officer had his attention called to it as requiring repair.

If this was the fact there was no negligence in the township, which in the case of such bridges is required to exercise a careful oversight in the manner fixed by statute, which, as amended in 1875, provides that it shall be the mill owner's duty to keep such bridges in repair, and if he "shall refuse or neglect to keep the same in good repair," it shall be the duty of the commissioner of highways of the township to proceed forthwith to repair the same at the owner's expense. Comp. L. § 1310.

While this statute requires of the commissioner that he shall not allow any such bridge to remain out of safe repair, yet if the mill-owner does not allow it to remain out of

apparently good condition it can hardly be assumed, without more evidence than the record contains, that the commissioner was negligent in not discovering latent defects. The portion of the bridge which is claimed to have been out of order formed no part of it which was designed for travel; and while we do not say that any part of a bridge can be properly left where, in the absence of light or from other causes, it may involve danger to passers-by, it is nevertheless very clear that such parts of the structure as cannot be knowingly used without leaving the way meant for travel, do not require the same vigilance as the rest.

In the present case the vehicle of plaintiff was driven upon the bridge at what was manifestly a pretty fast rate, and the difficulty was directly caused by driving where it was improper to drive and turning sharply where, if the ridge-board had been firmly nailed down, there would have been risk of a jolt or wrench of a not very different nature from what actually occurred. It does not appear to us that it is easy to avoid the conclusion that the accident was attributable to a large extent to the immediate carelessness of Mr. Abernethy, who appears without dispute to have paid no regard whatever to what he was doing. The fact that other people may also have been careless does not make any difference with his obligation, and as he says he had not been familiar with the bridge he could not have relied on a careless habit of which he was ignorant. But from his own statement he was entirely careless as to what he did, and paid no attention to his surroundings.

As the damages go beyond the demand, there must necessarily be a reversal on that ground, and there seems to be also a variance in describing the defect in the bridge as in the traveled track, which it clearly was not. The errors which we have further pointed out render it useless to consider the further numerous assignments.

For the reasons given we are compelled to reverse the judgment with costs and order a new trial.

The other Justices concurred.

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EDGAR O. DURFEE, PROBATE JUDGE v. TRUMAN A. DEAN ET AL.

Action on administrator's bond—Scire facias.

1. An action by the probate judge upon an administrator's bond cannot be brought in a justice's court when the penalty of the bond exceeds the jurisdictional limit of such court, and when judgment for the whole is sought so that the writ of scire facias may be resorted to on farther breaches. How. St. § 6003.

2. Assumpsit will lie in justice's court upon an ordinary money bond for any amount within its jurisdiction that may be necessary to indemnify for the breach thereof, whatever the penalty of the bond may be.

Error to Wayne. (Chambers, J.) Jan. 10.—Jan. 15.

DEBT on bond. Defendants bring error. Affirmed.

Moore & Moore for appellants.

George H. Prentis for appellee.

COOLEY, C. J. This action was upon an administrator's bond, to recover moneys which by an order of the probate court the administrator had been directed to pay to one of the heirs. The penalty of the bond was one thousand dollars; the amount found to be due under the order was forty-five dollars. The judgment rendered was for the penalty, and execution was awarded for the amount so found due with costs of suit. The sole error assigned is the award of costs.

It is argued that the controversy was within the jurisdiction of a justice of the peace, and the case should not therefore have been brought in the circuit court. If the bond had been an ordinary money bond, the obligee might have brought assumpsit upon it in justice's court for any amount within the jurisdiction of that court, irrespective of the amount named in the bond as the penalty. But when a probate bond is sued, the judgment for the penalty stands

as security in case of further breaches, and other parties than the party first suing may have scire facias upon it. How. St. § 6003. This suit could not therefore have been brought in justice's court.

The judgment must be affirmed with costs.

The other Justices concurred.

SIGMUND SIMON AND ISAAC MENDLESON v. CHARLES BEWICK, ANDREW W. COMSTOCK AND WILLIAM B. COMSTOCK.

Lease by a firm—Non-consent of absent partner.

An action upon the covenants of a lease which purports to have been given by a firm will not lie against the partners if, after having been left with the lessees' attorney to be held until an absent partner has approved of it, such approval is not given.

Error to the Superior Court of Detroit. (Chipman. J.) Jan. 10.—Jan. 15.

ASSUMPSIT. Plaintiffs bring error. Affirmed.

Moore & Moore for appellants.

Otto Kirchner for appellees.

SHERWOOD, J. The plaintiffs and defendants Comstock resided at Detroit, and the defendant Bewick at Alpena. The plaintiffs claim to have rented of the defendants two stores in Alpena for the term of two years, commencing on the 1st day of October, 1881, at an annual rental of one thousand and fifty dollars per year, payable quarterly in advance. The plaintiffs further claim that such rental was by written lease made and delivered by the defendants to plaintiffs; that the first quarter rent was duly tendered to defendants, and that they refused to receive the rent tendered or deliver possession of the store, which was duly demanded by the plaintiffs.

The plaintiffs bring this action to recover the damages they claim to have sustained by reason of the refusal of defendants to perform the covenants of their lease and deliver possession of the store as demanded.

The defendants claim that they never delivered a lease of the store to the plaintiffs; that while there was a long treaty in regard to the matter between the parties and their agents or attorneys, they never consummated the lease by delivery; that a lease was drawn and signed by defendants and placed in the hands of R. A. McDonald, an attorney for plaintiffs at Alpena, but not to be delivered to plaintiffs until it should be assented to and receive the approval of defendant Bewick; and that it never received his assent or approval.

This question of fact thus presented upon the claims of the respective parties clearly appears upon the evidence in the case, and was submitted to the jury. They found in favor of the defendants; and unless the circuit judge, in submitting the case to them upon this issue, committed some error prejudicial to the plaintiffs, we cannot disturb the verdict however much we might feel inclined to disagree with the result.

After a careful examination of the record, it fails to disclose to us any error in the rulings or charge of the court upon this point. The charge was full, clear and correct. This disposition of the first question presented makes it unnecessary to discuss the other questions raised.

The judgment must be affirmed with costs.

The other Justices concurred.

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WARREN D. KINNEY, FRANKLIN B. ADAMS AND JOHN IHLING v. ORRIN ROBISON.

[See 49 Mich. 247.]

Partnership accounting—Set-off.

1. One who has sold stock and leased a store to a firm and has then taken a partnership interest in the business can offset the amount

due him on such sale and lease in an action brought against him by the firm, and need not leave it to a partnership accounting already pending.

2. A pending and undetermined chancery proceeding is in itself no bar to an action at law whatever effect a final decree may have.

Error to Van Buren. (Mills, J.) Jan. 10.—Jan. 15

ASSUMPSIT. Plaintiffs bring error. Affirmed.

Geo. W. Lawton and *Crane & Breck* for appellants.

Lester A. Tabor and *H. F. Severens* for appellee. Communion of profits and losses is essential to a partnership: *Coope v. Eyre* 1 H. Bl. 49; and if the arrangement between the parties is such as to indemnify either against any loss it is merely a contract of loan: *Adams v. Funk* 53 Ill. 219; *Hawes v. Tillinghast* 1 Gray 289; *Freese v. Ideson* 49 Ill. 191; *Wall v. Balcom* 9 Gray 92; *Stearns v. Haven* 16 Vt. 87; *White v. Fitzgerald* 18 Wis. 480; *Buck v. Dowley* 16 Gray 555; *Ward v. Brigham* 127 Mass. 24; *Beckwith v. Talbot* 2 Col. 639; where two or more engage in business, having no mutual interest in the capital invested, and no stipulation for mutual loss, they have been held not to be co-partners though there be an agreement to share profits. *Vanderburgh v. Hull* 20 Wend. 70; *Pattison v. Blanchard* 5 N. Y. 186; *Fitch v. Hall* 25 Barb. 13; *Cummings v. Mills* 1 Daly 520; *Lowry v. Brooks* 2 McCord 421; 3 Kent's Com. (5th ed.) 23; *Champion v. Bostwick* 18 Wend. 175; *Green v. Beesley* 2 Bing. N. C. 108; *Hawkins v. McIntyre* 45 Vt. 496; *Johnson v. Miller* 16 Ohio 431; *McArthur v. Ladd* 5 Ohio 514; *Robinson v. Bullock* 58 Ala. 618; *Musser v. Brink* 68 Mo. 242; *Ruddick v. Otis* 33 Ia. 402; *Mason v. Potter* 26 Vt. 722; *Tobias v. Blin* 21 Vt. 544; *McCauley v. Cleveland* 21 Mo. 438; *Denny v. Cabot* 6 Met. 82; *Hitchings v. Ellis* 12 Gray 449; *Braley v. Goddard* 49 Maine 115; *Lintner v. Millikin* 47 Ill. 178; *Emmons v. Westfield* 97 Mass 230; *Gallop v. Newman* 7 Pick. 282; *Richardson v. Hughitt* 76 N. Y. 55; where an obligation between partners relates to the partnership business

but is distinct from all other matters in question between the partners, and can be determined without going into the partnership accounts, one partner can maintain an action at law on it against his co-partner. *Carter v. Bininger* 45 N. Y. 545; *Worrall v. Grayson* 1 M. & W. 166; *Van Ness v. Forest* 8 Cr. 30; *Gridley v. Dole* 4 N. Y. 486; and this is so if the money recovered will not belong to the firm: *Howard v. France* 43 N. Y. 593; *Currier v. Rowe* 46 N. H. 72; see *Whitehill v. Shickle* 43 Mo. 538; *Bailey v. Starke* 6 Ark. 191; *Wells v. Carpenter* 65 Ill. 447; *Dunham v. Gillis* 8 Mass. 462; *Neil v. Greenleaf* 26 Ohio St. 567; *Grigsby v. Nance* 3 Ala. 347; *Scott v. Campbell* 30 Ala. 728; if one co-partner contribute funds which it was the duty of another co-partner to furnish, in furtherance of a partnership enterprise, such funds thus contributed may be recovered in an action of assumpsit, without waiting for a final adjustment of the business of the co-partnership. *Wright v. Eastman* 44 Maine 220; when partners agree to put into the firm a specified amount either may sue the other at law for a breach of the agreement. *Truitt v. Baird* 12 Kan. 420; so, if there has been a breach of an express stipulation between them an action for damages will lie unless the breach, or the stipulation itself, or both, involve the whole partnership business and accounts, and the damages can be determined only by first settling those accounts. *Capen v. Barrows* 1 Gray 376; one partner may sue his co-partner for money advanced, if the transaction be single, not involving the rights of creditors or an adjustment of partnership accounts. *Russell v. Grimes* 46 Mo. 410; *Finlay v. Stewart* 56 Penn. St. 183; *Wills v. Simmonds* 51 How. (N. Y.) Pr. 48; *Smith v. Barrow* 2 Term 476; *Coffee v. Brian* 10 J. B. Moore 341; *Cross v. Cheshire* 6 Eng. L. & Eq. 571; and suit lies on the covenants in the articles of co-partnership for payment, advances or other acts for setting the partnership into operation even if accounts between the partners that are subsequent to the partnership require to be investigated and adjusted in a court of equity. *Venning v. Leckie* 13 East 7; *Glover v. Tuck* 24 Wend. 153;

Williams v. Henshaw 11 Pick. 81; *Ellison v. Chapman* 7 Blackf. 224; *Want v. Reece* 1 Bing. 18; *Hatcher v. Seaton* 2 M. & W. 47; *Hall v. Stewart* 12 Penn. St. 213; *Hayes v. Flowers* 25 Miss. 169; *Ridgway v. Grant* 17 Ill. 117; *Wadsworth v. Manning* 4 Md. 70; Pars. on Partnership 275.

CAMPBELL, J. Plaintiffs being a firm known as Kinney, Adams & Co., sued defendant for items of an account verified under the statute. Defendant put in a plea accompanied by a sworn statement of set-off in a larger amount. Defendant recovered judgment for a balance, and plaintiffs bring error.

Objection is made that there was no regular notice of set-off. This objection has no force. The set-off was not only claimed, but sworn to. By stipulation the correctness of both sides of the account was admitted, but the question of the admissibility of the set-off was left open.

It is claimed that it could not be received, because it formed a part of unsettled partnership dealings. The plaintiffs in their firm capacity had formerly entered into an arrangement with defendant to carry on business on terms which, it is claimed, created a partnership. The items of set-off consisted of the purchase price of half of defendant's stock, which plaintiffs bought of him and put in as capital. Also of rent which they agreed to pay defendant for premises used in the business. By the agreement under which their respective rights arose defendant leased to plaintiffs, by their firm name, an undivided half of the premises and fixtures and appurtenances for two years at $250 for the first year and $300 for the second year, payable at the end of each year. They were also to buy one-half of his stock at cost, and at the end of two years defendant was to buy at cost their half of stock then to be on hand. There were further articles as to partnership rights and duties.

Plaintiffs claim that their obligation to pay defendant for the interest sold and leased was part of the partnership business, and payment to be made by partnership settle-

ment. This is not the true view of the arrangement. Before they could put in any of this property as their own capital they must buy it, and until sold to them it was on no different footing than if owned by a third person. It was defendant's separate property, and they could only get it by purchase. It could only be theirs to put in after they had bought it. The agreements to buy this stock and to pay the rent were separate transactions, preliminary to and independent of any of the partnership business.

If thus separate they might be prosecuted for like any other individual liability, and formed no necessary part of the partnership accounting. It could therefore make no difference if it were true, which is at least very doubtful, that in a chancery cause for such an accounting reference may have been made to them in the pleadings or testimony. A pending and undetermined chancery proceeding is no bar or obstacle in itself to a legal action, whatever may be the force of a final decree.

It is claimed further that the court below prevented plaintiffs from showing payment of the defendant's claim. We find nothing in the record to indicate such a ruling. Some questions of an ambiguous character were ruled out on the ground that they involved an attempt to prove a parol agreement to vary a written one. Plaintiffs took no steps to correct this view of their proposition, and the court ruled correctly on the hypothesis thus tacitly accepted. No questions were asked calling for proof of actual payment beyond this.

There is no error in the record.

The judgment must be affirmed with costs.

The other Justices concurred.

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Iron Cliffs Company v. Edward Lahais.

Garnishment—Service of summons—Jurisdiction.

1. Garnishment proceedings are special and statutory, give a harsh and peculiar remedy and ought not to be resorted to when redress can be had at common-law. But when taken, the statutory requirements are to be strictly followed.
2. Jurisdiction of a personal action begun by summons against an absent defendant cannot rest upon a service made only by copy at defendant's last place of residence several days before the return day or an adjourned day.
3. Judgment cannot be rendered against a garnishee until he has been summoned to show cause to the contrary, or has consented in person or by attorney.
4. A disclosure in garnishment before jurisdiction of the principal case has been obtained, is of no force, and the subsequent appearance of the principal defendant does not cure it.
5. Garnishment proceedings are ancillary to the principal case, and if that is defective, go down with it.
6. Replevin lies for property seized upon an execution issued in void garnishment proceedings.

Error to Marquette. (Grant, J.) Jan. 10.—Jan. 15.

Replevin. Plaintiff brings error. Reversed.

W. P. Healy for appellant.

G. W. Hayden for appellee.

Sherwood, J. In this case it appears that in 1882 the plaintiff owed one Alfred Brunette about the sum of $1084.82. Brunette absconded February 2, 1882, leaving creditors. Defendant, being one of his creditors, on the 27th day of February, 1882, commenced suit by summons returnable March 8, 1882 before Byron D. Jones, a justice of the peace at Negaunee, to recover a claim against Brunette of $25.70. This summons was served by leaving a copy at Brunette's last place of residence the same day,

it being nine days before the return-day. No personal service was made. On the return-day another summons in continuation of the suit was issued by the justice, returnable on the 18th day of March, 1882, and was served on the 14th day of March, four days before the return-day thereof, by leaving a copy as before. No personal service of this summons was had.

On the 18th day of March the defendant took out a writ of attachment against Brunette in continuance of his suit, as he claimed, which was made returnable the 25th of March. The attachment was served on the return-day by leaving a copy at Brunette's last place of residence. No personal service was had of the writ, nor was it levied upon any property.

On the return-day of the attachment the defendant Lahais caused the suit to be adjourned until the 24th of April, 1882; and on the adjourned day, M. H. Crocker, an attorney, appeared for Brunette before the magistrate, and judgment was rendered in favor of Lahais for $35.70 damages, and $6.50 costs of suit.

At the time of the commencement of the principal suit on the 27th day of February, 1882, garnishee proceedings were commenced against the plaintiff. A summons was issued at the suit of the defendant, returnable on the 8th day of March following, and was served on the cashier of the plaintiff.

On the return-day of the summons Ira A. Clark, a surveyor and wood and timber agent in the employ of the plaintiff, appeared and assumed to make a disclosure on its behalf. The garnishee proceeding was then, on motion of the defendant Lahais, continued until March 18. At this time there was no appearance for the plaintiff company.

The case was then adjourned until the 25th of March. No one then appeared for the company, and again on motion of Lahais, the proceedings were continued till April 24, 1882, at which time said Clark again appeared, being still in the employ of the company as such surveyor and agent, and again assumed to make another disclosure on behalf of

the company. Thereupon the justice, without further summoning the company or taking any other proceedings, rendered judgment against the company as such garnishee of the said Brunette for $42.20 damages and costs. No appearance on the part of the company in any of these proceedings is claimed except that by Clark above stated.

Execution was issued upon the judgment thus rendered and levied upon certain property of the plaintiff to satisfy the same, on the 21st day of July, 1882, and the plaintiff brought replevin for the goods seized upon the execution. Trial was had before a justice, and judgment rendered October 14, 1882, for the defendant. On appeal to the circuit court for the county of Marquette on the 13th of August, 1883, a trial was had before the circuit judge without a jury, and judgment again given for the defendant, and the case is now before us for review on bill of exceptions containing all the testimony and findings of law and fact by the circuit judge.

All the proceedings in this case are special and statutory, and must be strictly construed. To entitle the defendant to the benefit he claims under them, he must show they are clearly within the provisions of the statute. Statutes of garnishment at best give a "harsh and peculiar remedy," and ought not to be resorted to when the redress sought may be obtained through common-law proceedings. *Thurston v. Prentiss*, 1 Mich. 194; *Maynards v. Cornwell* 3 Mich. 309; *Sievers v. Woodburn Sarven Wheel Co.* 43 Mich. 275; *Weimeister v. Manville* 44 Mich. 408.

The plaintiff must have a judgment against the principal defendant, or have commenced a suit against such principal defendant upon contract express or implied, or upon a judgment, before he can have process against a garnishee (How. St. § 8031); and before any judgment can be rendered against the garnishee he must have obtained judgment against the principal defendant (Id. § 8037;) and after judgment has been obtained against the principal defendant the garnishee is still entitled to his day in court to

show cause, if he can, why judgment should not be rendered against him, and if he does not voluntarily appear and permit judgment to be taken against him, he must be brought in by summons from the justice. How. St. § 8038.

The record in this case shows that judgment was rendered against the plaintiff without its ever having been summoned to show cause against such proceedings and without any consent from it or its attorney. There is no warrant in the law for such action by the court.

It further appears from the record in this case that there was not any legal service, actual or substituted, of the process in the principal case. Clearly there was no legal service of any kind of either summons against the principal defendant. The only attempt at service, as returned by the officers, was by copy, and made several days before the return-day in the one case, and the adjourned day in the other. This rendered the proceeding void, and gave the court no jurisdiction of the principal defendant. *Smith v. Thompson* Walk. Ch. 1; *Stafford v. Hulbert* Har. Ch. 435; *King v. Harrington* 14 Mich. 532–541; *Nicolls v. Lawrence* 30 Mich. 395; *Town v. Tabor* 34 Mich. 262; *Withington v. Southworth* 26 Mich. 381.

Whatever may have been the effect of the appearance of the principal defendant, as between him and the plaintiff in that suit, it is very certain such appearance could not have the effect to revive any void proceeding preceding it. At the time Clark made his disclosure Lahais had no valid legal proceedings pending against Brunette. On the return-day of the first summons against him no service of the process had been made, and the suit thus commenced went down for the want of jurisdiction in the court to continue it by issuing further process.

The garnishee proceedings, being merely ancillary, went down with it and for the same reason. *Laidlaw v. Morrow* 44 Mich. 547. Such being the case the execution cannot be sustained upon which the property replevied was taken, and the plaintiffs should have had judgment at the circuit. *Bigalow v. Barre* 30 Mich. 1.

The previous decisions of this Court are sufficient to determine all the questions raised upon this record, and their further discussion is unnecessary.

The judgment of the circuit court must be reversed with costs of all the courts and a new judgment entered for the plaintiff.

The other Justices concurred.

In the matter of the Estate of Isaac Turner. Chester B. Turner's Appeal.

Wills—Construction—Exclusion of heirs.

A man after deeding some land to one of his sons in consideration of the latter's relinquishing all claims of inheritance, made a will in which his wife and another son were the only legatees specifically named. He provided that his wife should have the use of $7000 until this son became of age, when the son was to have $2000 of it. When the mother died the remaing $5000 was to revert to the estate and the son was to share in it "*with the rest of my heirs.*" *Held* that this clause practically revoked the former arrangement by which the other son was excluded from any right of inheritance, and entitled him not only to a share in the $5000 but in any surplus for distribution.

Error to Kent. (Montgomery, J.) Jan. 11.—Jan. 15.

Appeal from probate order rejecting a claim against an estate. Claimant brings error. Reversed.

Fletcher & Wanty and *S. S. Babcock* for appellant. A clause in a will excluding an heir from further participation in an estate will not prevent him from taking his share of an undistributed remainder. *Hitchcock v. Hitchcock* 35 Penn. St. 393; *Crane v. Doty* 1 Ohio St. 279; *Linell v. Linell* 21 N. J. Eq. 81; *Thompson v. Carmichael* 3 Sandf. Ch. 120; *Atkins v. Kron* 2 Ired. Eq. 58; the doctrine of advancement applies only to cases of total intestacy: *Stew-*

art v. Pattison 8 Gill 56; *Linell v. Linell* 21 N. J. Eq. 81; *Black v. Whitall* 9 N. J. Eq. 572; *Newman v. Wilbourne* 1 Hill (S. C.) Eq. 10; *Sinkler v. Sinkler* 2 Dessau. 139; *Snelgrove v. Snelgrove* 4 Dessau. 274; *Brown v. Brown* 2 Ired. Eq. 309; *Donnell v. Mateer* 5 Ired. Eq. 7; *Jerkins v. Mitchell* 4 Jones Eq. 207; *Wilson v. Miller* 1 Patt. & H. 395; *Newell's Case* 1 Browne (Pa.) 311; *Brewton v. Brewton* 30 Ga. 416.

Maher & Felker, for appellee, argued that the claimant was barred from participation in the estate, and cited *Quarles v. Quarles* 4 Mass. 680; *Kenney v. Tucker* 8 Mass. 143; *Fitch v. Fitch* 8 Pick. 479; *Nesmith v. Dinsmore* 17 N. H. 515; *Parsons v. Ely* 45 Ill. 232; *Bishop v. Davenport* 58 Ill. 105; 2 Story's Eq. Jur. § 1040 *b.*; acceptance by him of a deed from the testator containing a clause of relinquishment of any claim as heir is as binding on him as though the deed were inter partes: *Crawford v. Edwards* 33 Mich. 354; *Trotter v. Hughes* 12 N. Y. 74; *Bayley v. McCoy* 8 Oregon 259; *Lockyer v. Savage* 2 Str. 947; *Medcalf v. Ives* 1 Atk. 63; *Fawkner v. Watts* id. 405; *Edwards v. Freeman* 2 P. Wms. 435; *Cox v. Belitha* id. 274; expectancies can be conveyed (*Bayler v Com.* 40 Penn. St. 40; *M'Clure v. M'Clure* 1 Phila. 117) unless the agreement therefor is unconscionable as against the heir: *Davis v. Hayden* 9 Mass. 514; *Amory v. Gilman* 2 Mass. 1; see *Beckley v. Newland* 2 P. Wms. 182; *Hobson v. Trevor* id. 191; *Clayton v. Duke of Newcastle* 2 Ch. Cas. 112; *Wiseman v. Roper* 1 Rep. in Ch'y 158; 17 Cent. L. J. 68; omission to dispose of part of an estate by will, after placing specific legacies, leaves the residuum not specifically disposed of subject to the statute of distributions and advancements the same as intestate property: *Bane v. Wick* 14 Ohio St. 507; and as to the residuum heirs who have had advancements must account: *Pearce v. Gleaves* 10 Yerg. 359, citing *Gold v. Vaughan* 4 Sneed 245; *Perry v. High* 3 Head 349; *Vance v. Huling* 2 Yerg. 315; *Norwood v. Branch* 2 L. R. 598.

CAMPBELL, J. The controversy in this case is whether Chester B. Turner, one of the heirs at law of Isaac Turner, deceased, is deprived of his right to share in the residue of the estate, after paying legacies, by reason of the grant to him of certain land by a deed which stated as one of the considerations the relinquishment of all right to his father the grantor's estate, as heir or otherwise. This deed was made two years before the will. There is in the hands of the executor $3600 for distribution among the heirs. That sum, divided among them ratably, would not give each as much as the value of the land so granted. The will is printed in full in the report of a former controversy concerning a sum of $5000 to be distributed under it, in 48 Mich. 369. The decision below was against appellant's right to share. This being so, a short summary will be sufficient.

The will, made in June, 1876, became operative on testator's death in 1879. It begins by a general recital of his desire to dispose of his property, and to provide for his wife and her child Isaac. It gives his wife a life estate in his homestead, and the use of $7000 during Isaac's minority, and gives her absolutely his household furniture, implements, horses and carriages. Isaac was to have the reversion of the homestead, and to receive on his majority $2000 out of the $7000, the remaining $5000 to be for her use for life. The will declares that "at her death said five thousand dollars to revert to my estate."

In case of the wife's death during Isaac's minority he was to have an annuity of $300 a year, and all accumulations from its savings, in addition to the $2000. The legacies to Isaac were to be in lieu of his share in the estate, "except to the amount of his share in the five thousand dollars which said Elizabeth Miller Turner is to have the use of from the time of said Isaac becoming of the age of twenty-one years until her death; and he is to have said interest in five thousand dollars with the rest of my heirs, even if said Elizabeth shall die before the said Isaac becomes twenty-one years of age."

It was the opinion of this Court that by the will the testator indicated that Chester B. Turner was not to be cut off from the heirship in the sum of $5000, (which was the fund formerly in controversy,) by reason of any prior conveyance or advancement, and that the will must be regarded as operating to remove that effect if it would have otherwise operated. While it was not necessarily decided that this action of the will would have a similar operation as to the remainder of the estate, it was so intimated, and we think such is its meaning. The $5000 was by a previous clause to fall into the bulk of his estate on the death of the wife. When it is provided that Isaac is to share in the sum of $5000, "*with the rest of my heirs*," it seems to indicate that the persons so referred to are the heirs generally, and not the heirs to that specific sum, which is only set apart from the rest of the property as the measure of Isaac's share. It would be a somewhat unnatural interpretation to imply in this matter qualifications which should divide the heirs into classes. This record does not show how matters stood in the way of advancements with the rest of the heirs. But if Chester is, as we have held, to take at all under this will as an heir, we can see no reason for dealing with him under the will on any different footing from the rest, and we can conceive no reason why such a peculiar intention should be imputed to the testator. If the will is, as we hold it to be, a practical revocation of any exclusion from inheritance under the grant, nothing appears to indicate that the revocation was meant to be partial or qualified. It would have been a very simple matter to declare such different intention if such was testator's desire.

The interesting discussion of the law of advancements and relinquishments of heirship does not, in our view of the case, require to be considered further.

We think the adjudications below were erroneous, and that appellant is entitled to the same privileges as the other general heirs, and it must be so adjudged and certified.

The other Justices concurred.

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WILLIAM H. WOOD v. DETROIT CITY STREET RAILWAY COMPANY.

Negligence—Case and trespass for injury.

1. It is gross negligence to drive upon a street railway track in front of an approaching car without looking around until the car runs into one's vehicle; and it is a wrong not only to the railway company but to persons riding in or waiting for the car, to wilfully obstruct its progress in this way when there is nothing to hinder one from getting off the track.

2. In trespass against an employer for an injury caused by the act of his servant, it is for the jury to decide whether the act was wilful or careless; if wilful, the employer would not be answerable.

Error to Wayne. (Chambers, J.) Jan. 11.—Jan. 15.

CASE. Plaintiff brings error. Affirmed.

John G. Hawley, for appellant, claimed that the case should have been submitted to the jury, and cited *Chic. & N. E. Ry. v. Miller* 46 Mich. 532; *Cleveland v. Newsom* 45 Mich 62; *Teipel v. Hilsendegen* 44 Mich. 461.

John C. Donnelly for appellee. Where the act of a driver in running into a person is not in the course of his employment it is wilful and malicious, and his employer is not responsible. *Moore v. Sanborn* 2 Mich. 519; *Smith v. Webster* 23 Mich. 298; *Harris v. Nicholas* 5 Munf. 483; *Ill. Cent. v. Downey* 18 Ill. 259; *Wright v. Wilcox* 19 Wend. 343; *Vanderbilt v. Turnpike Co.* 2 N. Y. 479.

COOLEY, C. J. This is an action for personal injuries alleged to have been caused by the driver of the defendant negligently causing his car to run against the vehicle of the plaintiff, as he was driving along one of the streets of Detroit.

The plaintiff was sworn as a witness in his own behalf, and he also called the driver as his witness. After hearing

both stories the circuit judge ruled that there was nothing to go to the jury, and directed a verdict for the defendant. The plaintiff brings error.

According to the plaintiff's story he was driving a one-horse vehicle along the street on one side of the defendant's tracks when he encountered obstructions and turned towards the tracks so that his right-hand wheels were over the rails. He did not look behind him to see if a car was coming until he felt something strike the rear wheel. He then looked around and saw it was the street car, and the driver, as he says,

"motioned me with one hand to go on or he would knock a wheel off me. I laughed at him and said, 'You better not knock off more than one or two of them or somebody will have to pay for them.' He kept on motioning to get out of the way. I told him I could not get over those wagons, and I was not going to try, but I would get out of his way just as soon as ever I could. I kept on. There was a number of wagons standing on that side of the street, loaded with brick, and three or four or five of them with the rear ends of the wagon out on the street further than the fore end, which brought the rear end of these wagons very near the car track, so that I had to get with the wheels on the right-hand side of my wagon partially onto the track, and some places it got off the track, and some places I had to get right out pretty well over the track."

Up to this point the plaintiff was not only in fault, but he was the only party in fault. He had driven upon the track in front of an approaching car without looking around until the car had come in collision with his vehicle. This was gross carelessness on his part. But further on his evidence shows that the other side of the track was entirely unobstructed, and that there was nothing to prevent his crossing at once and allowing the street car to proceed on its way. The car had come to a stand-still on the first collision, and the plaintiff's conduct in maintaining his ground and responding to the driver's request that he should get out of the way by a laugh and a threat, was not only a wrong to the defendant but also to any persons who might then be riding in the car or awaiting its coming.

But the plaintiff further testified that as he was leaving the track the driver called out: "God damn you, I can smash you anyhow," and that he let go the brake and the car almost instantly struck the plaintiff's wagon and threw it over, inflicting the injury complained of. The inference from this might be that the driver purposely and in the anger excited by their altercation, ran his car against the plaintiff's wagon; and if the action had been brought for the trespass, it might become necessary to decide whether under cases like *Wright v. Wilcox* 19 Wend. 343 the defendant would be responsible. In that case it was decided that where the servant wilfully drove his master's conveyance over a third person and injured him, the trespass was that of the servant, for which the master was not liable. The case was followed in *Richmond Turnpike Co. v. Vanderbilt* 1 Hill 480: s. c. in error, 2 N. Y. 479, where the master of a vessel had purposely run the vessel into another; and in *Illinois Cent. R. R. Co. v. Downey* 18 Ill. 259, where the engineer upon a railroad purposely run his engine over live stock. Also in *DeCamp v. Railroad Co.* 12 Iowa 348, and many other cases. The general principle that the master is not liable for his servant's trespasses is familiar, and was recognized by this Court in *Chicago &c. Ry. Co. v. Bayfield* 37 Mich. 205. And if it were important to determine whether the injury was one purposely inflicted and not one resulting from carelessness, the question would no doubt be one to be submitted to the jury. *Rounds v. Delaware, &c. R. R. Co.* 64 N. Y. 129.

But this is an action in case, and the ground on which it is sought to charge the defendant is that its servant negligently drove the car against the plaintiff's vehicle. We are then to see whether, if negligence on the part of the driver is made out, or there is any evidence tending to prove it, the plaintiff himself, on his own evidence, does not appear to have been at least equally negligent. And we think he does. He knew very well he was in the driver's way, and he had had ample time and opportunity to get out of danger if so disposed. That he was not disposed to allow the car

to go on until it suited his pleasure to do so, is quite apparent; and there is abundant reason in his evidence for believing that he was purposely annoying the driver and delaying the car. If so, he cannot complain of the consequences.

The driver's testimony is quite different from the plaintiff's. He testified that when he first signalled the plaintiff to get off the track, the plaintiff made no effort to do so. The driver told him to get off or he would be run into, and he replied, 'Run and be damned; he had as much right to the track as the driver had, and would get off when he pleased.' He drove right along on the track, looking back and scolding the driver. Finally he turned off, and the car moved on, but he almost immediately turned again towards the track sufficiently to be struck by the car. If this evidence is true the contributory negligence of the plaintiff was plain and very gross, and he must bear the consequences. Whether, therefore, we believe the plaintiff or the driver, the ruling of the circuit judge was well warranted.

The judgment must be affirmed with costs.

The other Justices concurred

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SARAH M. SHAW v. MORGAN VAUGHAN.

Composition of creditors.

A composition of creditors is not effective, under the Bankrupt Act, to discharge any portion of a debt unless the creditor's name and address and the amount of his claim were set forth in the statement made by the debtor at the meeting of creditors at which the resolution of composition was adopted, nor unless such resolution was recorded by order of the court which confirmed the composition.

Error to Eaton. (Hooker, J.) Jan. 14.—Jan. 15.

ASSUMPSIT. Plaintiff brings error. Reversed.

Henry A. Shaw for appellant.

Wood & Maynard for appellee. Composition with creditors, and confirmation thereof extinguishes the debtor's liability and is equivalent to a discharge in bankruptcy. *Smith v. Engle* 9 Chic. Leg. News 46: 44 Iowa 265; *In re A. Bechet* 12 N. B. R. 201: 2 Woods 173; *In re Knight* 8 N. B. R. 436; *Beebe v. Pyle* 1 Abb. New Cas. 412; and the discharge cannot be attacked in a collateral action. *Benedict v. Smith* 48 Mich. 593; Bump's Bankruptcy 727.

CHAMPLIN, J. This suit was instituted by plaintiff before a justice of the peace, where she obtained a judgment, and the defendant appealed to the circuit court where a trial was had and a written finding of facts and conclusions of law were found by the circuit judge as follows:

"1st. The defendant was, previous and up to April 16, 1875, a banker doing business at Eaton Rapids, said bank not being opened after the night of April 15th.

2d. A few days before April 16, 1875, plaintiff applied to have a draft cashed at the bank, said draft being drawn in Australia, upon an English bank, and payable in gold, which had a fluctuating value.

3d. The cashier, one Ostorn, took the draft, agreeing to send it to the correspondent of the bank, and to allow and pay plaintiff whatever amount such correspondent should credit draft, upon receiving advices from such correspondent.

4th. Said draft was forwarded, and on April 14th, draft received credit at Detroit for $65.50.

5th. On the morning of April 15th, plaintiff's son inquired at defendant's bank about the matter, but was informed that no advices had been received.

6th. About 2 P. M. of the same day (April 15th) defendant received advices from his correspondent. A certificate of deposit was thereupon filled out to plaintiff, which was the usual custom of the bank where persons had no account. This certificate was never delivered to plaintiff, nor has she received anything upon said certificate or claim.

7th. The plaintiff lived a short distance from Eaton Rapids, in the country.

8th. Plaintiff's son called again for the money on April 16th, but found the bank closed.

9th. Defendant for some years previous and up to the time of his failure, had caused an entry of $10,000 to appear as a credit upon his books, which sum was fictitious,

and was done for the purpose of increasing his credit, but plaintiff did not know or act upon this fact.

10th. On April 13, 1876, proceedings in bankruptcy being pending against the defendant in the district court of the United States for the Western district of Michigan, an offer of composition was made by defendant, which was, on August 19, 1876, accepted and confirmed by two-thirds of his creditors in number, and one half in value, which proceedings were afterwards, in all things, duly confirmed by said court on the 29th day of August, 1876."

On the foregoing statement of facts the circuit judge found the following conclusions of law:

"1st. By the dealings between the parties plaintiff became a creditor of defendant on his receiving credit for said draft.

2d. By the composition with creditors and confirmation defendant's liability was extinguished.

3d. Judgment should be rendered in favor of the defendant for costs."

The defendant excepted to the findings of the court upon the facts and law, and insisted that plaintiff should have judgment for the amount of her claim.

Objection is made to the exception taken that it is too general and indefinite; that it identifies no proposition specifically, and points out no distinct error. We shall regard the exception taken as equivalent to an exception that the facts found by the circuit judge do not support the judgment. If the facts found do support the judgment it must be affirmed. It is somewhat difficult to determine from the findings the legal relations existing between these parties relative to the draft in question. We are inclined, however to agree with the circuit judge to the effect that she became a creditor of defendant, and that the obligation to pay the plaintiff the amount of the draft did not arise out of any fiduciary relations which are saved from being discharged under the Bankrupt Act.

The fact, then, that she became a creditor of defendant, and that the debt has not been paid, entitles her to a judgment, unless, under the facts found, the debt has been discharged under the provisions of the Bankrupt Act. Do the

facts found by the circuit judge in the tenth paragraph above quoted effect such discharge? It is not found that he received a discharge as an adjudicated bankrupt, but certain facts are set forth in the 10th clause of the finding relative to a composition in bankruptcy proceedings pending against defendant.

The Act of Congress, passed June 22, 1874, (18 Stat. at L., ch. 390, sec. 17,) provides a scheme by which an insolvent or bankrupt debtor may effect a compromise with his creditors. Without attempting to set out the provisions of this law in detail, it is deemed sufficient for our purpose to refer to some of the more prominent features of the Act. It contemplates the passage of a resolution for composition, containing the proposal of the debtor; to be operative it must be passed by a meeting of his creditors who constitute a majority in number and three-fourths in value, and must be confirmed by the signatures thereto of the debtor and two-thirds in number and one-half in value of all the creditors of the debtor. Such resolution, together with the statement of the debtor as to his assets and debts, must then be presented to the court, and the court must, upon notice to all the creditors of the debtor, and upon hearing, inquire whether such resolution has been passed in the manner directed by said section; and if satisfied that it has been so passed, it shall, subject to the provisions hereinafter contained, cause such resolution to be recorded, and statement of assets and debts to be filed; and until such record and filing shall have taken place, such resolution shall be of no validity. And the section provides that "the provisions of a composition accepted by such resolution, in pursuance of this section, shall be binding on all the creditors whose names and addresses and the amounts of the debts due to whom are shown in the statement of the debtor produced at the meeting at which the resolution shall have been passed, but shall not affect the rights of any other creditors."

The foregoing reference to the statute shows how far short the facts found by the court come of constituting a legal discharge of the debt due to plaintiff. It has been held

that the section should receive a strict construction, because it is in plain derogation of common right. It compels the dissenting minority of creditors to accept just so much on their claims as the debtor and the requisite majority of the creditors resolve that all shall accept. *In re Shields* 15 N. B. R. 532. In order to show the debt admitted to exist is discharged, the facts should be found showing, at least, a substantial compliance with the law. The finding of the court below did not show that plaintiff's name and address and amount of her claim were embraced in the statement of the debtor produced at the meeting at which the resolution was passed; and if it was not, the law expressly saved her rights, and she was not in the least affected by the composition. Nor does the finding show that the resolution was ever recorded. Until it was, such resolution was of no validity. In short, the finding fails to show that this debt was barred or discharged, and consequently the facts found by the circuit judge do not support the judgment rendered in the court below.

That judgment is therefore reversed, and the plaintiff will be entitled to a judgment here for the one hundred and five dollars damages, and costs of both courts.

The other Justices concurred.

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SUSAN HAMILTON v. WILLIAM JENNISON, A CIRCUIT JUDGE FOR WAYNE COUNTY.

Justices' courts—Affidavit for appeal.

1. An unsigned affidavit for an appeal from a justice's court is not fatally defective; and if the appellee appears and notices the case for trial the omission of the signature is waived.

2. How. St. § 7020 in providing that no appeal from a justice shall be dismissed on the ground of a defective affidavit if the appellant makes a proper one, means affidavits that are fatally defective; any other would be sufficient.

Mandamus. Submitted Jan. 22. Granted Jan. 23.

Charles B. Howell for the motion.

PER CURIAM. Relator was party to a suit before a justice of the peace, and judgment was given against her. She appealed to the circuit court, or attempted to do so, and to that end filed with the justice an appeal bond and what purported to be the statutory affidavit. As matter of fact, however, oath was never made to the affidavit. The justice made return to the circuit court, and the appellee appeared in that court and noticed the case for trial. Subsequently he moved to dismiss the appeal for want of jurisdiction; the defect pointed out being that there was no affidavit for appeal. The circuit judge held that the defect was fatal, and that the want of an affidavit could not be supplied.

The statute provides that "No appeal shall be dismissed on the ground of a defective affidavit, nor because the same does not conform to the provisions of this chapter: provided, the appellant, his agent or attorney, shall make an affidavit which shall conform to said provisions." How. St. § 7020.

This is a statute in furtherance of justice. The purpose is to save to the party his appeal where through inadvertence or otherwise an affidavit in conformity to the statute has not been filed. The defective affidavit which the party is to be allowed to supplant with one which is sufficient, is an affidavit which is fatally defective; for if it is not fatally defective it is of course sufficient, and no new one is needed. An affidavit in due form but to which, through inadvertence, the party has failed to make oath, is such a defective affidavit. The court should have permitted a perfect affidavit to be filed, if needful to sustain the appeal; but we do not think it was needful after the appellee had appeared and noticed the case for trial. The defect was thereby waived.

Motion allowed.

Peter Ruppe et al v. Thomas W. Edwards.

Statute of frauds—Promise to pay another's debt.

1. A man who got some supplies from a merchant said they were for a certain lumberman, who, as the merchant knew, had been the man's employer and had cashed his orders. The merchant wrote to the lumberman's bookkeeper notifying him of the purchase and asking him to send an order to give the man supplies "if O. K." The book-keeper wrote back "I think it will be O. K. for about one hundred dollars at present." *Held* that this correspondence could not establish a contract on the part of the lumberman to pay for the supplies; and that even if he said it was all right on hearing of the correspondence, he would not be bound, as this would amount at most to a parol promise to pay the debt of another.
2. A book-keeper has no authority as such to make his employer liable for the debts of a third person.
3. A promise to pay another's debt is void under the Statute of Frauds unless in writing and signed by the person promising or by his duly authorized agent.

Error to Houghton. (Williams, J.) Jan. 8.—Jan. 22.

Assumpsit. Defendant brings error. Reversed.

Alexis C. Angell, T. L. Chadbourne and *Ashley Pond* for appellants.

Chandler & Grant for appellees.

Sherwood, J. This action is assumpsit to recover for goods sold and delivered by plaintiffs, who were merchants doing business at L'Anse, to one Edward St. Arnault who had been for some time previous in the employment of the defendant, and who had been accustomed to trade with plaintiffs, giving orders on the defendant for his pay, and defendant would accept and pay them to the amount of his indebtedness to St. Arnault.

In the fall of 1879 the defendant resided at Houghton and was carrying on business there. About that time the

defendant arranged with St. Arnault to cut some timber owned by defendant. By the arrangement St. Arnault was to cut the timber, Edwards to sell the logs, keep of the proceeds one dollar per thousand, and pay St. Arnault the rest after deducting stumpage and the amount of any supplies furnished by defendant. This took St. Arnault into the woods, and supplies became necessary.

In October, 1879, he applied to the plaintiffs to furnish him goods for a lumber camp, informing them at the same time that he was logging in defendant's timber. Plaintiffs let him have some goods and then refused to let him have more unless he would obtain an order from the defendant who was absent from his home. St. Arnault then said to the plaintiffs if they doubted his word they could write to J. P. Edwards, who was a brother of defendant and his book-keeper, and who had charge of the business during defendant's absence. Accordingly the plaintiffs wrote the following note to J. P. Edwards:

"L'Anse, Mich., Oct. 28, 1879.

Mr. J. P. Edwards, Houghton, Mich.—Dear Sir: Ed. St. Arnault has got some goods, mostly camping utensils. He said they were for T. W. Edwards, for lumber camp. Will you please send us order to give him supplies if O. K.

Yours respectfully, P. Ruppe & Son."

To this note J. P. Edwards made the following reply:

"*P. Ruppe & Co.:* I think it will be O. K. for about one hundred dollars at present."

The plaintiffs furnished to St. Arnault and his men goods to the amount of $913.43, of which $55.80 was for whisky, and $439.34 for wages of men in St. Arnault's employ in the woods.

The case was tried at the Houghton circuit, and the plaintiffs had judgment for the amount of their claims. The defendant brings error, and the case is now before us on bill of exceptions containing a summary of all the testimony given in the case. A large number of exceptions were taken, but few need be considered. Many of them were abandoned upon the hearing.

The principal question in the case is, Was the defendant properly chargeable with the goods furnished St. Arnault? The testimony relied upon by the plaintiffs upon this point is the foregoing correspondence had with defendant's book-keeper, and the fact that the defendant saw the account upon the plaintiffs' ledger after the goods were delivered, charged under the following heading: "Edward St. Arnault's camp; for T. W. Edwards." The goods were furnished at different times through the winter. The defendant was absent a portion of the time, and he expressly states that he never knew of the foregoing correspondence between his book-keeper and the plaintiffs until it was shown him on the trial, and this fact is undisputed. He further says that the book-keeper had no authority to pledge his credit, and the prior relations and dealings between the plaintiffs and St. Arnault were not of a character to induce the belief that the latter could use the defendant's credit without express authority, and the fact that the plaintiffs tried to get written orders from defendant to let St. Arnault have goods is very strong evidence that verbal or implied authority was not relied upon.

It is claimed by counsel for plaintiffs that the foregoing letters constitute a contract by which the defendant became responsible for goods to the amount stated in the J. P. Edwards letter. The business in which T. W. Edwards was engaged at Houghton does not appear from the record, but whatever it may have been it does appear that his book-keeper, J. P. Edwards, was authorized to take charge of it for defendant in his absence, and open and answer his letters. Such authority, however, would not give the book-keeper power to make his employer liable for the debts of a third person, and we do not think he intended to or did make the defendant liable when he answered the letter of plaintiffs; and there is nothing in the prior dealings or general usage of the parties, or in the business the defendant did with them and St. Arnault, which furnished any reason for plaintiffs to suppose that the book-keeper had any such authority. No such authority can be implied as a matter of

law by reason of his employment. *N. Y. Iron Mine v. Negaunee Bank* 39 Mich. 644; *Davidson v. Stanley* 2 Man. & G. 271; *Clayton v. Martin* 31 Ark. 217; *Meyer v. Baldwin* 52 Miss. 263; *Doan v. Duncan* 18 Ill. 96.

But a proper construction of the reply to plaintiff's letter, we think, clearly shows that the language imports no promise or assumption of St. Arnault's debt to plaintiffs, or any part thereof. The plaintiffs' letter was not addressed to the defendant but to his book-keeper, and the latter simply gave the plaintiffs his opinion about the extent to which the plaintiffs might safely trust St. Arnault. The defendant certainly could not be bound to make good his clerk's opinion. The reply is not sufficient to authorize an account to be opened against T. W. Edwards for goods purchased by St. Arnault.

It will be further noticed that the plaintiffs' letter shows they had already, without that expression of opinion from the book-keeper in the reply, let St. Arnault have some goods. It is true there is testimony in the case showing that when the plaintiffs' clerk, Campbell, called the defendant's attention to the fact that such correspondence had taken place, he replied 'that is all right'; but that did not help the plaintiff's case, because the letter contained no contract for defendant's liability to plaintiffs for the goods, and the court should have so instructed the jury.

There is no pretense that the defendant got any of the goods, or that they have anything but the parol promise of defendant to settle the account after showing it to him on the books, and furnishing him through the mails with a copy. Our statute requires more than this to make a person liable for the payment of the debt of another. The promise to make such payment must be in writing and signed by the party or his duly authorized agent before he can be charged thereby. No such promise was made in this case, and the court charged the jury, "If you find that St. Arnault had no authority to buy goods of plaintiffs in Edwards' name at the start, yet if Edwards consented to and ratified the transaction after he had knowledge of the same,

such ratification and consent would be as good and valid as though the authority had been given before the goods were sold." There was no evidence in the case of any written ratification or promise, and the charge was erroneous.

What we have said renders discussion of the other questions raised of no importance.

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

The other Justices concurred.

In the matter of the estate of Charles H. Bennett. Mary F. Smith's Appeal.

Evidence of facts known equally to deceased opponent—Presumption of payment.

1. The rule forbidding the survivor of two persons adversely interested to testify to facts known equally to both does not apply where the opposing party has introduced, as admissions, the statements drawn from the survivor in a preliminary proceeding in which he did not have the aid of counsel. In such a case the survivor is entitled to testify fully as to the subject matter of such admissions, and his opponent must be presumed to have waived the benefit of the statutory rule.

2. The error of excluding competent testimony may sometimes be cured by treating it as if it were in evidence.

3. A request to charge must be founded upon testimony in the case, or it is not error to refuse it.

4. Payment of a demand note is not presumed from the neglect to present it, until time enough has passed to outlaw it.

5. In a proceeding against an estate to recover the amount of a note given by the decedent, the fact that since the date of the note the payee has received from decedent cheques enough to pay it, does not of itself establish the payment of this particular note nor does it even place upon the claimant the burden of showing that it was not paid.

6. The burden of proving payment of a debt is upon the debtor when in an action to recover upon it the debt has been established by competent evidence.

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7. In a proceeding against an estate to recover the face of a note given by decedent it was shown that the maker had directed the cashier of a bank to pay the claimant a certain sum, and had himself given the cashier a cheque to serve as a voucher. *Held*, that after the payment of the amount had been shown the cheque was properly excluded as evidence, at least as against the claimant.

8. The payee in a cheque is not to be assumed to have received payment thereon if it is not shown to be indorsed; the fact of payment is for a jury.

Error to Wayne. (Jennison, J.) Jan. 9.—Jan. 22.

Appeal from probate order allowing a claim against the estate. The estate brings error. Affirmed.

Moore & Moore for appellant.

Fraser & Gates for claimant appellee, as to claimant's right to testify in respect to transactions with decedent, cited *Webster v. Lee* 5 Mass. 334; *Jackson v. Varick* 7 Cow. 238; *Den v. Downam* 13 N. J. L. 135.

CHAMPLIN, J. Bennett died April 3, 1881, and his estate was being administered in the probate court of Wayne county. Commissioners were appointed to hear and allow claims against the estate. Mary F. Smith presented to the commissioners for allowance a promissory note made by the decedent, a copy of which is as follows:

"$366.53. PLYMOUTH, April 30, 1877.

"On demand after date, for value received, I promise to pay Mrs. F. Smith or bearer, three hundred and sixty-six 53-100 dollars.

This note was signed by Mr. Bennett. On presenting the note to the commissioners, Mrs. Smith was sworn by them and examined respecting matters concerning the note which, if true, must have been equally within the knowledge of the deceased. She was not represented by attorney. She was interrogated by one of the commissioners, and her statement was taken down by a stenographer brought there by the commissioner for that purpose. The commissioners disallowed the claim, and she appealed to the circuit court,

and on the trial in that court the claimant introduced the note in evidence and rested her case.

The defendant then produced T. C. Sherwood as a witness, to whom were exhibited ten checks, and he testified that the signature thereto was the genuine signature of C. H. Bennett. They were all payable to bearer, except one dated February 26, 1878, which was payable to Mary F. Smith or order, for $90.58. This check was endorsed with the name of Mary F. Smith, respecting which signature the witness testified that he was familiar with the signature of plaintiff, and that in his opinion the signature of Mary F. Smith to this check was genuine; that he would not swear that it is hers; that the checks were all paid at the First National Bank at Plymouth, because they bore the cancellation mark of that bank. The witness further testified that on or about September 29, 1877, he met deceased and plaintiff in Plymouth, and deceased told him, in the presence of plaintiff, to pay her one hundred dollars and endorse it on the note; that Mrs. Smith said that she had not the note with her; that Bennett directed him to pay her the money, and he would give him a check for it; that he paid her the money and made out a check, and deceased signed it a day or two afterwards, and that check was given to the bank as a voucher for the money he paid to plaintiff. It also appeared from the testimony of this witness, who was the cashier of the bank, that Bennett was in the habit of drawing checks payable to persons in his employment, or bearer, and presenting them himself at the bank, and drawing the money to pay his men. The checks produced were selected from a large number of similar ones, and from these five are selected by defendant's attorney, which aggregate the sum of $367.11, being fifty-eight cents more than the amount of the note. Two of these checks were those above-mentioned, dated September 29, 1877, and February 26, 1878. The others bore date, and were payable as follows: April 30, 1877, to Mrs. F. Smith or bearer, $59.58; July 21, 1877, to Mary Smith or bearer, $100; January 11, 1878, to Mrs. M. F. Smith or bearer, $20.

On the examination before the commissioners she was questioned respecting these checks, and on the trial in the circuit the commissioners were sworn for the estate and were permitted to testify to what the plaintiffs swore to before the commissioners in response to questions put to her by them. These were offered and admitted on the ground that they were admissions of claimant, the tendency of which admissions went to show that she had received the checks from Bennett to apply as payment upon the note. After reading the checks in evidence, the defense rested. The claimant was then called in her own behalf, and gave testimony explanatory of her delay in not collecting the note during the life-time of Mr. Bennett, and also contradictory of the testimony relative to her admissions, given by witnesses for the defense. She was asked: "Did you state before the commissioners that this note was given for a balance due?" To which she replied: "I don't think I did; it certainly has not been paid." Although no objection was made to this reply the court directed the last part of the answer to be stricken out. Counsel then called her attention to the testimony of the witness Sherwood relative to the payment to her of the $100, and then put to her the following question: "You may state as to your recollection of any such transaction as that". This question was objected to on the ground that it was matter equally within the knowledge of Mr. Bennett and the witness, and the testimony was excluded. On the cross-examination she was examined at length as to the testimony given by her before the commissioners, and also in regard to matters which were generally within the knowledge of the deceased; after which the plaintiff rested her case. Whereupon the defendant's counsel then read in evidence Mrs. Smith's testimony before the commissioners, taken by his clerk, a stenographer. This testimony, as before stated, related almost exclusively to matters equally within the knowledge of Mr. Bennett and the claimant.

We think the method of proceeding adopted by the defense in this case, in introducing the commissioners to prove the ad-

missions made by the claimant before them on the hearing of her claim called out by them on their examination of Mrs. Smith made it competent for her to testify fully upon the subject-matter of such admissions. Where a party whose testimony, if objected to, would be excluded under the provisions of the statute (2 How. St. § 7545) is giving testimony in a cause, and the opposite party calls out facts equally within the knowledge of the deceased, and afterwards seeks to prove the statements so made under oath in a controversy between the same parties, as admissions, he must be held to have waived the inhibition of the statute, and the witness may testify fully in respect to the subject-matter of the admission, although it be equally within the knowledge of the deceased. When, therefore, in this case the defendant had placed the commissioners on the witness stand and proved the admissions made by Mrs. Smith in her testimony given before them relative to the payment of the note and the checks, it was competent for Mrs. Smith to testify relative to the same subject-matter that the note had not been paid, and it was error for the court to strike out such testimony, or exclude her evidence upon the points covered by such admissions, and if the court afterwards treated the testimony thus erroneously stricken out as being in evidence, it was not error.

The defense requested the court to charge the jury as follows: "1. If the note in suit was paid by Mr. Bennett in his life-time to Mrs. Smith she cannot recover. 2. If Mrs. Smith received the money on the checks offered in evidence, and the $100 which Mr. Sherwood swears he paid her, she cannot recover. 3. If Mrs. Smith received the money on the checks offered in evidence, and the $100 which Mr. Sherwood swears he paid her, the burden of proof is upon her to show that the money was not paid to be applied on this note. 4. If Mrs. Smith was paid any money by Mr. Bennett or his agents, after the date of the note in question, the amount or amounts so paid must, under the testimony in this case, be deducted from the amount of the note. 5. The checks of Mrs. Smith show that she received the amount of money mentioned in the checks."

The court refused to charge each of these requests, and defendant excepted thereto. A request to charge must be founded upon some testimony in the cause in order to constitute error in case of refusal, and we find no testimony returned in this record to base the first request to charge upon.

A showing that the note was payable on demand and was not presented for payment for four years, did not raise a presumption that the note was paid in the life time of the maker. No period short of that prescribed by the Statute of Limitations is sufficient to raise a presumption of payment.

The second request was properly refused. As the case was left at the close of the testimony, it was not an admitted fact that if she had received the checks and the money paid her by Mr. Sherwood, such checks were given toward the payment of the note. It was a question for the jury to determine, and it was an element in the controversy which the request ignored.

The third request, relating to the burden of proof, was rightly refused. The debt was established by competent evidence, and the burden of proof was upon the debtor to show payment of the debt. *Adams v. Field* 25 Mich. 16; *Wakeman v. Akey* 29 Mich. 308. Merely showing that Mrs. Smith received the money on the checks offered in evidence, and the $100 which Sherwood says he paid her, would not show payment of the debt. The checks may have been given for the purchase price of goods or for money advanced for some particular object other than the payment of the note, and hence the burden of proving payment by the debtor was not discharged until he had shown that the checks were received as payment. The judge charged the jury substantially that if Mrs. Smith received the checks or the money on them in payment of the note, she could not recover. This issue as to whether the plaintiff received the money on the checks produced in evidence as payment of the note in question was submitted by the court to the jury, and they found against the defendant.

The subject-matter of the fourth request was given to the jury with proper instructions. The court stated to the jury the substance of the testimony of Mr. Sherwood respecting the payment to her of one hundred dollars at the request of Mr. Bennett. He also commented upon the testimony of Mrs. Smith, wherein she states that she had no recollection of receiving the $100; and then the court used this language:

"The general rule of law is that where the testimony is positive of a witness, a fair, candid person, and the cashier seems to be so—the rule is that unless that testimony is denied by some preponderance of proof, why, unless you have some reason to believe the other witness, you would be entitled to receive that as true, viz.: that there was $100 paid to Mrs. Smith. He states further that he drew a check—at least filled up a check—at the request of Mr. Bennett, simply as a voucher for this $100 which was given to Mrs. Smith, so as to keep his cash account straight at the bank."

Mr. Frazer. "I will ask your honor to state that it was simply a note that was paid."

Court. "That is what I said; there was no special note described; she may have had half a dozen notes."

To this last remark of the court the defendant excepted; and if it appeared that the defendant was prejudiced by the remark, it would be ground for reversal. It is evident, however, that the jury did allow and deduct from the amount of the note the $100 referred to; consequently the error does not prejudice the defendant.

The fifth request to charge is clearly erroneous. It assumes that Mrs. Smith indorsed the check. This was a fact for the jury to determine, and the request was therefore properly refused. Exhibit A is the check referred to by the witness Sherwood as having been drawn by him and signed by Bennett, as a voucher between him and the bank. The record does not state the objection made to its admission. The fact of payment had been proved prior to the making of the check, and the plaintiff was not shown to have had any connection therewith. Its only purpose was that of a voucher between Bennett and the bank, and it was properly excluded as evidence against the plaintiff.

Complaint is made of the language of the court in charging the jury wherein he says: "He (referring to Mr. Voorhees) says that these checks were produced, and he says that she says that she didn't remember anything about it; and then again supposed that they were right &c. But she comes upon the stand and denies that flatly. She says that that note was not paid, and that the checks did not pay it;" and defendant claims that there was no testimony to justify it. The record discloses the fact that there was a direct conflict between the testimony of Mr. Voorhees and the plaintiff, relative to what occurred at the interview she had with him concerning the checks and note; and on page eleven of the printed record she says: "I said, I don't recollect anything about these checks, Mr. Voorhees; this I do know, I have never had my pay upon that note, and I propose to do something about it." And again, "That she didn't acknowledge to Voorhees the payment of the checks, but told him she did not remember anything about the checks." Moreover we think the trial judge fairly submitted the testimony given by these two witnesses to the jury in his charge from which we quote as follows:

"Now, gentlemen, in conclusion, if you believe that Mrs. Smith admitted to Mr. Voorhees, or before the commissioners when she was sworn—if you believe that she admitted to them that these checks were not only paid to her, but that they were paid to take up this note, why of course, that would be the end of the case; it would show the note was paid. But if you do not believe these checks were delivered to her for the purpose of payment upon this note, or if you do not believe that they were delivered to her at all (as I said before, it does not follow that they were delivered to her,—on their face it merely gives her name) and if you do not believe that these checks were delivered to her, of course the defendant does not make out his case, because the defendant must satisfy you by what is called preponderance of proof that this note is paid. It is matter entirely for you, gentlemen, to determine what weight you will give this testimony. If you believe Mrs. Smith, this note is not paid; but if you believe the testimony on the part of the defendant that these checks were intended to apply, and did apply and did constitute payments, why they

would pay this note except some eighty-five cents, with regard to which a mistake is claimed."

Nothing further need be said. We find no errors that justify a reversal of the judgment. It must be certified to the circuit court for the county of Wayne that no error appears in the proceedings before it, the claimant to recover costs of this Court.

The other Justices concurred.

THE WEST MICHIGAN SAVINGS BANK OF BANGOR v. HENRY G. M. HOWARD AND ENOCH S. HARVEY.

Replevin—Possessory rights.

1. A joint judgment in replevin is proper where the possession of the defendants was joint and they were connected in all the transactions on which it was based.

2. A bill of lading was sent to a bank together with a draft upon the consignees, to whom the bill was not to be delivered until they had paid the draft. The bank however let them remove the merchandise to examine it, and they contested payment. *Held*, that the bank, on paying the draft itself, was fairly entitled to replevy the merchandise; and that the fact that it had at first attached it without the consignor's authority was unimportant.

Error to Van Buren. (Mills, J.) Jan. 11.—Jan. 22.

REPLEVIN. Defendants bring error. Affirmed.

O. N. Hilton and *Annable & Fitch* for appellants. If one who has become bound to pay the debt of another does so, the payment will be considered compulsory and will have the effect to subrogate him to the rights and remedies of the creditor; but if one who is under no obligation to pay the debt of another does so, his payment will be deemed voluntary and will extinguish the debt without preserving any remedy for his benefit. Sheldon on Subrogation §§ 1, 3, 240; *Shinn v. Budd* 14 N. J. Eq. 234; *Webster's Appeal*

86 Penn. St. 409; *Guy v. Du Uprey* 16 Cal. 195; *Gadsden v. Brown* Speer's Eq. 37, 41; *Roth v. Brig Terry* 18 La. Ann. 705; *Kitchell v. Mudgett* 37 Mich. 82; *Woods v. Gilson* 17 Ill. 218; *Winder v. Diffenderffer* 2 Bland Ch. 199; *Griffin v. Orman* 9 Fla. 22; *Cole v. Malcolm* 66 N. Y. 363; *Hoover v. Epler* 52 Penn. St. 522; *Sandford v. McLean* 3 Paige 117; *Griffin v. Proctor* 14 Bush 571; *Cheesborough v. Millard* 1 Johns. Ch. 409; *Silver Lake Bank v. North* 4 id. 370.

Benj. F. Heckert for appellee.

CAMPBELL, J. Plaintiff replevied certain buggies, and recovered judgment. The facts were in substance these. Defendants made a purchase from Joseph Duen & Co., the manufacturers at Cincinnati, payable on delivery. Duen & Co. sent the property to Bangor, consigned by bill of lading to Howard, and sent the bill of lading and a draft for the amount through intermediate agencies to the plaintiff, to be delivered to Howard on payment. Harvey was the real purchaser under Howard's name, the latter to have a share in the profits and the apparent control. Defendants obtained leave of plaintiff to examine the property and had it removed to their own premises. Some negotiation was had as to the allowance of reduction for errors and damages, and they undertook to sell some of the property. Mr. Chase, who is president of plaintiff, sued out an attachment on the accepted draft in the name of Duen & Co., and the property was attached. This was done without any authority from Duen & Co. and the suit was discontinued and the attachment dissolved, and the property returned to Howard and replevied.

The questions all arise upon rulings upon the charge, and no questions of fact are left open by the requests. The main controversy is whether plaintiff had any possessory rights. One or two collateral questions are also presented.

We see no ground for complaining that the judgment is joint. The defendants were connected in all the transactions and their possession was clearly joint.

The attachment suit is unimportant because it was unauthorized, and in no way changed the rights of Duen & Co. Plaintiff was no party to that controversy.

After considerable delay in the various transactions plaintiff paid the draft to Duen & Co. This payment was not made on behalf of defendants, and we do not see any reason why the plaintiff has not the same right now that it would have had if the draft had been cashed on receipt. It represented the debt on payment of which plaintiff was authorized to deliver the property, and plaintiff was practically a bailee of the property to obtain the payment and hold it till paid. We think that whether it was paid Duen & Co. or not in advance could not concern defendants, who could not lawfully hold the property sold against either. But in our opinion the transaction was such as to give plaintiff all the rights that Duen & Co. had in the property. Such dealings cannot be subjected to any technical niceties, but must be decided on common-sense grounds.

We think the judgment must be affirmed with costs.

The other Justices concurred.

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PHILINDA DERWIN v. PHILO PARSONS.

Indecent assault—Hallucinations—Medical testimony.

1. Where a woman in disordered health charges people with assaulting her it is entirely proper to show that persons so afflicted are subject to hallucinations, even though there has been no showing that she herself is; a good deal of latitude is allowable in drawing out the facts upon the trial of such cases. It is also proper to ask her if she has not made similar charges against others, and if, shortly after the assault alleged, she had not told a friend of a previous one, without mentioning this; and to show the facts if she denies them.

2. A woman appearing as complaining witness in a case of alleged indecent assault was required to state that she had been undergoing treatment at a medical college. *Held* that she ought not to have been asked whether it was in the presence of a class, but that the

error of allowing the question was probably cured by the sympathy the jury would naturally feel for her if she were compelled to answer so outrageous a question.

3. A defendant denying a charge of indecent assault cannot be discredited by showing that he had improperly approached a judge or had been charged with buying votes.

Error to the Superior Court of Detroit. (Chipman. J.) Jan. 11.—Jan. 22.

TRESPASS for assault and battery. Plaintiff brings error. Affirmed.

James H. Pound for appellant. Inquiry as to charges of bribery and of lending money for usury are proper in an action against one for indecent assault: *Wilbur v. Flood* 16 Mich. 40; *Clemens v. Conrad* 19 Mich. 170; *Hamilton v. People* 29 Mich. 173; *Driscoll v. People* 47 Mich. 417; *Leland v. Kauth* id. 508.

Moore & Canfield for appellee.

COOLEY, C. J. Action for assault and battery. The plaintiff was the sole witness to the facts upon which she relied for a recovery. The defendant contradicted flatly the story told by the plaintiff, but he also claimed, and put in evidence to show that the plaintiff was afflicted with a certain disease, and that women having that disease are likely to have hallucinations under which they imagine that assaults like the one complained of are made upon them.

The case was tried by jury and judgment rendered for defendant. The plaintiff complains of a considerable number of rulings made by the trial judge on questions of admissibility of evidence and the case has been fully and ably argued upon the errors assigned by her. We have considered them all, and have reached the conclusion that while the judge might, and perhaps in some cases ought to have ruled differently, yet that no such error appears as would justify the reversal of the judgment.

The case was one which justified a good degree of liberality in the admission of evidence. The parties were

directly opposed in their testimony, and the jury would be likely to accept the statement of the one who was best supported by the circumstances. The plaintiff was cross-examined at great length on her previous history, and seems to have been willing to make full explanations on most subjects. To questions whether she had not made charges similar in nature against two other persons objection was made, but we have no doubt it was proper to allow them, and also to prove the facts if she denied having made the charges. The probability that a woman who conducts herself properly will be frequently assaulted is very small, and every new complaint therefore tends to cast doubt upon those which preceded it. It was also proper to ask the plaintiff whether she did not within a few hours after the alleged offense tell a confidant of a similar case but make no mention of this; and then when she denied it, to allow her to be contradicted. The jury would be very likely to infer that an outrage just committed and not mentioned under such circumstances was not committed at all.

It was also proper, after it had been proved that plaintiff was afflicted with a particular disease, to show by experts that a considerable proportion of women thus diseased were liable to hallucinations respecting the conduct of men towards them. There was indeed no direct evidence that plaintiff was ever the victim of hallucinations; but nevertheless she might be without the fact being known; and so long as the main facts to which she testified were in dispute, the circumstance which might produce delusion was not without significance.

But upon this branch of the case a wrong was done to the plaintiff, which we cannot pass without rebuke. She appears to be a woman without means, and she went for necessary medical treatment to the hospital of a medical college where she would be treated without charge. The reason for this gratuitous treatment is understood to be that the students attending the college have the benefit of such instruction as comes from actual attendance upon surgical operations and other treatment. To submit to treatment

before a class of students must often be mortifying to a modest woman; but if she is poor there is nothing disgraceful in it, and it ought not to be the subject of controversy or comment elsewhere with a view to her annoyance. The public as well as the woman herself is interested in her having the attention and treatment her case requires and she is to be commended for going for it, instead of being exposed to ridicule or to disparaging suggestions. Therefore, in this case, after it had appeared that the woman had been treated by a competent physician, the question whether the treatment was not in presence of a class of medical students should never have been asked, or if asked, should have been promptly overruled. It could have had no purpose except to afford a ground for unfavorable inferences respecting her modesty; and these, if unjust, would subject the woman to a great cruelty when her only fault was her poverty. In most such cases unfavorable inferences would unquestionably be unjust; and it would therefore be inexcusable to suggest them in any case without direct evidence rendering their justice probable.

We cannot believe, however, that the plaintiff's case was injured by this evidence. Indeed it was more likely to be aided; for a jury is certain to be quick to detect anything which appears like an insult to a woman in their presence, and to resent the insult if in their power to do so. It is not likely the plaintiff's counsel failed to call the attention of the jury to any unnecessary and apparently baseless insinuations against his client, and he would be reasonably certain to have the sympathy of the jury with him in very plain and pointed comments. We do not think, therefore, that we ought to disturb the judgment for the improper admission of this evidence.

When defendant was on the stand he was asked, with a view to discredit him, whether he had not improperly approached a certain judicial officer, and whether he had not in a certain election been charged with buying votes. These and other similar questions were overruled. Obviously they had no bearing on the case on trial. A man cannot be

said to be more likely to assault a woman because of being guilty of the conduct suggested. The ruling was correct.

Nothing further in the case seems to us to require comment, and the judgment must be affirmed.

The other Justices concurred.

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FRANK SCHAFBERG v. MINNIE SCHAFBERG.

Bill to annul marriage.

1. How. St. § 6622 in requiring the issues raised upon a bill to annul a marriage to be tried by jury is not mandatory but secures to either party the right to a jury, unless it is waived. And it will be considered waived if after replication a motion is not made by one party, on notice to the other, for a feigned issue.

2. A divorce bill cannot be amended by substituting a prayer that the marriage be annulled.

Appeal from Wayne. (Jennison, J.) Jan. 11.—Jan. 22.

BILL for divorce. Defendant appeals. Reversed.

Sylvester Larned for complainant.

James H. Pound for defendant. A chancery bill cannot be so amended on the hearing as to radically change its purpose. *Davanbagh v. Davanbagh* 5 Paige 554.

CHAMPLIN, J. Complainant filed his bill of complaint in the circuit court for the county of Wayne, in chancery, on the 21st day of October, 1882, to obtain a divorce. He alleged that he was married to the defendant on or about September 27, 1882, and had never lived or cohabited with her since; that the marriage was consummated by force, duress and threats of imprisonment, against his will and while he was under the influence of intoxicating liquor and unable to assert his will or successfully oppose the mar-

riage which was forced upon him. He also charged, upon information and belief, that the defendant had been, and then was, a woman of unchaste character, and had been guilty of illicit carnal intercourse with a person named during the months of July and August, 1882, before the alleged marriage, which facts were wholly without the knowledge of complainant until within one week then passed. He prayed that defendant might answer, but not under oath, and that the marriage might be dissolved and a divorce decreed. The defendant answered, admitting the marriage but denying that it was consummated by force, duress and without his consent or against his will or while he was under the influence of intoxicating liquors to such an extent as to prevent the exercise of his will in a rational and intelligent manner. She also denied the charge of illicit intercourse with any person other than complainant. Replication was filed, and the parties proceeded to take proof under a stipulation, in open court, without a jury.

The cause was heard on pleadings and proofs and the court, on the 1st day of October, 1883, became satisfied, as appears, that the pleadings and proofs did not make out a cause for divorce, but that the proofs did warrant a decree for annulment of the marriage contract, and gave complainant leave to amend the prayer of his bill by withdrawing the prayer for divorce and inserting in the place thereof a prayer that the marriage be annulled and declared void, and without waiting for the amendment to be made or any issue formed in relation thereto, the court proceeded to render a decree that the marriage between the complainant and defendant be annulled and declared void on the ground of fraud, duress and intoxication. This decree appears to have been filed with the register on the 3d day of October, 1883, and the amendment to the bill was filed on the 5th day of October, 1883.

There is a material difference between a bill for a divorce from the bonds of matrimony and one to annul the marriage contract, not only in the consequences that arise from

a decree pronounced in the two cases, but in the method of proceeding.

Where a bill is filed to annul the marriage contract for any cause except the physical incapacity of one of the parties, and the defendant denies the allegations of the bill so as to raise an issue as to the legality of the marriage, the statute requires that the issues so raised shall be tried by a jury of the country. 2 Comp. L. § 5068. [How. St. § 6622.] We do not consider this statute mandatory upon the court and parties in all cases, but as securing to either party the right, if he chooses to exercise it, to have the issues tried by a jury. The parties will be deemed to have waived a trial by jury unless, after the filing of replication, one of them applies to the court, on notice to the adverse party, for a feigned issue. This has been the uniform practice in the courts of New York from whose statutes ours, in this respect, were adopted. 2 Barb. Ch. Pr. 251. The proceedings in this case were of such a nature as to deprive the defendant of the exercise of this right and cannot be upheld. The amendment allowed changed the entire nature of the relief sought, and no statute or practice, however liberal with regard to amendments, will justify it.

We have carefully considered the proofs in this cause. It would answer no good purpose to review or comment upon them in this opinion. Suffice it to say that we are all of opinion that the complainant entirely failed to substantiate the charges alleged in his bill of complaint: and it must be dismissed with costs of both courts.

A decree will be entered here reversing the decree of the court below and dismissing the bill of complaint with costs of both courts with an extra allowance to defendant of fifty dollars.

The other Justices concurred.

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GILBERT A. POWELL v. JAMES H. POWELL.

Set-off—Discharge from guardianship.

1. A claim for personalty received by plaintiff while acting as defendant's guardian, but not accounted for by him, is proper set-off in an action on a note, being for goods sold or for money had and received. How. St. § 7365.

2. A claim for money had and received cannot be classed as unliquidated damages, as the amount of such a claim is always ascertainable.

3. A receipt by a ward for property held by his guardian is no more conclusive than any other receipt, and while it justifies the guardian's discharge neither the receipt nor the discharge precludes the ward from showing that under a mutual arrangement the guardian has not actually accounted for part of the property.

4. Undue haste in the settlement of a guardian's accounts is not favored.

Error to Macomb. (Stevens, J.) Jan. 11.—Jan. 22.

ASSUMPSIT. Defendant brings error. Reversed.

Edgar Weeks for appellant. The right of set-off is statutory (*Woods v. Ayres* 39 Mich. 345) and includes everything that can be the subject of suit (*Wallace v. Finnegan* 14 Mich. 170; *Hosmer v. Wilson* 7 Mich. 294; *Ward v. Warner* 8 Mich. 508; *Watson v. Stever* 25 Mich. 386) even a distinct debt: Waterman on Set-off §§ 89, 286; *Smith v. Huie* 14 Ala. 201; *Gunn v. Todd* 21 Mo. 303; *Leavenworth v. Packer* 52 Barb. 132; *Ogden v. Coddington* 2 E. D. Smith 317.

Dwight N. Lowell for appellee. Assumpsit cannot lie at the suit of a ward against the guardian for matters involved in the trust: *Moore v. Hazelton* 9 Allen 104; *Brooks v. Brooks* 11 Cush. 20; *Conant v. Kendall* 21 Pick. 36; *Cole v. Eaton* 8 Cush. 587; *Wade v. Lobdell* 4 Cush. 510; *Hicks v. Chapman* 10 Allen 464; Schouler's Dom. Rel. 506–514; *Gott v. Culp* 45 Mich. 274; unliquidated demands are not properly within the law of set-off: *Hol-*

land v. Rea 48 Mich. 218–225; *Carter v. Jaseph* id. 615; Waterman on Set-off §§ 301–4; an unsettled account constitutes a claim not only unliquidated but wholly uncertain: *Cumings v. Morris* 3 Bosw. 560; *Sherman v. Ballou* 8 Cow. 304; *Osborn v. Etheridge* 13 Wend. 339; *Butts v. Collins* 13 Wend. 139; *Stanbery v. Smythe* 13 Ohio St. 495; *Ratliff v. Davis* 38 Miss. 107; *Hanna v. Pleasants* 2 Dana 269; a final account between guardian and ward, a full hearing in the probate court and a determination of the guardian's accounts bind all concerned: *Le Guen v. Gouverneur* 1 Johns. Cas. 501; *Adams v. Cameron* 40 Mich. 511; *Embury v. Conner* 3 N. Y. 522; *Kamp v. Kamp* 59 N. Y. 215; *Ross v. Wood* 70 N. Y. 11; *Webb v. Buckelew* 82 N. Y. 558; *Jacobson v. Miller* 41 Mich. 93; *Baxter v. Aubrey* id. 13.

CAMPBELL, J. Plaintiff recovered judgment against defendant for a balance due on a promissory note. Defendant offered but was not allowed to prove a set-off arising from the conversion of certain personal property which plaintiff, as guardian of defendant, had received and not accounted for. This property consisted of grain, hay and some animals belonging to defendant. This set-off was rejected below chiefly on the ground that the guardianship accounts had been settled and the guardian discharged. It is now claimed further that the amount was unliquidated.

This last objection amounts to nothing. The claim, if valid, might have been either for goods sold or for money had and received, either of which would come within the statute, and neither of which is within the residuary clause relating to unliquidated damages, because money had and received is always ascertainable, and a claim for this, as well as for personal property sold, is expressly allowed to be set off. Comp. L. § 5796. [How. St. § 7365.]

The foundation for the other objection is in a receipt in full, given after an account had been settled in the probate court, on the basis of which receipt the guardian was discharged.

It appears that during a part of the year 1880, defendant was under guardianship of plaintiff, as temporarily non compos. In the fall of that year he left the asylum and plaintiff filed an account, and a day of hearing was fixed, and the parties were present before the judge of probate. It appeared from the inventory that certain personal property, including in whole or in part the property now in question, was in the guardian's hands, but no price was put upon it. On the accounting the judge of probate says that his attention was called to the fact that this property was not included either in the inventory or in the account; that there was to be a receipt drawn, and "certain moneys or property—an amount found in his hands" should be delivered. The order discharging the guardian was made, if the dates are correctly stated by the probate judge, a few days before the receipt was filed, the order providing for such discharge when the receipt should be given. The judge does not remember whether any understanding was had in his presence concerning what was to be done with the property not inventoried, but the order showing the accounting shows affirmatively that this outside property was not brought into the account.

There is conflicting testimony as to the real facts, but it was not allowed to go to the jury.

There is no rule which makes a receipt conclusive evidence, and if these items were not included in the probate account, we do not think the right of defendant is precluded. The judge of probate was justified by the receipt in discharging the guardian, but this did not preclude the parties from having arrangements as to matters outside of the action of that court. The law does not favor undue haste in the settlement of guardian's accounts, and where the information must necessarily be in the hands of the guardian, it would be inequitable to stretch matters unduly in his favor. In the present case it is certain that he did not account to the probate court for these items. It is equally certain that he did not perform his duty, until he had done so in some way. It was held in *Hooper v. Hooper* 26 Mich. 435,

that it is competent for guardian and ward to make settlements between themselves, and if they choose to do so and to take any class of items out of the accounting they can do so. The ward, being sane, can make such an arrangement as he can make any other contract, and if to close up the probate matters papers are formally passed, we know of no reason why such a receipt is any more conclusive than any other receipt. We think the set-off was admissible.

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

The other Justices concurred.

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William H. Fuller v. Daniel F. Rice.

Statute of frauds — Parol agreement — Part performance — Variance — Measure of damages — Contract involving trespasses.

1. A parol agreement that would be void under the Statute of Frauds may nevertheless be put in evidence in an action on it, to the extent to which the parties have carried it out, since they have so far agreed to be governed by its terms.

2. Where no special counts are needed in an action on a contract in which both special and common counts are used, the objection that the contract as proved differs from that set forth in the special count is unimportant. Even if the contract were void recovery might be had upon the common counts.

3. One who, under a contract, has done valuable services of which the other party thereto has had the advantage, is entitled to recover therefor at the contract rate less any damages the other party may have suffered from incomplete performance.

4. A contract to clear an innavigable stream and to run logs through it cannot be assumed to be void as against public policy on the ground that it involves trespassing on the lands of third persons, unless it also appears that the riparian owners object or that an invasion of their rights is intended.

Error to Oceana. (Russell, J.) Jan. 11.—Jan. 22.

ASSUMPSIT. Defendant brings error. Affirmed.

L. G. Rutherford for appellant.

M. H. Brooks and *W. E. Ambler* for appellee.

COOLEY, C. J. Plaintiff sued to recover for services performed by him under an oral contract whereby, as he testified, he agreed with defendant to cut, skid, haul and put on the bank of the south branch of Pentwater river in Elbridge township, six hundred thousand feet of logs; two hundred thousand feet in the season of 1880, and two hundred thousand feet in each of the two succeeding years; and also to clear the river from obstructions and then deliver the logs at Hart or at Wigton & Bosworth's mill-pond. For these services he testified he was to be paid as follows: For cutting and banking the logs, one dollar per thousand feet; for clearing the river, six hundred dollars; and for delivering the logs at Hart or the mill-pond, two dollars and fifty cents per thousand feet. Under this agreement he claimed to have performed what was to be done in the season of 1880, including the clearing of the river. The defendant did not dispute that some such agreement was made, nor but that services were performed under it; but he denied that the terms were as plaintiff testified, and claimed that the price to be paid for the delivery of the logs was to compensate for services in clearing the river.

The declaration contained counts on the agreement and also the common counts. On the trial defendant objected to evidence of the agreement because, not being in writing, it was void under the Statute of Frauds. But this was not a valid objection, and was properly overruled. So far as the parties had acted in performance of the agreement they had consented to be governed by its terms, and they must be bound by them.

Objection was also taken that the agreement as proved varied from that set out in the special counts; but this also was not well taken. Special counts in the case were entirely unnecessary, and if the contract was void the plaintiff must recover, if at all, on the common counts.

The general principles governing such cases are familiar. If the plaintiff had performed valuable services for the defendant under the contract, of which the latter had reaped the advantage, he was entitled to recover therefor at the rate fixed by the contract, less any damages the defendant may have suffered by reason of failure in complete performance. *Allen v. McKibbin* 5 Mich. 454; *Whipple v. Parker* 29 Mich. 369; *Wildey v. School District* 25 Mich 419; *Burroughs v. Morse* 48 Mich. 520. This was the view taken by the circuit judge, and his instructions to the jury in this regard were unexceptionable.

The stream to be cleared of obstructions, it is said, was not a navigable stream, and therefore plaintiff had no right to enter upon the lands of the owners of the banks for the purpose of removing obstructions; and any contract for that purpose would be a contract for the commission of trespasses and therefore void. We do not think the question of the navigability of the stream arises in the case. It is entirely competent for parties to contract with each other for labor to be performed on the land of a third person, and if the owner of the land does not object, the labor may be performed and the contract price recovered. It does not appear in this case that the owners of the banks were objecting, or that any invasion of their rights was contemplated. There was nothing in the contract, therefore, that was opposed to public policy.

Objection was taken that the scaling of the logs was not shown to have been by a competent person or by a correct scale; but the evidence was sufficient for the jury. We also think the case was fairly submitted to the jury, and that their verdict for the plaintiff should not be disturbed.

The judgment will be affirmed with costs.

The other Justices concurred.

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The Genesee County Savings Bank v. The Michigan Barge Company, impleaded with Edward P. Ferry and Thomas W. Ferry.

Corporations—Directors—Corporate note—Bona fide holder.

1. The ordinary management of a corporation is under the control of its directors.

2. The directors of a corporation in which every stock-holder was a director adopted a rule allowing any stockholder to have its note at any time for the par value of a quarter of his stock. Such a note was duly executed by the treasurer, at the instance of a director, and was made payable to a firm consisting of this director and one other, who together owned nearly all the stock. The note was negotiated and came into the hands of a bona fide holder. *Held* that the corporation, on being sued by the holder, could not deny its execution or escape liability upon it.

3. Negotiable paper of a corporation is valid in the hands of a bona fide holder if it appears, on its face, to have been duly issued by the corporation in conformity to the provisions of its charter. If the corporation has power under any circumstances to issue such paper, a bona fide holder has the right to presume that it was issued under the circumstances which gave authority.

Error to Ottawa. (Arnold, J.) Jan. 15.—Jan. 22.

Assumpsit. Defendant brings error. Affirmed.

George C. Stewart and *Blair, Kingsley & Kleinhans* for appellant. A note purporting to be signed by an agent will not sustain recovery unless the agency as well as the signature are proved: *Stagg v. Elliott* 12 C. B. (N. S.) 381; *Dickinson v. Valpy* 10 B. &. C. 128; 21 E. C. L. 45; *Awde v. Dixon* 6 Exch. 869; *Grant v. Norway* 10 C. B. 689; 1 Ames Cases on B. & N. 717, n; negotiability does not prove execution: *The Floyd Acceptances* 7 Wall. 676; *Marsh v. Fulton County* 10 Wall. 683; the ordinary business of a corporation is to be managed exclusively by the board of directors: *Dabney v. Stevens* 40 How. Pr. 341; *N. Y. Iron Mine v. Negaunee Bank* 39 Mich. 644;

McCullough v. Moss 5 Den. 567; *Adriance v. Roome* 52 Barb. 399; the treasurer is only a special agent with defined powers: *Torrey v. Dustin Monument Ass'n* 5 Allen 329; *Brown v. Weymouth* 36 Me. 414; special authority to accept or indorse bills is construed strictly: Byles on Bills 22; Story on Agency § 66; *Sewanee Company v. McCall* 3 Head 619; *Attwood v. Munnings* 7 B. &. C. 278; while the holder of the negotiable securities of a corporation may presume them to be issued by authority: (*Lexington v. Butler* 14 Wall. 282; *Farmers' Bank v. Butchers' Bank* 14 N. Y. 631); such authority cannot be presumed where the security is executed by an officer whose powers are limited: *Stoney v. Ins. Co.* 11 Paige 635; and the holder is put upon inquiry: *Gould v. Sterling* 23 N. Y. 456; *Schooner Freeman v. Buckingham* 18 How. 182; *Alexander v. Mackenzie* 6 C. B. 766; *Mechanic's Bank v. Railroad Company* 13 N. Y. 599; the powers of statutory corporations are limited to what is expressly conferred: *Weckler v. First Nat. Bank* 42 Md. 590; *Thomas v. Railroad Company* 101 U. S. 81; *East Anglian Co. v. Eastern Co.* 11 C. B. 775; *Ashbury Case* L. R. 7 App. Cases H. of L. 653; *Eastern Counties Ry v. Hawkes* 5 H. of L. Cas. 331; and if no express power to execute bills and notes is given and the only power to execute such paper is that which is incidental to the main undertaking, no power exists to execute merely accommodation paper: *Smead v. Ry. Co.* 11 Ind. 104, 109; *F. & M. Bank v. Troy City Bank*, 1 Doug. (Mich.) 457; *Cent. Bk. v. Empire Co.* 26 Barb. 23; *Morford v. Farmers' Bk.* id. 568; *Bridgeport v. Empire Co.* 30 Barb. 421; *Farmers' Bk. v. Empire Co.* 5 Bosw. 275; *Monument Nat. Bk. v. Globe Works* 101 Mass. 57; but an accommodation note made by an officer having, by virtue of his office, power to issue a note, is valid in bona fide hands. *Monument Nat. Bank v. Globe Works* 101 Mass. 57; *Mech. Bank Ass'n v. N. Y. White Lead Co.* 35 N. Y. 505; ultra vires transactions are void; *Thomas v. Railroad Company* 101 U. S. 71; *Lockhart v. VanAlstyne* 31 Mich. 76; the capital stock and assets of a corporation are trust funds for the benefit of its

creditors, and cannot be impaired by any device of its stockholders: *Sawyer v. Hoag* 17 Wall. 610; *County of Morgan v. Allen* 103 U. S. 498.

Long & Gold and *Geer & Williams* for appellee. An act done by an officer is presumed to be done within the scope of his duty: *Bank of U. S. v. Dandridge* 12 Wheat. 69; *Supervisors v. Schenck* 5 Wall. 782; *McNitt v. Turner* 16 Wall. 363; *Carpenter v. Rannels* 19 Wall. 146; *Cornett v. Williams* 20 Wall. 250; *Keely v. Sanders* 99 U. S. 447; *Nelson v. Eaton* 26 N. Y. 415; *Kent v. Quicksilver Mining Co.* 78 N. Y. 183; *Warren v. Ocean Ins. Co.* 16 Me. 451; *Flint v. Clinton Co.* 12 N. H. 434; strangers dealing with a corporation are only bound to know the powers conferred on it by its charter: *Miners' Ditch Co. v. Zellerbach* 37 Cal. 543; *Com'rs of Knox County v. Aspinwall* 21 How. 539; and may presume securities issued by it and held by him in good faith to have been properly issued if it has power under any such circumstances to issue such: *Gelpcke v. Dubuque* 1 Wall. 203; *Bissell v. M. S. & N. I. R. R. Co.* 22 N. Y. 290; *Bank of Vergennes v. Warren* 7 Hill 91; the rule of ultra vires does not apply where the case is not that of the exercise of a power not conferred, but the abuse of a general power: *Monument Bank v. Globe Works* 101 Mass. 57; if a corporation has power to make or take a note for any purpose a note originally given by or to it would be valid in the hands of a bona fide holder or a bona fide indorsee without notice, even though the corporation has no power to make or take the particular note: Ang. & Am. Corp. § 268; Field on Corp. § 270; *Safford v. Farmers' Bank* 4 Hill 442; *Willmarth v. Crawford* 10 Wend. 344; *Aken v. Blanchard* 32 Barb. 527; *Elwell v. Dodge* 33 Barb. 336; *Tome v. Parkersburg R. R.* 39 Md. 36: 17 Am. 540; *Genesee Bank v. Patchin Bank* 3 Kern. 309; *Mech. Banking Ass'n v. N. Y. & Saugerties White Lead Co.* 35 N. Y. 505.

Sherwood, J. This is an action of assumpsit against the Michigan Barge Company as maker, and Ferry & Brother

as indorsers, of a promissory note of which the following is a copy:

"$5000. GRAND HAVEN, MICH., Sept. 20, 1882.
Four months after date we promise to pay to the order of Ferry & Bro. five thousand dollars, at the Importers' & Traders' National Bank, New York. Value received.
MICHIGAN BARGE CO.
ANDREW THOMPSON, Treasurer."

The Michigan Barge Company and Edward P. Ferry pleaded the general issue. The former denied the execution of the note under oath. Thomas W. Ferry did not appear.

The Michigan Barge Company was duly organized on the 27th day of December, 1879. On the day the note sued on was made, the record shows that Thomas W. Ferry, Edward P. Ferry, John Furlong, Andrew Thompson, Henry G. Bigelow and Dwight Cutler were all the stockholders in said company; that the Ferrys held $199,325 of the stock, John Furlong $600, and the other three $25 each, and that this constituted all the stock of the company. It further appears that on that day the share of stock standing on the books in the name of Dwight Cutler was held by him solely for the use of T. W. Ferry, so as to enable Cutler to act as one of the officers and directors of the company, and he did so act and subsequently re-transferred the share of stock to T. W. Ferry.

On the day the note was given, so far as the record shows, T. W. Ferry, in matters relating to the Barge Company, acted for Edward P. Ferry as well as himself, and on the 20th day of September, 1882, Andrew Thompson was treasurer of the Barge Company and had been several years before, and Henry G. Bigelow was the secretary.

Among the articles of association adopted by the Barge Company in its organization is the following:

"The stock, property and affairs of said company shall be managed by a board of five directors who shall be stockholders, and all the rules and regulations for the conduct and management of the business of this company shall be in accordance with the provisions of the statutes under

which the company is organized, and of such by-laws as shall hereafter be adopted in pursuance of said statutes, and of these articles of association."

Among the by-laws adopted appears the following:

"The treasurer shall sign or indorse all drafts, notes and checks for the company, be custodian of its funds and disburse all moneys under direction of the board of directors; he shall give a satisfactory bond to the board of directors for the faithful performance of his duties."

"No debt shall be contracted for or against the company unless first authorized by vote of the board of directors, except such debts or credits as are necessary to carry on the ordinary current business of the company."

On the 3d day of January, 1881, the board of directors of the Michigan Barge Company took action as follows:

"The following resolution offered by Thomas W. Ferry and supported by John Furlong was adopted, viz.: That the several stockholders of this company have the right at any time, on their application to the treasurer, to the notes and indorsements of this company in such amounts as they may ask for, not exceeding at any and all times twenty-five per cent. of the par value of the stock severally owned, as appears upon the stock-books of the company, and at no time shall the secretary transfer or allow the transfer of any stock of any stockholder on the stock-book to an amount less than four times the amount of the notes and indorsements of the company which may at any time have been given such stockholder and outstanding uncanceled. Any resolution inconsistent with this is hereby rescinded."

The foregoing resolution was received in evidence without objection.

H. G. Bigelow, who was the first treasurer of the Michigan Barge Company and when the note was issued its secretary, was sworn for the plaintiff and testified: Andrew Thompson, the company's treasurer, made and executed the note; the signature of the company and body of the note are in his handwriting. He also testified that the indorsement of Ferry Brothers is in the handwriting of Thomas W. Ferry, and there is no pretense or showing that the note did not come to the possession and ownership of plaintiff in regular course of business and for value, but on the contrary it affirmatively appears without contradiction that it was so received by the Bank.

The record asserts the fact that the execution of the note was denied under oath, but by what authority or by whom such affidavit was made, we are not informed by the printed record. It is, however, difficult to understand under the facts stated in this record, and we have before us all the testimony taken in the bill of exceptions, how or upon what theory such an affidavit could be made. Under the articles of association and the by-laws of the Michigan Barge Company, its treasurer was authorized to execute the notes made by the company. In his official capacity the treasurer so signed this note. It was a negotiable promissory note, due four months after date, made and executed by the treasurer on the 20th day of September, 1882, payable to the order of Ferry & Bro., by whom it was indorsed and placed upon the market for sale with Orvis & Co., note brokers in the city of New York. These brokers sold the note to the plaintiff for its face value, and the owners of the paper received the proceeds thereof, and as we think the circuit judge very properly held, all the stockholders having any interest in the Barge Company had knowledge of the transaction; substantially that Ferry & Brother ran the Barge Company.

The plaintiff bought the note in good faith and paid its full value in money therefor, and when the same became due and plaintiff demanded its money, E. P. Ferry denied the contract made and his liability thereon, and permitted the Michigan Barge Company to deny not only all liability, but further that it ever made any contract creating the same. The evidence undisputed shows that it was for Ferry & Brother (of which firm E. P. Ferry was a member) that the note was made and executed, and for their benefit it was negotiated, and it is nowhere shown that they did not receive the benefit thereof.

Upon the facts as they appear upon this record the defense made is one not entitled to favor. This suit involves equitable rights of these parties, and unless compelled by some imperative rule of law to the contrary, it is clearly

our duty to sustain the claim made by plaintiff. After making proof of the articles of association and by-laws of the Michigan Barge Company, and the making and execution of the note by its treasurer, and the indorsement by Ferry & Brother, and that the plaintiff paid full value for it, the plaintiff offered the note in evidence. Defendants objected on the ground that it was incompetent, immaterial and irrelevant, and stated twenty reasons in support of the objection. After a careful examination, we find none of them sufficient to sustain the objection taken, and it was correctly overruled.

The plaintiff's cashier was sworn and by its counsel asked the following question in regard to the note: "At the time you purchased it, what knowledge had you, if any, of any defects in the note?" Defendants objected that it was incompetent, irrelevant, immaterial and calling for a conclusion. Certainly, if the defendant's theory of the case was correct, the testimony was proper. As the case stood, however, latent infirmities in the note were of no consequence, and the answer being that the witness had no knowledge of any, it could not prejudice the defendant. The objection was properly overruled.

The principal points relied upon by defendant's counsel are—*First*, that if the treasurer had authority to make and execute this note as treasurer he did not do so but executed it as agent, and his authority as such does not appear; *second*, that the treasurer had no authority to make and execute the note in behalf of the Barge Company; *third*, that the note was not issued in carrying on the ordinary and regular business of the Barge Company; it was therefore not binding upon the company, and the plaintiff was bound to take notice of these facts at his peril.

Counsel for defendant admit that the Barge Company had power under the statute to issue its negotiable paper in its regular business. The treasurer is the person designated by the articles of association and by-laws to make such paper. The note is made and executed in due form by the Barge Company, by Andrew Thompson, its treasurer, and not as agent. This disposes of the first point so relied upon.

The ordinary management of the affairs of the Barge Company was, undoubtedly, under the control of its directors. *Star Line of Steamers v. Van Vliet* 43 Mich. 364. At the time the note was issued there were but six stockholders in the company, and they were all its directors, and in that capacity duly passed the resolution of January 3, 1881, above given. This resolution, and the paragraph from the articles of association and by-laws of the Barge Company above quoted, clearly authorize the treasurer to make and execute the note in suit on behalf of the company. Either of the Ferrys, under the action of the board of directors, was entitled to have a note from the Barge Company, issued by its treasurer, of the amount of the one in suit, whenever application to the treasurer should be made therefor. No other of the stockholders, however, was entitled to such note. It is true, the firm of Ferry & Bro. were not stockholders, but its members were, and each had the right to have the note applied for by him made payable to such party as he might desire. It could make no difference to the Barge Company to whom the note was made payable; that was of no consequence; it was the note of the Barge Company or its indorsement the stockholder was entitled to when applied for. It is not necessary to determine what would be the effect of the resolution referred to were these stockholders who were not members of the board of directors, or to what extent such action would tend to bind them, but as the case is now presented it would be a fraud on justice to deny its binding force upon these defendants. This disposes of the second point.

The evidence that the plaintiff bought the note in good faith, and paid full value for it is undisputed. There is nothing appearing upon the face of the paper indicating a want of authority in the Barge Company to issue it, or that it was irregularly issued, or that it was not issued in the regular and ordinary transaction of the company's business. In such case, where the corporation has power to issue negotiable notes, and the purpose for which it issued them is not absolutely prohibited by statute, a bona fide holder

of its paper will be protected though it appears that the note was unauthorized for the particular purpose for which it was made; the rule being in this class of cases that, where a corporation has under any circumstances power to issue negotiable paper the bona fide holder has the right to presume that it was issued under the circumstances which gave the requisite authority, and the negotiable paper of a corporation, which appears on its face to have been duly issued by such corporation, and in conformity with the provisions of its charter, is valid in the hands of a bona fide holder.

The plaintiff's case is clearly within these rules. The circuit judge was evidently of the same opinion, and gave judgment accordingly.

That judgment must be affirmed with costs.

The other Justices concurred.

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ALBERT R. WILDEY v FARMERS' MUTUAL FIRE INSURANCE COMPANY OF VAN BUREN COUNTY.

Insurance—Loss of live stock in village barn.

A mutual insurance company organized under How. St. ch. 132 is allowed to insure "live stock, wagons, carriages, harness," etc., "being upon farms as farm property." The by-laws of a certain company did not allow it to insure village property that was within one hundred feet of other buildings, and provided for canceling the policy if the situation of insured property was so changed as to increase the risk. *Held,* that the company would not be liable for a horse, harness, cushion and blanket insured as "personal farm property in buildings and on farm," but destroyed by fire while in the barn of a village hotel that stood within one hundred feet of other buildings.

Error to Van Buren. (Mills, J.) Jan. 15.—Jan. 22.

ASSUMPSIT. Defendant brings error. Reversed

Lester A. Tabor for appellant. The best construction of a doubtful contract of mutual insurance is that which the

company has always acted on and in which the members have acquiesced: May on Ins. §§ 173, 178; *Citizens' Ins. Co. v. McLaughlin* 53 Penn. St. 485; *Daniels v. Hudson River Fire Ins. Co.* 12 Cush. 416; *Winthrop v. Union Ins. Co.* 2 Wash. C. C. 7; *Aurora Ins. Co. v. Eddy* 49 Ill. 106; where a mutual insurance company is prohibited from taking risks within specified territorial limits, and the insured covenants not to increase the risk, the breach of these conditions avoids the policy: *Richards v. Protection Ins. Co.* 30 Me. 273; *Pindar v. Continental Ins. Co.* 38 N. Y. 364; *Jones v. Firemans' Fund Ins. Co.* 51 N. Y. 318; *Murdock v. Chenango County Mut. Ins. Co.* 2 N. Y. 210; *Roberts v. Chenango County Mut. Ins. Co.* 3 Hill 501; *Hayward v. Liv. & London Ins. Co.* 3 Keyes 456; *Steinbach v. Relief Ins. Co.* 13 Wall. 183; *Lee v. Howard Ins. Co.* 3 Gray 592; *Whitmarsh v. Charter Oak Ins. Co.* 2 Allen 581; *Boatwright v. Ætna Ins. Co.* 1 Strob. 281; *Langworthy v. Oswego & Onondaga Ins. Co.* 85 N. Y. 632; where a policy provided that if the risk should be increased by means within the control of the assured the policy should be void, it was *held* that if the assured did any act which increased the risk he could not recover: *Appleby v. Astor Ins. Co.* 54 N. Y. 253; *Cornish v. Farm Buildings Ins. Co.* 74 N. Y. 295; *Mumlok v. Franklin* 65 N. Y. 556; *Daniels v. Equitable Ins. Co.* 48 Conn. 105; *Gorman v. Hand-in-hand Ins. Co.* 11 Weekly Rep. 224; *Boynton v. Clinton & Essex Ins. Co.* 16 Barb. 254; *Annapolis & Elkridge R. R. v. Balt. Ins. Co.* 32 Md. 37.

E. A. Crane for appellee. Insurance of farm property as such does not preclude recovery for its destruction while temporarily off the farm: May on Ins. 234; *Peterson v. Miss. Valley Ins. Co.* 24 Iowa 494; *Mills v. Farmers' Ins. Co.* 37 Iowa 400; *McCluer v. Girard Fire Ins. Co.* 43 Iowa 349; *Sawyer v. Dodge County Mutual Ins. Co.* 37 Wis. 503; *Fitchburg R. R. Co. v. Charlestown Mutual Fire Ins. Co.* 7 Gray 64; *Everett v. Continental Ins. Co.* 21 Minn. 76; *Edwards v. Farmers' Ins. Co.* 74 Ill. 84; *Longue-*

ville v. Western Assurance Co. 51 Iowa 553; *Holbrook v. St. Paul Fire and Marine Ins. Co.* 25 Minn. 229.

CAMPBELL, J. Plaintiff sued to recover insurance on a horse, harness, cushion and blanket, burned on the 6th of October, 1881, at a hotel barn in the village of Paw Paw near and within one hundred feet of other buildings.

The defense was that the policy did not cover this property when used and situated as it was when destroyed.

Defendant is a mutual fire insurance company organized under the statute of 1873, [How. St. ch. 132] and formed for the purpose of farm insurance. The entire property insured consisted of dwelling-house and contents, three barns and sheds and an item described as follows: "Personal farm property in buildings and on farm, $1000." The property burned, if insured at all, was part of this item. No other description is given, and the declaration instead of describing the property actually burned, avers the burning of all the property described in the policy.

The statute, which is closely followed in the articles of association, allows these companies to insure "dwelling-houses, barns, accompanying outbuildings and their contents, farm implements, hay, grain, wool and other products, live-stock, wagons, carriages, harness, household goods, wearing apparel, provisions, musical instruments and libraries, being upon farms as farm property." The articles allowed certain large tracts on the edges of villages to be included as farms, but the by-laws allowed no village property to be insured within one hundred feet of other buildings. They also provide for canceling the insurance where the situation of property is so changed as to enhance the risk. The court below adjudged a recovery, and while holding that the risk was enhanced, held that this was not done beyond what was contemplated.

The question for decision is whether under our statute and the articles and by-laws, property which is insured, not specifically, but only as included in "personal farm property in buildings and on farm," continues covered by insur-

ance when it is used and placed in a building remote from a farm and in a village, when the place of custody could not be insured by the defendant on any terms.

The case has been fully presented, and some decisions have been cited, which, if the facts were just such as those before us, would certainly lend force to plaintiff's arguments. But so far as we can gather from the statements in those cases they do not generally if at all resemble the present case in the restrictions put on the power of the company, or in the manner in which the property is described. Where particular property is specified as covered by the risk, it may very well be held covered though moved elsewhere, unless there are clear provisions to the contrary. But where property is only insured as farm property, it may be so restricted as to raise very different presumptions.

The loss here was by burning, and the only way in which live animals are likely to be burned is by the burning of such buildings as shelter them, or such surroundings as confine them. The situation of the building is, therefore, a very important consideration, because, where fire risks vary according to location, it is not reasonable to hold that any risks were designed to be covered except such as correspond with the rates and conditions of insurance. Under the present record no power existed in the officers of this company to insure any buildings but farm buildings, or any property but farm property. The reason for this is manifest. The statute and the articles and by-laws limit the risks to such as are likely to be very safe, and will not allow the ordinary risks of close habitations to be taken. No power is given to insure live-stock generally, but only farm stock, and all these provisions indicate clearly that the dangers of burning such animals, which the insurers are to guard against, are such burnings of property as are only within the exposure of farm dangers. We cannot satisfy ourselves that the company can be held liable for the burning of property under circumstances where a direct insurance would have been illegal. We are bound to look at the entire provisions and policy of these arrangements, and we

do not think there can be an implied liability in any case where an express undertaking is forbidden. If the company had more general powers, the case might appear very differently. We do not think the defendant can under this policy be liable for the burning of any of the contents of a village hotel barn close to other buildings and used with them.

In our opinion the judgment cannot be supported by the finding, and it must be reversed and a judgment entered for defendant with costs throughout.

COOLEY, C. J. and CHAMPLIN, J. concurred.

SHERWOOD, J. dissenting. I cannot concur in the views my brother Campbell takes of this case. The field of operations of this company included the whole of Van Buren county, in which the place where the property destroyed was located. The policy covered farm property including the horse destroyed.

At the time of the loss the owner was in the village of Paw Paw on legitimate business, and placed the horse for a short time in a hotel barn where farmers were generally in the habit of placing horses when in town on business, and while there the barn took fire and the horse was burned to death.

The plaintiff's farm was but three miles from Paw Paw. The policy, in giving the location of the property insured, places it on section nine, it being the farm of the plaintiff, and I fully agree with Judge Mills, before whom the cause was tried, that the reference to the property in the application and policy, as being on section nine, was intended to identify it by locating the place where it was kept, and not as a limitation of the locality in which it must continually remain in order to preserve the insurance.

And I further agree with his finding that at the time the property was destroyed it was located and being used under such circumstances as is generally the custom among farmers. And it was contemplated by the parties to the contract that it would be so located and used; that they contemplated the property destroyed would be taken by

plaintiff from the premises where it was needed in connection with plaintiff's ordinary use of the same, and while so removed might be subjected to greater risks than when on the farm; and that such increased risks, while in a hotel barn temporarily, as stated in the record, must have been contemplated and understood by the parties as within the contract of insurance. No other construction would seem to meet the necessities of the farmers, in whose interests this company was supposed to be organized.

I think the judgment rendered by the circuit judge was correct and should be affirmed with costs.

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92 447

ARTHUR W. ALEXANDER v. HARVEY A. RICE, CATHERINE ALEXANDER ET AL.

Probate Courts—Foreclosure by foreign executors—Stipulations.

1. The probate courts of Michigan are courts of general jurisdiction in probate matters; and where foreclosure proceedings were taken by foreign executors to whom letters testamentary had been issued in Michigan, and the proceedings were taken under a stipulation by the parties to the suit that the executors were duly appointed and acted as such, and the probate records showed nothing to the contrary, it was *assumed* that the appointment referred to in the stipulation meant the appointment in Michigan, and that such a showing was made to the court, by sworn petition or by oral proof, that the estate had such property interests in the county as would warrant the issue of the letters.

2. A foreclosure by executors is not invalidated by the fact that only two out of three executors acted if these two acted under proper authority and there is no showing that the third ever gave an official bond or qualified.

Appeal from Ionia. (Lovell, J.) Jan. 15-16.—Jan. 22.

BILL to set aside a mortgage. Defendants Rice appeal. Reversed and bill dismissed.

Mitchell, Bell & McGarry for complainants. The execu-

tion of a power confided to two or more persons requires the united and concurrent action of all, and the power is indivisible. Comp. L. § 4179; Hill on Trustees 136; *Ridgeley v. Johnson* 11 Barb. 527; *Ogden v. Smith* 2 Paige 197; *Barber v. Cary* 11 N. Y. 397; *Sinclair v. Jackson* 8 Cow. 543; *Berger v. Duff* 4 Johns. Ch. 368; Perry on Trusts §§ 441, 443; Sugd. on Powers 162, 263; *Scott v. Det. Y. M. Society* 1 Doug. (Mich.) 119, 149.

Henry B. Fallass for defendants Harvey A. and Eliza G. Rice. One administrator may act for the estate even if there be several administrators appointed: Williams on Executors 854; *Willand v. Fenn* 2 Ves. Sr. 267, 268. *Jacomb v. Harwood* 2 Ves. Sr. 267, 268.

Cooley, C. J. Complainant, who is one of the heirs at law of Alexander C. Alexander, late of the county of Ionia, and is the assignee of the other heirs, filed his bill in equity to set aside a mortgage given by the defendant Catharine Alexander to the defendant Harvey A. Rice for the sum of two thousand dollars, upon lands belonging to the estate. Catharine Alexander is the widow of Alexander C. Alexander, and the case turns upon the validity of the mortgage she gave.

It appears that at the time of the death of Alexander C. Alexander there was a mortgage on the lands in question, which was then held by Ira Davenport of Bath, New York. Davenport died in 1868, leaving a last will in which John Davenport, Ira Davenport, Jr. and Martin Adsit were named executors. The will was probated in Steuben county, New York, June 11, 1868, and letters testamentary were issued to John and Ira Davenport. On the 29th of the same month letters were issued by the same surrogate to all three of the executors. No explanation of these proceedings is given.

On July 8, 1868, a copy of the will and of the probate was produced and filed in the office of the judge of probate of Clinton county in this State, and the judge made an order for hearing upon it, August 3, 1868. No petition is on file in

the case, and the order for hearing does not refer to any such petition nor does it appear, either from the will or from the order, that there was any property belonging to the estate of Davenport to be administered in Clinton county. On the day named for hearing, an order was made by the judge of probate for the probate and recording of the will in Clinton county, and for the issue of letters testamentary to the three executors.

On August 20, 1868, proceedings were begun for the foreclosure of the mortgage by advertisement. The notice for the purpose was signed by John Davenport and Ira Davenport, and took no notice of the other executor. There is nothing in this case to show that Adsit had ever acted as executor, or that he was living at the time the foreclosure was begun. Neither is there anything to show the contrary. A sale was had under the notice, and the mortgaged premises were purchased by Joshua W. Waterman.

Before the year for redeeming from this sale had expired, Mrs. Alexander, who had been appointed administrator of her husband's estate, made an arrangement with Joshua W. Waterman, whereby she was to have three years to make payment in. Waterman gave her an ordinary land contract, in which he was named vendor of the land, and she, in her capacity of administrator, was named vendee, and she at the time paid him $800 of moneys belonging to the estate. A new contract was made between the parties in June, 1872, whereby Mrs. Alexander obtained further time for making payment. In this contract her administrative character was dropped.

In the following year Mrs. Alexander made arrangement with the defendant Harvey A. Rice for a loan which would enable her to pay off Waterman and obtain the title to the lands. To enable her to carry this arrangement into effect, Waterman conveyed the lands to her in pursuance of the second contract, and she then gave to Rice the mortgage which is now in controversy. At the time Waterman conveyed to Mrs. Alexander he had an apparent title of record. The sheriff's deed on the foreclosure sale was duly filed at

the time, or soon after the sale was made, and it was put on record three or four years afterwards.

On behalf of complainant it is contended that the mortgage foreclosure was void. The executors, it is said, were not entitled to foreclosure by virtue of the letters issued to them in the state of New York, and those issued to them in Michigan were invalid for the want of any petition to set the probate court of Clinton county in motion, and the absence of any showing of the jurisdictional fact that there was property belonging to the estate to be administered in that county. This contention is met by a stipulation entered into by the solicitors for the respective parties, bearing date April 14, 1879, whereby it was agreed "that Ira Davenport and John Davenport were duly nominated and appointed the executors of the last will and testament of said Ira Davenport, deceased, and took upon themselves, in pursuance of said appointment, the execution of such trust, and acted as such executors in the foreclosure proceedings had for the purpose of foreclosing said mortgage."

This stipulation must be understood to refer to the appointment by the letters issued in this State. But it is said on behalf of complainant that the stipulation is of matter of law, not of fact; and therefore not competent; and that in point of law the letters to these executors were not valid for the reasons already mentioned. We do not agree in this. The probate courts of this State are courts of general jurisdiction in probate matters, and if, consistent with what appears in their records, any showing might have been made which would support their orders, we must assume, with this stipulation before us, that such a showing was made before the probate court of Clinton county made the order for publication of notice. The showing required in this case was that there was property belonging to the estate in the county of Clinton. This might have been made either by the sworn petition or by oral proof; the latter method was equally admissible with the former. The parties might have stipulated that an oral showing was made, and it would have been sufficient: but they have chosen to

make a stipulation that covers all the essentials of valid probate action, and we have no doubt of their competency to do so, or that they are bound by what they have done in that regard.

That two only of the executors acted in foreclosing the mortgage is of no importance. It does not appear that the third executor ever gave bond or qualified; and if the two named in the stipulation acted under competent authority, the fact that a third party might, by taking the proper steps, have united with them, will not affect their action.

It is further contended that Rice did not take his mortgage in reliance upon a record title in Mrs. Alexander, and that it must be concluded, under the proofs in the case, that Rice knew all the facts, and knew that the lands did not belong to Mrs. Alexander but to the heirs. As has been already said, the record title was in Mrs. Alexander, and we are directed to no evidence which brings home to Rice knowledge or notice that she was not owner in fact. This being so, complainant has failed to make out any case against the mortgage.

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

The other Justices concurred.

August Rasch et al. v. Edward W. Bissell.

Statute of frauds—Bargain to make a costly coat

1. The Statute of Frauds declares that a contract for the sale of goods for more than fifty dollars shall not be valid unless the purchaser shall accept and receive part of the goods, or shall give something to bind the bargain, or unless some memorandum of the bargain shall be signed by the party to be charged. How. St. § 6186. *Held* that this does not cover a tailor's contract to make a customer a sixty dollar overcoat that has actually been sent to the customer when finished and has been returned by him for alterations after which it has been held subject to his order.

2. A jury must find for the plaintiff if his claim is supported by undisputed testimony which they believe.
3. A request to charge is properly refused if unsupported by testimony.

Error to Wayne. (Jennison, J.) Jan. 16.—Jan. 22.

ASSUMPSIT. Defendant brings error. Affirmed.

Sands F. Moore and *Henry M. Duffield* for appellant.

J. W. Donovan for appellee.

SHERWOOD, J. The plaintiffs were merchant tailors and did business in Detroit. They were employed to make, and did make, an overcoat for the defendant, the agreed price for which was to be sixty dollars. The coat was made like the sample designated by the defendant at the time it was ordered, and when completed, which was in good time, the plaintiffs sent it to the defendant at his house.

In a day or two thereafter it was returned to the plaintiffs, to be made a little larger, which was done by plaintiffs, and in a few days thereafter again sent to defendant at his house. Defendant returned it, saying it was not heavy enough for him. Plaintiffs then showed him the sample overcoat, and that it was completed according to the contract. The plaintiffs, however, told him they could make it heavier, and did so, and again sent the coat home. The next morning defendant sent it back with a message saying he did not want it, and when plaintiffs saw him a few days thereafter, at his office, he informed them he "did not wish for a coat, for he had bought a ready-made one." He then refused to take the coat and pay for it. The evidence shows it was well made, and a reasonably good fit. The plaintiffs brought suit in assumpsit, and declared on all the common counts and specially upon the contract. The case was tried at the circuit on appeal before a jury, and the plaintiffs recovered a judgment of $60. The defendant brings error.

Rasch was the only witness sworn, and all the testimony given upon the trial was by the plaintiff. Rasch testified to the facts above stated, and at the close of the trial the court charged the jury that, if they believed Mr. Rasch, the plaintiffs had made out a prima facie case, and their verdict

should be for the plaintiffs. He also further charged the following: "The defendant has not seen fit to come in here and offer evidence, or try the overcoat on in your presence, or bring experts to show that it was not a good fit. Now, that is his privilege. If his attorney was satisfied, or if he thought that the plaintiff did not make out a good case, he was not obliged to call Mr. Bissell; but I charge you that, if you believe Mr. Rasch, your verdict will be for the plaintiffs, for Mr. Rasch, for $60, until the defendant brings in evidence here to overcome that testimony."

These charges were excepted to. They are not erroneous. They were fully warranted by the testimony in the case. The evidence alluded to therein stands undisputed, and, if believed by the jury, their duty was not too strongly indicated by the court. This disposes of defendant's first, second, fourth, fifth, seventh, tenth and eleventh assignments of error.

There was no testimony to support the defendant's third request to charge, and no error was committed in its refusal.

That portion of the charge contained in defendant's eighth assignment of error, wherein the court states what was comprehended in the order for work at plaintiff's store, was unobjectionable, but if erroneous it could not have harmed the defendant.

The charge in the twelfth assignment, we think, was supported by the evidence in substance.

The remaining assignment assumes the claim made by the plaintiffs is within the Statute of Frauds. This is a mistake. That question is not involved in the case. The testimony clearly shows that the property contracted for was delivered to the defendant in pursuance of the contract, with which it complied. Whatever changes were afterwards made in the garment were so made at the request of the defendant, and since that time plaintiffs have held it subject to the disposition of the defendant.

We find no error in the record, and the judgment must be affirmed with costs.

The other Justices concurred.

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133 548
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d137 198

The City of Detroit v. William Jepp.

Municipal taxes—Enforcement of collection.

An action by a city for unpaid taxes on personal property will not lie, except so far as specially provided for, if provision is already made by the city charter for a specific remedy, such as collection by process from the receiver of taxes and by levy on any personal property within the city.

Error to Wayne. (Jennison, J.) Jan. 16.—Jan. 22.

Assumpsit. Defendant brings error. Reversed.

William Look and *Weeks & Randall* for appellant. Where a city's charter prescribes a specific mode of enforcing payment of a tax by distress and sale, it supersedes any action for it: Dill. Mun. Corp. § 653; *Camden v. Allen* 2 Dutch. 398; *Peirce v. Boston* 3 Met. 520; *Flournoy v. Jeffersonville* 17 Ind. 169; *Shaw v. Peckett* 26 Vt. 486; *Lane County v. Oregon* 7 Wal. 81; *Durant v. Supervisors* 26 Wend. 66; *Cooper v. Savannah* 4 Ga. 68; *Alexander v. Helber* 35 Mo. 334; Cooley on Taxation 13; *Stevens v. Evans* 2 Burr. 1152; *Staley v. Columbus* 36 Mich. 38; *McCallum v. Bethany* 42 Mich. 457; *Putman v. Fife Lake* 45 Mich. 125.

Henry M. Duffield for appellee. A general tax legally levied and assessed by a municipal corporation, pursuant to its charter, creates a legal obligation to pay such tax, and the corporation can recover it in assumpsit, even though there be a summary mode of recovery provided for in the charter and ordinance of the municipality. 2 Dill. Mun. Corp. (3d ed) § 817; *Dugan v. Baltimore* 1 Gill & J. 499; *Mayor v. Howard* 6 Har. & J. 383; *Gordon v. Baltimore* 5 Gill 243; *Eschbach v. Pitts* 6 Md. 71; *State v. Southern Steamship Co.* 13 La. Ann. 497; *Dunlap v. County* 15 Ill. 9; *Ryan v. County* 14 Ill. 83; *Geneva v. Cole* 61 Ill. 397; *Mayor v. M'Kee* 2 Yerg. 167; *Dubuque v. Ill. Cent. R. R. Co.* 39 Ia. 56.

CAMPBELL, J. The only question in this case is, whether under the charter of Detroit, as existing previous to July, 1881, suit could be brought by the city for unpaid personal property taxes.

The charter provided very fully for the enforcement of such collection by process from the Receiver of Taxes, who could at any time after default collect the amount by levy on any personal property of the delinquent within any part of the city. No provision was made to sell lands, except for the land taxes.

It has always been recognized as the law of this State, that where such a specific remedy is provided in the tax law as the proper method of collection, no suit will lie unless specially provided for, and then only as so provided. *Staley v. Columbus* 36 Mich. 38; *McCallum v. Bethany* 42 Mich. 457; *Putman v. Fife Lake* 45 Mich. 125. Such is the weight of authority elsewhere under similar conditions. See Cooley on Taxation 13.

Nothing has been pointed out in the charter which directly or impliedly favors any different doctrine. And it may be suggested that in the recent revision of the charter in 1883, the language of the old charter was radically changed, not only by declaring such taxes to stand as personal debts, but also by providing expressly for suits on default, and limiting those suits without reference to amount to the circuit court for the county of Wayne,—thus shutting out actions before justices, and before the Superior or Recorder's courts, and the courts of other counties. Charter, chap. 10, § 10.

We think the action did not lie.

The judgment must be reversed with costs of both courts, and judgment entered on the finding for defendant.

The other Justices concurred.

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62 368
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68 479
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72 177
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107 118
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121 296
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153 403
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j153 2414

JOHN GALLOWAY v. PATRICK H. CORBITT.

Certiorari—Justice's presence in jury room.

1. Certiorari does not lie for the review of merely technical defects in the proceedings of a justice, unless they go to the foundation of the action; the proper remedy is by appeal, when the case can be re-tried and determined on its merits.
2. A justice's return to a writ of certiorari must be taken as true.
3. A justice of the peace has no right to go alone into the jury room to advise the jury, even at their request, unless the parties or their counsel consent.

Error to Wayne. (Certiorari.) Jan. 16.—Jan. 22.

ASSUMPSIT. Plaintiff brings error. Reversed.

Stewart & Galloway for appellant. Answering a question by the jury in the absence of counsel is not necessarily error (*Thayer v. Van Vleet* 5 Johns. 111) and going to them with the counsel and discussing the same matter again would cure it: *Smoke v. Jones* 35 Mich. 409.

R. Laidlaw for appellee.

CHAMPLIN, J. This case was brought into this Court by writ of error to the circuit court for the county of Wayne. The suit was originally commenced in justice's court, and was brought from thence to the circuit by writ of certiorari.

The return of the justice shows that the case was tried before a jury, and after the testimony was closed the jury retired to consider their verdict under the charge of an officer duly sworn; and after they had been out a few moments the justice, at the request of the jury, entered the jury-room in the absence of the parties, and was asked by the jury the following question: "Can we reduce the amount of the note?" To which he made answer: "No; you will have to allow in full the amount due on the note when plaintiff purchased it, if before maturity, or disallow it."

He was requested a second time by the jury to enter the jury-room, which he did in company with the plaintiff and defendant, who both consented to his entering the room the second time. The jury asked the same question they asked before, and the attorneys each gave their views of the law bearing upon the question, after which the justice and attorneys retired from the room.

The jury, after further deliberation, returned a verdict for the plaintiff for thirty-five dollars, and the justice rendered a judgment for that amount.

The only allegation of error set out in the affidavit for the writ of certiorari is that the justice erred in entering the jury-room after the jury were in charge of an officer, without the consent of the defendant, and advising with them during their deliberations, upon the law and evidence in the case. For this error assigned the circuit judge reversed the judgment of the justice, and this reversal is assigned as error here.

It was highly improper for the justice to enter the jury-room, whether requested to do so by the jury or not, alone, without consent of the parties or attorneys, after the jury had retired to deliberate. But whether it was such an error as calls for a reversal of the judgment upon certiorari is quite another question.

We have here, from the justice's return, a statement of all that occurred, and in passing upon this question we must take his return as true. We cannot say that it was an error that prejudiced the rights of the defendant. *Hart v. Lindley* 50 Mich. 20; *Thayer v. Van Vleet* 5 Johns. 111; *Blackley v. Sheldon* 7 Johns. 32; *Henlow v. Leonard* 7 Johns. 200; *Whitney v. Crim* 1 Hill 61.

If the defendant was dissatisfied with the verdict and judgment, as being against his substantial rights, a more appropriate remedy would have been an appeal to the circuit court, where the case could have been tried and determined upon its merits. This Court has heretofore expressed its disapprobation of the practice of taking advantage of technical errors in the proceedings before justices of the

peace, by the process of certiorari, thus converting what was designed to be a speedy and inexpensive court for the trial of causes into a costly and dilatory tribunal, and often in its practical operation, through serious delays, defeating the ends of justice; and we are of opinion that except for errors which go to the foundation of the action, the proper remedy is by appeal. *Erie Preserving Co. v. Witherspoon* 49 Mich. 377.

The judgment of the circuit court is reversed and that of the justice affirmed with costs of this Court and of the circuit.

The other Justices concurred.

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107 56

52 462
149 [1]524

52 462
152 [2]431

MALCOLM J. WHITING v. PETER OHLERT.

Statute of frauds—Agreement for future lease.

1. An agreement for a lease may be a different thing from the lease.
2. A parol agreement for a year's lease to begin in the future is valid, and not within the Statute of Frauds as an oral contract for more than a year's lease.

Error to Wayne. (Chambers, J.) Jan. 16.—Jan. 22.

ASSUMPSIT. Plaintiff brings error. Reversed.

Stewart & Galloway for appellant.

James H. Pound for appellee. A leasehold interest is a chattel (4 Kent Com. 95) and a lease cannot be made by parol for the full term allowed by law, to begin at a future time, because it cannot be fully performed within a year from the making thereof. *Boydell v. Drummond* 11 East 142; *Bracegirdle v. Heald* 1 B. & Ald. 722; *Snelling v. Huntingfield* 1 C. M. & R. 20; *Giraud v. Richmond* 2 C. B. 835; *Lockwood v. Barnes* 3 Hill 128; *Wolf v. Dozer* 22 Kas. 436; *Whiting v. Pittsburgh Opera Co.* 88 Penn. St.

100; *Scoggin v. Blackwell* 36 Ala. 351; *Parker v. Hollis* 50 Ala. 411; *Stackberger v. Mosteller* 4 Ind. 461; *Delano v. Montague* 4 Cush. 42; *Grant v. Ramsey* 7 Ohio St. 157; *Larkin v. Avery* 23 Conn. 304; *Janes v. Finny* 1 Root 549.

CAMPBELL, J. This was an action by a tenant against his landlord for disturbance in his enjoyment. The main dispute was concerning the validity of the lease. The testimony tended to show an agreement by parol in April for a year's tenancy from the beginning of May. The court below held that an agreement by parol for a full term of a year, to begin in the future, was void under the Statute of Frauds. That statute provides that all contracts for the leasing for more than one year of lands shall be void unless in writing. Comp. L. § 4694. [How. St. § 6181.] The only other provision supposed to be involved is that which declares that every agreement which by its terms is not to be performed within one year must be in writing. Comp. L. § 4698. [How. St. § 6185.]

The distinction between an agreement for a lease and the lease itself was pointed out in *Tillman v. Fuller* 13 Mich. 113. It is very well settled that a lease may be made to take effect in future, and that the estate does not begin with the contract, but with the future period. *Young v. Dake* 5 N. Y. 463; *Trull v. Granger* 8 N. Y. 115; *Wood v. Hubbell* 10 N. Y. 479. It is held in New York, under a statute corresponding to ours, that an agreement by parol for a future term not exceeding one year is valid, and not within the statute. *Young v. Dake* 5 N. Y. 463. That case is well considered, and is, we think, a fair construction of the statute, which ought not to be given a strained meaning. The same doctrine has been adhered to in that state, and is re-affirmed emphatically in *Becar v. Flues* 64 N. Y. 518, where a tenant was held liable for the agreed rent, who had never gone into possession, and had declined to do so.

Concurring, as we do, in this view of the law, we think the court below erred in its ruling, and should have allowed

a recovery of damages for the injury done plaintiff. We note further in the record that the right of possession seems to have been determined in plaintiff's favor in proceedings before a commissioner, and we cannot understand why on any theory his recovery, to some extent at least, was questionable. But as tenant for a year he was of course entitled to larger damages.

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

The other Justices concurred.

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106 253

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d119 422
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f122 387

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124 635

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147 322

Mary Peet v. Warren L. Peet et al.

Constructive matrimony—Reputation—Widow's claim.

1. Continued cohabitation as husband and wife establishes the relation without any actual marriage ceremony if the parties are competent to marry and consent to take each other as husband and wife.

2. Reputation is important as evidence to establish the fact of a marriage, but it cannot disprove an actual marriage. And where there is doubt, the presumption should favor a lawful marriage rather than notorious immorality.

3. A man and woman lived together, as if they were husband and wife, for twenty years and had thirteen children. Then they separated and during the man's life the woman was formally married to another man who lived with her nearly three years and then married another woman while the first was still living. *Held* that the first couple were husband and wife, and the following marriage therefore void, so that the last marriage was valid and the woman entitled to claim a widow's share of her husband's estate upon his death.

Error to Clinton. (V. H. Smith, J.) Jan. 17.—Jan. 22.

Appeal from probate allowance against the estate of Lucius H. Peet. Claimant brings error. Reversed.

O. L. Spaulding and *O. W. Barker* for appellant. Repute and conduct are evidence of marriage: *Richard v.*

Brehem 73 Penn. St. 140; *Lyle v. Elwood* 11 Eng. 702; cohabitation as husband and wife is presumed lawful till the contrary appears, but if the relation was meretricious at first, living together and long recognition as husband and wife and birth of children raise a presumption of subsequent marriage: *Proctor v. Bigelow* 38 Mich. 282; *Hutchins v. Kimmell* 31 Mich. 126; Husbands on Married Women §§ 3–5; *Caujolle v. Ferrie* 23 N. Y 91; *O'Gara v. Eisenlohr* 38 N. Y. 296; *Hynes v. McDermott* 82 N. Y. 46: 91 N. Y. 451; *Betsinger v. Chapman* 88 N. Y. 487; 2 Greenl. Ev. § 462; *Fenton v. Reed* 4 Johns. 51; and such a relation would render invalid the subsequent marriage of either party in the life-time of the other: *Drummond v. Irish* 52 Ia. 41; *Reeves v. Reeves* 54 Ill. 332; *Blossom v. Barrett* 37 N. Y. 434.

A. Stout for appellees. Cohabitation cannot amount to marriage if it is meretricious: Husbands on Mar. Women 12 n; *Cunningham v. Cunningham* 2 Dowl. P C. 511; where marriage was shown to have existed as a fact and cohabitation followed, this direct proof of an actual marriage was held not to be rebutted by proof of a previous cohabitation, merely, by one of the parties with a former apparently matrimonial partner: *Wheeler v Mc Williams* 2 U. C. (Q. B.) 77; *Clayton v. Wardell* 4 N. Y. 230; *Jones v. Jones* 48 Md. 391: 45 Md. 144: 30 Am. Rep. 466; *Taylor v. Taylor* 1 Lee 571; *Poultney v. Fairhaven* Brayt. (Vt.) 185; *Senser v. Bower* 1 Penr. & Watts 450; *Weatherford v. Weatherford* 20 Ala. 548.

Cooley, C. J. Mary Peet, claiming to be the widow of Lucius H. Peet, late of Clinton county, deceased, filed in the probate court for that county, where his estate was being administered, a claim to an allowance as such widow. The heirs contested her claim upon the ground that she was never legally married to the decedent. The probate court made the allowance prayed for and the heirs appealed.

In the circuit court the judge heard the case without the assistance of a jury, and made findings of the facts. From

these findings he concluded as matter of law that the claimant was not the widow of the decedent, and gave judgment against her. The case is brought to this Court by writ of error.

The second of the judge's findings of fact is as follows:

"Mary Peet, this claimant, and Lucius H. Peet were married February 28, 1858, and lived and cohabited together as husband and wife until some time in November, 1880, when Lucius H. Peet died. In this case there was an actual marriage ceremony according to the laws of this State."

This finding, it will be seen, makes out an apparent right in the claimant to the allowance asked for, and we have only to see whether in the other findings there is anything to overcome this prima facie right.

The other findings are as follows:

"David and Deborah Belcher lived together as husband and wife, previous to 1847 or 1848, for about twenty years, and had thirteen children, and ceased entirely from living together in 1847 or 1848, he, David, going away from Deborah sometimes and coming back when he wished, there being no evidence, however, that such absences were intended to be a separation, or anything more than occasional absences from home. They had some trouble between one another while living together as husband and wife. The reputation as to their being husband and wife was divided and no actual marriage ceremony is shown between David and Deborah Belcher. David Belcher died in 1860.

Lucius H. Peet and Deborah Belcher were married in February, 1855, and lived together as husband and wife about two and one-half years. In this case there was an actual marriage ceremony according to the laws of this State.

Deborah Belcher was living at the time of the marriage of Lucius H. Peet and Mary Peet."

These are the facts from which the circuit judge deduced the conclusion of law that the claimant was never legally married to the decedent. We can not assent to this conclusion.

The marriage of the claimant was indisputably legal, unless Lucius H. Peet had at the time of its solemnization a lawful wife living. He had gone through the forms of marriage with Deborah Belcher, but after a time had aban-

doned her, and it is inferable that he did so because he had become convinced she had in David Belcher a lawful husband living. If she had, he was justified in leaving her, and in entering into marriage relations with the claimant.

The whole case therefore turns upon the question whether it appears that David and Deborah Belcher were husband and wife. It is not shown that any marriage ceremony ever took place between them; neither is the contrary proved; there is simply an absence of any evidence on that point. But an actual ceremony of marriage is not essential to the establishment of the relation of husband and wife; it is sufficient that a man and woman of due competency, and in respect to whom no impediment exists, consent to take each other as husband and wife, and actually cohabit as such. The case of *Hutchins v. Kimmell* 31 Mich. 126; s. c. 18 Am. Rep. 164, determines this for this State, and refers to many decisions in other states to the same effect.

Now the circuit judge finds that David and Deborah Belcher lived together as husband and wife for about twenty years and had thirteen children. If they were living together as husband and wife their relations were not meretricious. The finding is equivalent to a finding that they had taken each other for husband and wife; and is therefore a finding of the fact of marriage.

The circuit judge attached importance to the fact that the reputation as to these parties being husband and wife was divided; that is, we suppose, that some people believed and said they were married and others believed and said the contrary. Reputation is sometimes very important when a marriage is in doubt; but it is only one of the circumstances from which the true relations of the parties, as legal or otherwise, may be inferred; it is not in itself a fact which is at all important to the validity of the relation. When a marriage in fact is made out, whether by formal ceremony or otherwise, it must stand, though the whole community say and believe it is illegal. But upon doubtful facts the court ought to presume a lawful marriage rather than a notorious act of immorality. *Starr v. Peck* 1 Hill 270, 272.

It is suggested on behalf of the heirs that the circuit judge did not intend to find that David and Deborah Belcher were married, and did not understand his finding on that subject to bear such a construction. That being so, we ought, it is said, to look into the evidence, and if it is evident from that that a conclusion against marriage should be drawn, the case should go back for a new trial. We have looked into the evidence and are clearly of opinion that a marriage ought to have been found. There is really nothing to raise doubts about it, except that some of their acquaintances did not believe they were married. On much less evidence than the living together for twenty years, and the bringing of thirteen children into the world, marriage has been inferred even in cases where the cohabitation was shown to be meretricious in its origin. *Fenton v. Reed* 4 Johns. 52; s. c. 4 Am. Dec. 244; *Taylor v. Swett* 3 La. 33; s. c. 22 Am. Dec. 156; *North v. North* 1 Barb. Ch. 241, s. c. 43 Am. Dec. 778; *Caujolle v. Ferrie* 23 N. Y. 90. In this case there was no such showing.

The order of the circuit court must be set aside and that of the probate court affirmed, and the claimant must recover costs of all the courts.

The other Justices concurred.

ALEXANDER MCLENNAN v. DONALD MCDERMID ET AL.

Election between counts—Sale subject to inspection—Damages.

1. Whether it is not an abuse of judicial discretion to allow a plaintiff who has elected to proceed under special counts to change his election and ask for judgment on the common counts—Q. But where, in either case, the plaintiff must rely on the same facts and the defense is the same, the error is unimportant.

2. In suing for the price of a quantity of timber shipped to defendants at a distance, and received subject to inspection, it is proper for plaintiff to show, as an element in the case, how much was loaded

for shipment, if it appears that some of it was taken by defendants before inspection and that they used some which did not pass.

3. The measure of damages for lumber sold under a contract, subject to inspection, is the contract price for such as passed inspection, and the market value for such as did not but was taken by defendant.

Error to Mackinac. (Steere, J.) Jan. 17.—Jan. 22.

ASSUMPSIT. Defendants bring error. Affirmed.

Humphrey & Perkins for appellants.

Cady & Hoffman for appellee. Where anything has been done under an agreement, from which one party has received substantial benefit which he has appropriated, recovery may had based for that benefit on quantum meruit. *Allen v. McKibbin* 5 Mich. 449; *Chapman v. Dease* 34 Mich. 375.

COOLEY, C. J. This suit was once before in this Court, and the decision upon the questions then raised is reported in 50 Mich. 379. The case has been re-tried and a judgment rendered for the plaintiff, upon which the defendants again bring error.

The action was for the recovery of the price or value of timber sold by plaintiff to be delivered to defendants at St. Ignace. The terms of the sale were in writing, and the contract specified that the timber should be subject to inspection by the inspector of the Detroit, Mackinaw & Marquette Railroad Company. The timber was cut in the woods at some distance from St. Ignace, and sent forward by rail, and the parties were in controversy respecting the amount received by the defendants.

The declaration contained counts on the contract, and also the common counts. The court required the plaintiff to elect whether he would proceed on the special counts or on the common counts, and he first elected to proceed on the special counts, but afterwards, and before the case went to the jury, was permitted to change this election, and to ask for judgment on the common counts. This permission is

complained of; and it certainly seems to have been a very liberal exercise of judicial discretion. Under the circumstances of this case, however, we cannot think the defendants were injured or embarrassed by it. The case was such that, whether recovery was asked on the special or the general counts, the same facts had to be relied upon by the plaintiff, and the same defense made. We think there was no legal error in this ruling.

The plaintiff, in making proof of the amount of his timber received by the defendants, called the inspector of the railroad company, who testified that he inspected the timber received at St. Ignace, and that a certain quantity which he specified passed inspection, while a large quantity was rejected. It appears from his testimony that timber was used by defendants before inspection; and this was not only a method of dealing with the property which was not contemplated by the contract, but also one very well calculated to raise doubts and create difficulties in making proof of the amount for which defendants should be held accountable. It also appears that defendants made use of considerable timber which had been rejected by the inspector. Plaintiff claimed that there was delivered of his timber at St. Ignace for defendants, 25,394 feet, and that the whole amount, less 2889 feet, was used or made away with by them. In making out his case he was allowed, against the objection of defendants, to testify that he put the quantity of timber first mentioned on the cars to be sent forward to St. Ignace. This, it is very truly said, did not show that the defendants received all that was thus put upon the cars; but it might be a necessary step in making such showing. The difficulty in getting at the exact facts on this branch of the case was chargeable, in part at least, to the loose manner in which the business was done; and for this the defendants and their agents were largely chargeable. The plaintiff was not to be shut off by this difficulty from showing how much of his timber the defendants had received, and he must get at the facts as best he could under the circumstances. If he failed to trace the timber from the woods to defendants, it

is to be supposed the defendants would be able to point out the failure to the jury; but they were not entitled to shut out an item of evidence, which might be an important part of a complete showing, because of its incompleteness or futility by itself.

The judge in submitting the case to the jury instructed them that defendants should be charged for the timber which passed inspection, at the contract price, and for all other timber which they took and used, at its market value. This instruction was correct. If defendants appropriated any of plaintiff's property otherwise than according to the terms of the contract, their liability must be determined irrespective of the contract. The charge of the judge seems to have been in all respects fair, and though a large number of exceptions were taken, we do not discover any plain error, or anything further in the case which calls for discussion.

The judgment will be affirmed.

The other Justices concurred.

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ADALINE A. SUTHERLAND v. ALFRED R. CARTER.

Replevin by tenant-in-common.

One who has leased a farm upon the tenant's agreement to deliver in payment half the produce is a tenant-in-common in respect to such produce and can maintain replevin for it after it is in condition to deliver.

Error to Saginaw. (Gage, J.) Jan. 18.—Jan. 22.

REPLEVIN. Defendant brings error. Affirmed.

Trask, Grout & Smith and *Ferdinand Brucker* for appellant. A landlord who is to have a share of the crop raised by a tenant in exclusive possession has no such right to the possession of his share as will entitle him to maintain replevin for it, until the crop is divided and his share delivered to him: Thompson's Law of the Farm § 333; *Dulany*

v. Dickerson 12 Ala. 601; Taylor's L. & T. § 24; *Tuttle v. Bebee* 8 Johns. 152; *Bailey v. Fillebrown* 9 Me. 12; *Dockham v. Parker* id. 137; *Symonds v. Hall* 37 Me. 354; *Garland v. Hillborn* 23 Me. 442; *Hatch v. Hart* 40 N. H. 97; *Walls v. Preston* 25 Cal. 59; *Smyth v. Tankersly* 20 Ala. 216; *Butterfield v. Baker* 5 Pick. 522; *Ross v. Swaringer* 9 Ired. N.C. L. 481; *Ream v. Harnish* 45 Penn. St. 376; *Schwartz v. Skinner* 47 Cal. 3; *Burns v. Cooper* 31 Penn St. 429; *Parsons v. Boyd* 20 Ala. 112; *Frierson v. Frierson* 21 Ala. 549; *Bell v. Hogan* 1 Stew. (Ala.) 536; *Hunt v. Chambers* 21 N. J. L. 620; *M'Elderry v. Flannagan* 1 Har. & G. 308; *Wilson v. Gray* 8 Watts 25; *Alford v. Bradeen* 1 Nev. 228; *Brown v. Lincoln* 47 N. H. 468; *Jeter v. Penn* 28 La. Ann. 230: 26 Am. Rep. 98; and the rule applies where the crops are held by tenants in common: *Crouse v. Derbyshire* 10 Mich. 479; *Chisholm v. Hawkins* 11 Ind. 316; *Fowler v. Hawkins* 17 Ind. 211; *Lindley v. Kelley* 42 Ind. 294; *Lacy v. Weaver* 49 Ind. 373; *Alwood v. Ruckman* 21 Ill. 200; *Dixon v. Niccolls* 39 Ill. 372; *Parker v. Garrison* 61 Ill. 251; *Sargent v. Courrier* 66 Ill. 245; *Daniels v. Brown* 34 N. H. 454; *Ellis v. Culver* 2 Harr. (Del.) 129; *Strong v. Colter* 13 Minn. 82; *Usry v. Rainwater* 40 Ga. 328.

L. C. Holden and *J. M. Harris* for appellees. One who is entitled to a share of property which can be divided can maintain replevin for it: *Kaufmann v. Schilling* 58 Mo. 219; *Inglebright v. Hammond* 19 Ohio 337; *Fiquet v. Allison* 12 Mich. 328; Wells on Replevin 112; and see *Kindy v. Green* 32 Mich. 310.

Sherwood, J. This action is replevin for a quantity of wheat and oats raised by Carter, as Mrs. Sutherland's tenant, on her farm, she having on the 1st day of January, 1880, leased the same to Carter for three years, he agreeing to pay her one-half the hay, grain, roots and fruits, and in good season and good order, as her share for the rent, and deliver the same to her on the farm. They were to share equally in all pasturage and the profits therefrom.

The parties seem to have got along without difficulty until October, 1882, when Carter threshed the grain. At this time when the threshing was completed the plaintiff asked to have her half of the grain delivered to her according to the terms of the lease. This Carter refused to do, and immediately carried the wheat off from the farm to a neighbor's barn (said neighbor being the other defendant named in the record) and locked it up. Plaintiff went to the barn and demanded her half of the grain again, of both the defendants, and they refused to comply with her request and she therefore brought this suit.

The case was tried by the court and plaintiff recovered her damages and costs, the property having been taken on the writ and delivered to plaintiff.

The defendant Carter brings error and the case is before us on findings by the circuit judge.

In addition to the facts above stated the circuit judge found that at the time the demand was made and the suit brought the grain was an undivided mass, but was of the same general kind, quality and value; and the value of the grain.

The court found as conclusions of law that the plaintiff became owner of one-half the grain raised, and that under the facts in the case she was entitled to maintain her suit against Carter therefor.

We think the circuit judge was correct. The plaintiff was tenant in common of the grain, and after it was threshed she was entitled to her one-half thereof, and it was Carter's duty to deliver it to her when she demanded it upon the farm. It was her property, and the action will lie in such a case under the facts found in this record. Wells on Replevin § 205; *Kaufmann v. Schilling* 58 Mo. 219; *Inglebright v. Hammond* 19 Ohio 337; *Ryder v. Hathaway* 21 Pick. 305; *Warner v. Cushman* 31 Ill. 283; Tayl. Landl. & T. 19 (6th ed.) and authorities cited under note 5; *Caswell v. Districh* 15 Wend. 379; *Crouse v. Derbyshire* 10 Mich. 479; *Fiquet v. Allison* 12 Mich. 328; *Kindy v. Green* 32 Mich. 310.

The judgment must be affirmed with costs.

The other Justices concurred.

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WALKER B. SHERMAN v. CHAUNCEY JOSLIN, CIRCUIT JUDGE FOR WASHTENAW COUNTY.

Costs on appeal from a justice—Appeal from taxation—Attendance of witnesses.

1. The statute permitting a circuit judge to award the costs, on an appeal from a justice, to either party (How. St. § 7026), does not apply where the plaintiff has discontinued after the case has been sent back to the circuit for a new trial upon a reversal in defendant's favor; in such cases defendant is entitled to costs as a matter of right.
2. An appellant's right to costs is fixed by the entry of a judgment for reversal with costs, if his adversary discontinues without taking a new trial.
3. Witness fees must be taxed as costs in accordance with the showing made by the statutory affidavit attached to the bill of costs, unless there is a counter showing.
4. When an appeal from the taxation of costs by the county clerk is taken to the circuit judge, the party appealing should specially except in writing to the allowances or disallowances complained of; and the bill of costs should then go upon those exceptions alone and on the same showing as was made to the clerk.

Mandamus. Submitted and granted Jan. 29.

A. E. Hewitt and *Hewitt & Freeman* for relator.

E. B. Norris for respondent.

PER CURIAM. Sherman was a party defendant in a case in justice's court, which was appealed to and tried in the circuit court, where judgment passed against him. He brought the case to this Court, where the judgment was reversed and a new trial ordered. The case was noticed for trial, but before it was reached the plaintiff discontinued his suit. The defendant thereupon prepared and served a bill of costs, and the same was taxed by the county clerk. Both parties appealed, and the taxation was reviewed by the circuit judge.

The circuit judge struck out some items in defendant's

bill, and relator insists that this was erroneous. The respondent claims that the circuit judge had a discretion in the case, because it originated in justice's court, and the statute provides that "in all cases heard and determined on appeal, the costs, or such part thereof as to the court shall seem just, may be awarded to either party, as the court may deem just and right between the parties, in view of the peculiar circumstances of each case." How. St. § 7026. We do not think this statute has any application to a case in which the plaintiff discontinues his suit. If he goes out of court voluntarily, the recovery of costs against him is a matter of right. Moreover it appears in this case that judgment for costs in favor of the defendant has been duly entered. The right to costs is fixed by the judgment, and the judge's discretion, if he would otherwise have any, is thereby exhausted. It only remains to see what items of costs the defendant showed before the clerk he was entitled to.

The only items of costs we find improperly disallowed are those of the attendance of the defendant and of two other persons as witnesses. The judge disallowed the charge as to the defendant, on the ground that the judge believed he attended, not as a witness, but to aid in the management of the defense, and he disallowed the charge as to the others because he considered their evidence incompetent. It appears, however, that the affidavit presented by the defendant on the taxation of costs was, as to all three, in compliance with the statute; How. St. § 9002; and where that is the case, and there is no counter showing, the taxing officer must tax for the attendance of the witnesses. In this case there was no counter showing.

It is proper to add, inasmuch as the parties appear to have proceeded somewhat irregularly in this case, that when appeals from the taxation of costs by the clerk are taken to the circuit judge, the party appealing should specially except in writing to such allowances or disallowances as he complains of, and the bill of costs should then go before the circuit judge on those exceptions only, and on the showing and no other that was made before the clerk.

Mandamus must issue.

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JOHN W. BALL v. CHARLES W. YOUNG AND HENRY W. MCCABE.

Garnishment—Joint garnishees—Disclosure.

1. Where an agent for the collection of a debt that is secured by mortgage takes possession of the mortgaged property, he cannot be held with the creditor as a joint garnishee in a proceeding in which the debtor is principal defendant.
2. Several persons cannot be held as joint garnishees unless the principal defendant is indebted to them jointly; and this is so whether the garnishment proceeding is based upon a debt or upon the possession of property.
3. Persons cannot be held as garnishees upon a disclosure which admits neither an indebtedness nor the possession of property belonging to the principal defendant.

Error to Van Buren. (Mills, J.) Jan. 11.—Jan. 29.

GARNISHMENT proceeding. Plaintiff brings error. Affirmed.

Crane & Breck for appellant.

Annable & Fitch for appellee

CHAMPLIN, J. Plaintiffs in error were garnished by defendant in error, who had commenced suit against one Augusta Eilers. They appeared before the justice and made disclosure, from which it appears that Augusta Eilers was indebted to Young, and to secure this indebtedness he had taken a chattel mortgage upon certain property which at the time he supposed belonged to Mrs. Eilers. To enforce payment of the debt he placed the note representing the debt and the chattel mortgage in the hands of McCabe, with instructions to collect the amount due on the mortgage. McCabe took possession of the property and advertised it for sale. This was the position of affairs when Mr. Ball commenced garnishee proceedings, and the summons was served upon Young and McCabe jointly.

Neither of the parties admitted in their disclosure that the property in question belonged to Mrs. Eilers at the time the garnishee process was served upon them. They stated that other parties claimed to own it, and they did not know to whom it belonged. Judgment having been obtained in the principal suit, plaintiffs in error were summoned to show cause why judgment should not pass against them. The parties appeared, and the plaintiff (defendant in error here) declared against them in trover for the property mentioned in their disclosures, and for money had and received. The defendants pleaded the general issue. The only evidence introduced was the disclosure, and the justice rendered a judgment against them for the amount of the judgment recovered in the principal action, which was removed to the circuit court by certiorari, where it was reversed.

The judgment of the circuit court should be affirmed for two reasons.

I. The garnishee defendants did not have joint possession of the property. The relation between them was that of principal and agent. Young did not have actual possession of the goods, although it may be said that they were under his control, while McCabe, though having actual possession, held them as the mere agent of Young, and subject to his direction. His accountability for the possession of the goods was not to Mrs. Eilers, but to Mr. Young. If he may be jointly garnished with Mr. Young, his principal, then a joint judgment may be obtained, and he made liable for a debt to Mr. Ball without any privity of contract having existed between him and the principal defendant, and without such possession of property as would have rendered him liable had he been proceeded against alone. *Penniman v. Ruggles* 6 Mass. 166. It has been repeatedly held by this Court that one cannot be held as garnishee where the liability is joint; and the converse of this is equally true, that two or more cannot be held as garnishees unless the liability to the principal debtor is joint; and this is so whether the proceedings instituted relate to the possession of property or to indebtedness.

II. Neither of the persons garnished admitted any property in their possession belonging to Mrs. Eilers at the time they were summoned, nor any indebtedness to her. This should have ended the proceedings. *Newell v. Blair* 7 Mich. 103; *Hewitt v. Wagar Lumber Company* 38 Mich. 701; *Sexton v. Amos* 39 Mich. 695; *Tabor v. Van Vranken* 39 Mich. 793; *Spears v. Chapman* 43 Mich. 541.

The judgment is affirmed with costs.

The other Justices concurred.

AUGUST E. WURZELL v. GOTTFRIED BECKMAN.

Wills—Revocation.

Where the contestant of a will claimed that it had been revoked by a later will which had been destroyed, and the proponent sought to show that testator was incompetent to make the second will, the testimony of testator's physician and of others that testator had said she wanted the first will to stand, is inadmissible upon an issue of competency, and cannot sustain a finding that there was a revoking clause but that testator did not so understand.

Error to Macomb. (Stevens, J.) Jan. 16.—Jan. 29.

Appeal from refusal to probate a will. Contestant brings error. Reversed.

Crocker & Hutchins for appellant.

Edgar Weeks and *Otto Kirchner* for appellee, as to the admissibility of the evidence, cited *Beaubien v. Cicotte* 12 Mich. 459; *Harring v. Allen* 25 Mich. 505; *Waterman v. Whitney* 11 N. Y. 157; *Brunt v. Brunt* L. R. 3 Prob. & Div. 37; the question of mental capacity to make a second will is made immaterial by a special finding that testatrix did not know or understand that the second will contained a revocatory clause. 1 Redf. Wills 181; *Re Duane* 8 Jurist N. S. 752; *Clarkson v. Clarkson* 2 Sw. & Tr. 497: 31 L. J. 143; *Brown v. Brown* 8 E. & B. 876.

COOLEY, C. J. Wurzell is proponent of an instrument purporting to be the last will and testament of Louisa Wurzell, his wife, which bears date June 19, 1876. Mrs. Wurzell died in July, 1882. Beckman is her brother and contests the probate. The will gives to Beckman an annuity of thirty dollars, and gives all the remaining property to proponent. The probate court disallowed the will, and proponent appealed to the circuit court.

On the trial in the circuit court the due execution of the will now in controversy was not contested, but Beckman produced evidence which appeared to show unmistakably that in 1881 Mrs. Wurzell executed a new will with due formality, whereby she disposed of all her property in a somewhat different manner from that in which it was disposed of by the first will. This second will contained a clause expressly revoking prior wills. The draughtsman, who was a witness to prove it, testified on his direct examination that he was expressly instructed by Mrs. Wurzell to insert in this will a clause of revocation; but on his cross-examination this statement is, to say the least, left in doubt. He stated, however, that after the will was drawn he read and explained it to Mrs. Wurzell, and that she understood it, and said she would procure the will now in question—which was not then present—and have it destroyed. She did not, however, do this, and at a subsequent time she destroyed the second will with a manifest purpose to revoke it.

The contestant does not rely upon the second will except as a revocation of the first. The proponent claimed that Mrs. Wurzell was not of sound mind when the second will was executed; but we look in vain in this record for evidence tending to show it. Much of the evidence put in by proponent to show the incapacity of Mrs. Wurzell had no tendency to prove anything but that she had become dissatisfied with the second will, and desired the first will to stand. The evidence of her physician may be taken as an illustration. He testified that he was with her from January, 1882, until her death. He was then asked what she

told him about the first will. The evidence was called for on this issue of mental competency to make the second will, and was admitted by the court against the objection of the contestant. The answer was that she told him she wanted the first will to stand, and she went on to assign a reason for this, which it is not material to repeat here. Now, while the answer did not in the slightest degree tend to show any want of mental capacity, it did tend to prejudice the jury against the contestant's case, and it is scarcely possible that its influence should not have been damaging. Considerable evidence of a similar nature was put in on the same nominal ground, and there was error in receiving any of it.

It is contended on behalf of proponent that all the rulings on the admission of this evidence were rendered immaterial by the special findings of the jury. The jury found, in answer to special questions, that the second will contained a clause of revocation, but that Mrs. Wurzell did not understand the fact when she executed it. If this finding had been made upon competent evidence, the argument would have had some basis; but there was no evidence to support it, and very strong evidence to the contrary.

The judgment must be reversed and a new trial ordered.

The other Justices concurred.

EDWARD Y. WILLIAMS v. THOMAS H. MCGRAW.

Commissions.

A claim for commissions on a sale of logs was based on the following advices from the owner: "I would sell them for $8 or, if you thought necessary, as low even as $7.50. I want you to find a customer for me, and I will feel greatly obliged, besides paying you whatever you ask for your trouble." The logs were in fact sold to a purchaser designated to the agent by the owner, at prices lower than those stated, and the agent acted in part in the purchaser's interest. *Held* that he was not entitled to commissions.

Error to Bay. (Green, J.) Jan. 17.—Jan. 29.

ASSUMPSIT. Plaintiff brings error. Affirmed.

A. McDonell and *John J. Wheeler* for appellant. An agent to find a purchaser has only to bring together the vendor and purchaser: *Duffey v. Hobson* 6 Am. Rep. 617; *Carter v. Webster* 79 Ill. 435: 3 Cent. L. J. 409; *Earp v. Cummins* 54 Penn. St. 394; *Rupp v. Sampson* 16 Gray 398; *McCreery v. Green* 38 Mich. 172; *Fox v. Rouse* 47 Mich. 558; and he is entitled to his commission if the sale is made even though the price first named is not paid: *Stewart v. Mather* 32 Wis. 344; *Woods v. Stephens* 46 Mo. 555; *Jones v. Alder* 34 Md. 440; or even though the vendor did not know the agent had obtained the purchaser: *Shepard v. Hedden* 5 Dutch. 334; *Gillett v. Corum* 7 Kan. 156; and while he cannot have commissions if he acts as the purchaser's agent, without the vendor's consent *Walker v. Osgood* 98 Mass. 353; *Scribner v. Collar* 40 Mich. 375); he can otherwise: *Barry v. Schmidt* 57 Wis. 172.

Hatch & Cooley, Isaac Marston and *John Atkinson* for appellee cited *Ingerson v. Starkweather* Walk. Ch. 346; *Clute v. Barron* 2 Mich. 192; *Dwight v. Blackmar* id. 330; *Moore v. Mandlebaum* 8 Mich. 441; *Ames v. Pt. Huron* 11 Mich. 139; *Flint &c. R. R. Co. v. Dewey* 14 Mich. 477; *Scribner v. Collar* 40 Mich. 376; 1 Pars. Cont. 61, 81, 85, 112; *Church v. Marine Ins. Co.* 1 Mas. 341; *Davone v. Fanning* 2 Johns. Ch. 251.

CAMPBELL, J. Plaintiff sued defendant for commissions on a sale of logs, the sum claimed being 25 cents a thousand on between 11 and 12 million feet. The court below, allowing recovery for some other causes of action, ruled that there could be no recovery for this, which must have been on the ground that there was no testimony to support it.

Defendant, who lives at Poughkeepsie, New York, owned the logs in question, some cut and some not then cut, on Rifle river. January 7, 1881, defendant wrote a letter to

plaintiff, in which, after describing the property, he says: "I would sell them for $8, or if you thought necessary, as low even as $7.50. I want you to find a customer for me, and I will feel greatly obliged, besides paying you whatever you ask for your trouble." This is the only direct communication from defendant to plaintiff relating to employment. Plaintiff testifies that before he received it he was called upon, at his office in Bay City, by Mr. Barker, who told him he had received a dispatch from McGraw, stating that Mr. Hall, president of the Export Company (the subsequent purchasers of the logs), would be there in a day or two, and desiring plaintiff to be sure and sell the logs to him. The price mentioned was $7.50 a thousand. Mr. Hall is said by plaintiff to have been present at this interview. Immediately thereafter plaintiff visited the place where the logs were, and Hall desired him to report to him, and he subsequently telegraphed and wrote to Mr. Hall his views about value and the policy of purchasing them. He subsequently telegraphed to defendant that if he would go to New York, he could probably close a bargain with the Export Lumber Company. He also telegraphed to New York to Mr. Hall, the president, advising him not to buy over eight dollars, and that he should want a guaranty for delivery by July 1st. This delivery, he says, was to be at Bay City, while the prices mentioned by defendant were at the boom, which would involve the purchaser in expenses and risks of removal to the ultimate destination. Plaintiff had previously peformed services for the Export Company, and after these logs were sold, attended to their sawing. There is a conflict between him and Mr. Hall as to whether Hall paid him commissions on this purchase.

Defendant went to New York and was unable to contract with Hall on the original terms proposed, owing to plaintiff's advices to Hall. A bargain was finally made for a portion of the lumber, excluding certain qualities, and the contract provided for delivery at Tawas and Bay City, and involving some stipulations as to rafting and sawing. The testimony indicates that the price received was practically

considerably lower than that proposed, but as plaintiff puts his claim on peculiar grounds which do not involve this inquiry very closely, and as the case was taken from the jury, we cannot look into any disputed matters.

It appears, however, from plaintiff's own showing, that he peformed services for Mr. Hall in connection with this business, and that, so far as he exercised any influence at all, it was not in the direction of getting a sale on the terms proposed. It might be a matter for serious consideration whether this double agency could be allowed to form a basis of compensation, if it were true, as plaintiff claims, that his duty assumed was merely to bring parties together. But there is nothing in the case which, in our opinion, indicates that he was to receive any compensation unless he procured a purchaser at defendant's prices. Such is plainly, we think, the meaning of defendant's letter to plaintiff. The only other communication bearing on the subject was a dispatch to defendant's agent fixing the same prices, and naming Mr. Hall as the purchaser to be approached. If this is the one read in the presence of Hall and plaintiff, as plaintiff alleges, it was confined to the procurement, or at least the attempt to procure, a sale to Hall at the boom for the prices named, and the purchaser was nominated by defendant himself. No such services, either by attempts or successful results, were shown. The case, in our opinion, is entirely destitute of any testimony of the rendering of such services as were contemplated.

We think the judgment is correct and should be affirmed.

SHERWOOD and CHAMPLIN, JJ. concurred. COOLEY, C. J. did not sit in this case.

George L. Maltz v. George N. Fletcher.

Failure of consideration—Purpose of giving notes.

1. B and F were litigating in equity the ownership of certain logs and B filed a separate bill to restrain F from interfering with them. In this latter proceeding a receiver was appointed by consent of the parties, and he, being authorized to sell the logs, delivered them to F and took his notes therefor upon which he afterwards brought suit. The bill in the last mentioned suit was dismissed and the receiver thus became a mere bailee for the party actually entitled to the logs. *Held* that in the suit by the receiver on the notes F had a right to show that it was understood when they were given that they were to be paid only if the logs should be adjudged not to belong to him, and that as the logs were in fact his, the notes were without consideration.

2. Failure of consideration may always be shown in a suit on a contract; and in an action on negotiable paper proof may be made of the purpose for which it was given, or that the purpose does not require the enforcement of payment.

Error to Alpena. (Emerick, J.) Jan. 17.—Jan. 29.

Assumpsit. Defendant brings error. Reversed.

Clayberg v. Sleator for appellant. In an action on a written contract an accompanying parol arrangement respecting the consideration can be shown in connection with the defence of a failure of consideration: *Chaddock v. Vanness* 35 N. J. L. 523; *Sanders v. Howe* 1 D. Chip. 363; *Simonton v. Steele* 1 Ala. 357; *Sweet v. Stevens* 7 R. I. 375; *Slade v. Halsted* 7 Cow. 322; *Barlow v. Flemming* 6 Ala. 146; *Shepherd v. Temple* 3 N. H. 455; *Folger v. Dousman* 37 Wis. 619; *Peterson v. Johnson* 22 Wis. 21; *Hubbard v. Galusha* 23 Wis. 398; *Bennett v. Beidler* 16 Mich. 150; *Hyde v. Tenwinkel* 26 Mich. 93–4; *Ortmann v. Canadian Bank* 39 Mich. 518, 520; *Bookstaver v. Jayne* 60 N. Y. 146; *Benton v. Martin* 52 N. Y. 570; *Jordan v. Jordan* 10 Lea 124: 43 Am. R. 294.

Wm. S. Tennant for appellee.

COOLEY, C. J. The facts out of which this litigation arises appear in the opinion of the Court in *Beekman v. Fletcher* 48 Mich. 156. In the year 1881 John G. Beekman, assignee of the Alpena Lumber Company, filed his bill in the circuit court for the county of Alpena in chancery to restrain Fletcher from interfering with or taking legal or other measures to get possession of certain logs, the ownership of which was in dispute between them. The bill showed that the controversy respecting the logs was involved in another suit in equity to which Beekman and Fletcher were parties, and it prayed no other relief than an injunction and the appointment of a receiver for the logs, to abide the result of the principal litigation.

In that injunction suit Maltz was appointed receiver by consent of the parties; and was authorized to sell the logs and hold the proceeds subject to the order of the court. This Court was of opinion that there was no equitable ground on which the injunction suit could be maintained, and the bill was directed to be dismissed. As to the receiver it was said in the opinion that he "got his appointment and all his powers from the consent of the parties and became their bailee; and there will be no difficulty in reaching a disposition of the funds when the parties have settled their rights; which could not be done in this suit."

The present suit is brought on promissory notes given by Fletcher to Maltz. The defense which Fletcher undertook to make was that the notes were given for the logs of which Maltz was receiver, and which he allowed Fletcher to take at a price agreed upon; that it was understood when the notes were given that they were only to be paid if the logs should be adjudged not to belong to Fletcher, and that they were Fletcher's in fact. The circuit judge was of opinion that this defense could not be made, because it would be in effect permitting an oral understanding to control the written contract of the parties.

We are of opinion that this is not the proper view to take of the case. The suit in which Maltz was appointed receiver was disposed of, leaving him mere bailee in respect

to the logs or their proceeds. He was not an officer of the court, and could only be called to account by the parties in individual suits. His bailment was for the party entitled in fact; in other words for the real owner. The intent of the parties that he should account under the order of the court was defeated when it was decided that there was no case of equitable cognizance; for that determined that there was no pending case in which he could be called to account. If, therefore, Fletcher was in fact, as he offered to show, the owner of these logs, the bailment was for him, and any notes he had given for the logs, and which depended for their consideration upon the pendency of the suit, were without consideration when the suit was disposed of without a decision upon the merits of the controversy between the parties. It is always competent to show that a contract sued upon is without consideration. And no rule or policy of the law is violated by allowing proof to be made of the purpose for which negotiable paper was given: or that the purpose does not require that payment should be enforced. *Colman v. Post* 10 Mich. 422; *Catlin v. Birchard* 13 Mich. 110; *Bowker v. Johnson* 17 Mich. 46.

Counsel for the plaintiff very justly say that this conclusion imposes very serious hardship upon Maltz, who, having consented to act for the parties, and having no personal interest in the controversy, is compelled to determine at his peril whom he will recognize as owner. Common fairness to him seems to require that the parties should come to some understanding whereby they may relieve him from this embarrassment; but the Court is powerless in the premises.

A new trial must be ordered.

The other Justices concurred.

Edward Murphy v. Benson Bidwell, William D. French and The Union Trust Company of Grand Rapids.

Mutual Aid Society—Action by member.

A man belonged to a mutual aid society to which he paid certain moneys which, according to the scheme of the society, were to be paid out again to the various members. Thinking that he had received no consideration for these payments he afterwards brought an action as for money had and received, and sued two of the members jointly with the society. *Held* that the joint action would not lie; and as the money had been disposed of with plaintiff's consent the form of action seems inappropriate.

Case made from the Superior Court of Grand Rapids. (Parrish, J.) Jan. 18.—Jan. 29.

Assumpsit. Defendants had judgment. Affirmed.

Holmes & Hine and *W. W. Taylor* for plaintiff.

D. E. Corbitt for defendants.

Campbell, J. This is an action in the nature of an action for money had and received, to recover back, as paid without legal consideration, certain moneys paid by instalments upon a membership contract with the defendant company, asserted to be beyond the corporate powers.

The company was organized as a mutual benefit society under the statutes [How. St. ch. 118], to provide for paying benefits in case of death or sickness, and its articles are to that effect. The agreement in question, dated August 30, 1882, made plaintiff a member of a class of persons organized by the company, and provided for an entry fee of five dollars, and further instalments of fifteen dollars a month until full payment should be made of $200. It was then provided that in consideration of these payments, plaintiff should receive in the order of his certificate, out of the contributions of members the sum of $600, less 5 per cent. and less $170 retained as security fund,—or in all $400.

The declaration sets out various fraudulent representations whereby plaintiff was induced to make the contract, but its only ground of action is the legal invalidity of the company's promise.

The court below held he had no cause of action, because the contract on its face, and the evidence which he put in, so far identified the plaintiff with the scheme as to prevent him from now complaining of it, as any worse than he had reason to believe it.

Without saying whether there is anything in this ruling open to objection, it is clear that he cannot recover in this suit. He has joined two separate individuals with the company as having received money to his use. As the ground of action is based on the company's reception of money without consideration, and as by the terms of his contract all money was to be paid over to the company and distributed among the various subscribers, there is no joint liability asserted or made out. Bidwell and French had no joint functions as receivers of money, and most of it was not paid to either. Whatever either or both may have done, they have never held money jointly with the company or with each other. The action is entirely misconceived. It is also apparent from plaintiff's showing, that whatever money he paid over was expected to be paid out to other persons and not to be retained, and it is not obvious how this particular action will lie for money which has been disposed of by his consent.

We need not, therefore, consider whether he is cut off by his own fault from complaining in any shape for the wrong which he supposes was done to him. He cannot recover in this particular action.

The judgment must be affirmed with costs.

The other Justices concurred.

HENRY S. THOMAS AND HARRIET THOMAS v. MARY P. BURT, ANN L. HOLLAND, THE DETROIT POST & TRIBUNE CO., CHAS. P. RABAUT AND JAY BASSETT.

Bill of review against foreclosure purchaser—Sworn plea.

1. *It seems* that a bill of review filed after foreclosure sale and after the time for appealing has expired, and allowed on the ground that the property has been sold at a great sacrifice to a purchaser who really represents the complainant, should be accompanied by adequate security and contain an offer to redeem or procure a higher bidder.
2. Where a sworn plea to a bill of review is regular in form and positive in substance and consists of a denial of the main issue presented, a demurrer to it, if permitted by practice, would be so frivolous as to entitle the pleader to final judgment. And setting the plea down for hearing would be equivalent to a demurrer. If it leaves any issue to be disputed, it should be replied to and the facts investigated.
3. A foreclosure sale ought not to be set aside on merely disposing of the plea to the bill of review filed to set it aside.
4. A bill of review to set aside a foreclosure sale was dismissed where complainant took no steps to facilitate inquiry into the facts or to obviate delays, and did not make any offers.

Appeal from Wayne. (Jennison, J.) Jan. 18.—Jan. 29.

BILL of review in foreclosure. Defendant Bassett appeals. Reversed.

Walker & Walker for appellant. A judicial sale in pursuance of a decree or judgment of a court of competent jurisdiction, to a purchaser in good faith, is conclusive, and cannot be affected either by errors of law or fact contained in the proceedings or in the decree itself or by a subsequent reversal of the decree on appeal: *Gray v. Brignardello* 1 Wall. 627; *Bank v. Voorhees* 1 McL. 221; *Voorhees v. Bank* 10 Pet. 449, 473; *Grignon v. Astor* 2 How. 319, 340; Jones on Mortg. (2d ed.) § 1662; Rorer on Judicial Sales § 576.

Prentis & Patchin for appellee.

CAMPBELL, J. Complainants were defendants, as mortgagors, in a foreclosure suit wherein defendant Burt was complainant, and the other parties, except Bassett, defendants. Decree was made and sale had and confirmed, Bassett being purchaser. On appeal from this confirmation the sale was held valid. Leave was afterwards granted to file a bill of review, on the ground that Bassett was alleged to be in collusion with complainant, and not a bona fide purchaser, and that the sale ought not to have been ordered so early. 49 Mich. 462. The bill of review was filed, making Bassett a defendant with the rest, and not requiring a sworn answer. He put in a sworn plea of bona fide purchase. Complainants, instead of replying, set it down for hearing, and it was overruled, and a decree made setting aside the sale, from which Bassett appealed.

This bill, which goes somewhat further than an ordinary bill of review, does not appear from the record to have been accompanied by any adequate security, and contains no offer either to redeem the mortgage sale or to procure a higher bidder. How far these deficiencies would operate if objected to formally we need not consider, but we cannot in examining the general merits overlook the fact that the only ground for allowing the bill after the time for appealing had expired, was that the property had been sold at a great sacrifice to a person who really represented the complainant.

Mr. Bassett's plea was neither more nor less than a simple denial of the main issue presented by the bill of review. It was regular in form and positive in substance. Upon what theory such a plea was held insufficient we cannot imagine. It had been already decided by this Court that the sale was regular and valid on its face. This being so, the only possible issue as to Bassett was his good faith. If this was to be disputed the plea should have been replied to and the facts investigated. Instead of this the plea was set down for hearing—a proceeding equivalent in its nature to a demurrer. Had the practice permitted a demurrer in form it would have been so plainly frivolous as to entitle the party to final

judgment without further pleading. Inasmuch as the complainants have continued to enjoy the possession of the property without adequate security, it is evident that delay is greatly to their advantage, and to the disadvantage of Bassett, and should not have been allowed.

The court not only overruled the plea, but set aside the sale, which it had no right to do under the practice, but which seems to have been acquiesced in by both parties to bring the controversy to an end.

In view of the state of the record, we feel bound not only to reverse the decree but to dismiss the bill, inasmuch as complainants took no steps to facilitate the inquiry into facts and made no offers and took no steps to obviate the evil of delays. As the case stands it presents no grounds for further indulgence.

The other Justices concurred.

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LESTER LAMPSON v. NORMAN CUMMINGS.

Sale—Mistake of fact—Rescission.

1. A bill of sale of a livery stock included "two two-seated full-top carriages," but it afterward appeared that one of the carriages which the vendor supposed was a full-top was not so. *Held* that this mistake of fact could not, in law, relieve him of the obligation to deliver a full-top in its place or account for the value of such a carriage.

2. The rule that one cannot rescind a contract in part and affirm it in part does not apply where a purchaser of stock, the items of which are particularly described in the bill of sale, refuses to accept an article which varies from the description, and sues the vendor for failure to fulfill the contract of sale.

Case made from Kent. (Montgomery, J.) Jan. 18.—Jan. 29.

ASSUMPSIT. Plaintiff had judgment. Affirmed.

Taggart & Wolcott for plaintiff. One who sells goods of a specified description undertakes to deliver goods that shall correspond to those described: *Henshaw v. Robins* 9 Met. 89; *Winsor v. Lombard* 18 Pick. 60; *Tye v. Finmore* 3 Camp. 462; *Shepherd v. Kain* 5 B. & Ald. 240; 1 Pars. Cont. 582; *Batturs v. Sellers* 5 H. & J. 117; *Yates v. Pym* 6 Taunt. 446; 2 Sutherland on Damages 410; *Wright v. Barnes* 14 Conn. 518; *Edgar v. Canadian Oil Co.* 23 U. C. (Q. B.) 333; and on default is liable to an action for breach of contract: *Kimball & Austin Mfg. Co. v. Vroman* 35 Mich. 328; *Heilbutt v. Hickson* L. R. 7 C. P. 438; *Clark v. Moore* 3 Mich. 55; *Wilson v. Wagar* 26 Mich. 452; good faith or want of knowledge is no protection: *Byles v. Lawrence* 35 Mich. 458; see *Martus v. Houck* 39 Mich. 436.

Maher v. Felker for defendant. A bill of sale absolute in its terms can be shown by parol in an action at law to be a collateral security only, and parol proof of the purpose and character of a transfer of personalty is competent, notwithstanding the giving of a bill of sale, as a symbolical delivery or to show a transfer of title; *Fuller v. Parrish* 3 Mich. 213; *Picard v. McCormick* 11 Mich. 68; *Rowe v. Wright* 12 Mich. 289: *Sirrine v. Briggs* 31 Mich. 443; *Trevidick v. Mumford* 31 Mich. 467; if the bill of sale embodies the terms of the contract made by the parties, and is as capable of explanation or contradiction by parol and the goods do not answer the description, the purchaser can elect to sue for breach of warranty or rescind the entire contract by offering to return the property purchased and demanding re-payment of the consideration paid: *Clark v. Baker* 5 Met. 461; *Lawton v. Keil* 61 Barb. 558; he can not, however, rescind as to a portion of the property and retain the rest; he must rescind entirely or not at all: *Hubbardston Lumber Co. v. Bates* 31 Mich. 159, 169; *Peninsular Bank v. Hanmer* 14 Mich. 208; *Widner v. Lane* 14 Mich. 125; *Dunks v. Fuller* 32 Mich. 242, 245; *Morse v. Brackett* 98 Mass. 205.

COOLEY C. J. The plaintiff in this case declared in assumpsit "for that the said defendant agreed to sell, and did contract in writing to sell, to said plaintiff two two-seated full-top buggies; that said defendant failed to comply with his said contract of sale and to deliver one of the two-seated full-top buggies, which was of great value, to-wit, of the value of three hundred dollars; that, although often requested, and said buggy has been fully paid for by said plaintiff, yet said defendant has failed to deliver said buggy, to plaintiff's damage of three hundred dollars."

"Also for that said defendant agreed to and did sell and contract to deliver other two-seated full-top buggy; yet the said defendant did not in fact sell and deliver such buggy as he had contracted to deliver as aforesaid, but only one buggy that answered such description, to plaintiff's damage three hundred dollars."

The case was tried by the circuit judge without a jury, and findings were made of fact and law which are given in the margin.[1] The defendant requested further findings on

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[1]This cause having been tried before the court without a jury, and a written finding of facts having been requested, I therefore find the facts therein as follows:

1. That on or about January 6, 1883, the plaintiff purchased a livery stock consisting of horses, carriages, etc. of defendant in which was described two two-seated full-topped carriages, and received from defendant a bill of sale thereof, a copy of which is attached to these findings marked Exhibit A, and which is made a part hereof.

2. That said stock sold and transferred by said bill of sale was in part, at the time of said sale, located upon Kent street in the city of Grand Rapids, and a part, being the remainder, was located on the fair grounds just south of the city. Plaintiff received that part of said stock at the barn on Kent street in said city, at the time of the execution of said bill of sale, and was to take possession of that part located at the fair grounds where it was located on the fair grounds.

3. When the agreement was being talked up Dexter Barker, the agent for defendant in charge of the stock in question, stated to the plaintiff that the two-seated full-top carriage at the fair ground was a better carriage than the two-seated full-top carriage at the barn on Kent street.

4. That said plaintiff made no examination of the carriages at the fair grounds at any time, but in fact relied upon the representations made in the city, where the trade was consummated, and upon the bill of sale given, the entire consideration of which, including incumbrances assumed, was the sum of twenty-five hundred dollars.

5. That when negotiations were first opened, some days before they were closed, Irwin Lampson, a son of the plaintiff, sent another son to the fair grounds who reported to Irwin but not to his father, the plaintiff, what carriages he saw there, but this knowledge was not brought to plaintiff in any manner, and he relied upon the representations made and agreement given, reduced to writing as aforesaid.

6. There was not at the fair grounds any two-seated full-topped car-

some points, which were refused, and he also excepted to some of the findings as having no evidence to support them; but in neither particular do we think the record discloses any error. He also excepted to the conclusions of law, and such of the exceptions as appear to us to require attention are here noticed.

It is contended for the defendant that it is obvious from

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riage, and defendant has never delivered to the plaintiff but one two-seated full-topped carriage. There was at the fair ground a half-topped carriage, the top covering one seat, and the carriage of less value than the one called for by the said bill of sale. Plaintiff never accepted the carriage in lieu of the one called for by the contract, and never in any manner took possession of it or had to do with it, and it still remains at the fair grounds where placed by defendant's agents.

7. That immediately upon said plaintiff ascertaining that there was no two-seated full-topped carriage at the fair grounds (and shortly after the trade was closed), and only the half-topped carriage was there, he notified defendant of the fact, and that he would not receive such half-topped carriage in lieu of the two-seated full-topped carriage called for by the bill of sale, and that the only reply or claim of defendant was that the half-topped was a full-topped carriage. Plaintiff did in fact, at the time of the sale or shortly thereafter, take possession of the entire stock covered by said bill of sale, except the two-seated full-topped carriage, which the defendant failed to produce and deliver to him at all times.

8. That the full-top two-seated carriage called for by the bill of sale was worth the sum of one hundred and fifty dollars, and plaintiff, by reason of defendant's failure to deliver the same, was damaged in that sum.

9. That at the time of the execution of said bill of sale, there was drafted by the agent of the defendant, a chattel mortgage upon the property described in the bill of sale from plaintiff to defendant, and the same was then and there executed by said plaintiff and delivered to said defendant, a copy of which said chattel mortgage is hereto attached and made a part of these findings of fact, and is marked Exhibit B.

10. That the suit was commenced on the 23d day of March, 1883, and on the 6th day of April, 1883, said plaintiff procured a loan of some money from John J. Belknap, Esq., city clerk of Grand Rapids, and gave him a chattel mortgage to secure the same upon his stock of livery; that said Belknap drafted this, his own chattel mortgage, from the one on file in his office, given to defendant as aforesaid, and in describing said stock in detail, described two two-seated full-top carriages, and so drafted, the same was signed and delivered by plaintiff to said Belknap. That by the execution of this Belknap mortgage and the mortgage to defendant, plaintiff did not intend to claim or exercise ownership over the two-seated half-top carriage, and did not in fact, as neither of the same described it. A true, correct copy of said chattel mortgage to said Belknap is hereto attached, made a part of these findings of fact and marked Exhibit C. That plaintiff paid no farther attention to the description of property in this chattel mortgage, and did not notice the description of two two-seated full-topped carriages, but that they were included in said description.

As conclusions of law from the foregoing facts I find:

1. That defendant having executed and delivered to said plaintiff his

the findings he did not intend to obligate himself to the delivery of anything that he did not have; that if the carriage on the fair grounds did not answer the description in the bill of sale, the parties were under mutual mistake as to the fact, and therefore the contract as to the carriage in respect to which suit is now brought was ineffectual. One answer to this is that the parties seem to have understood per-

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bill of sale under the circumstances set forth in the findings of facts, was legally obligated to comply with its conditions and to deliver, or cause to be delivered, to said plaintiff two two-seated full-topped carriages.

2. That plaintiff, by the execution of the chattel mortgage to defendant, before having knowledge of the breach of the conditions of bill of sale, and by the execution of the chattel mortgage to Belknap, did not waive the breach and accept the half-top carriage in lieu of the one called for by the bill of sale, and its terms relating to the controversy in this cause.

3. Defendant having failed to deliver the two-seated full-topped carriage called for by the bill of sale, and by none of his actions or conduct has plaintiff waived his right to insist upon the bill of sale, executed and delivered by him to the plaintiff, and having delivered only one such carriage, is liable to respond in damages for the carriage not delivered to said plaintiff, and for its value.

4. That plaintiff is entitled to recover the value of the carriage not delivered, from said defendant, and to a judgment against said defendant for $150 and interest from March 6, 1883, being the sum of $154.60, and his costs of this suit to be taxed, and judgment is directed accordingly.

ROBERT M. MONTGOMERY, Circuit Judge.

[The exhibits are omitted. They describe the carriages as "two two-seated full-top carriages."]

Amendments to the findings were afterwards made on application of the defendant as follows:

1. The defendant became the owner of the livery stock referred to in said findings on the second day of January, 1883. The representations made by Dexter Barker, as stated in the 3d paragraph of the findings of fact herein, were made previous to that time, and were made to Irwin Lampson, plaintiff's agent, instead of to the plaintiff. Said Barker was continued in the possession of the property by the defendant, and subsequent negotiations were had with him by the plaintiff, Barker acting as defendant's agent, which negotiations resulted in the giving of the bill of sale in question, January 6, 1883.

2. The defendant had never seen the carriage at the fair ground, and did not know its particular description.

3. Irwin Lampson was acting as the agent for the plaintiff in respect to the negotiations for the purchase of said livery stock at the time he sent another son of the plaintiff to the fair grounds as stated in said findings, and such other son was sent by said Irwin to examine that portion of said livery stock that was at the fair grounds.

4. The carriage at the fair grounds referred to in said findings, had a full-top over one of the seats, and a two-seated carriage having a top extending over both seats is known in the trade as an extension top, and are also classed as full-topped carriages.

fectly that the one was selling and the other was buying a carriage of a definite description, and the plaintiff in paying for the stock has paid for such a carriage. The only mistake made was in assuming that a certain carriage then on hand answered the description. It turned out that it did not. If this mistake would entitle the party to any relief in equity it certainly will not at law. The defendant has promised to deliver the carriage, and he must do so or account for its value.

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5. A two-seated carriage having a full top over one seat is not known in the trade as a full-topped carriage, in contradistinction to an extension top.

6. In the negotiations of said livery stock by the plaintiff, there were lists made of the different articles included in said stock, with estimates of the value of each, and the sale was finally made for a gross amount, which was several hundred dollars less than the amount of the valuation made by such lists.

7. At the time of the making of the mortgage by the plaintiff to John J. Belknap, the plaintiff directed said Belknap to make said mortgage to cover the said property as that covered by the mortgage given by the plaintiff to the defendant, as stated in said findings. Said mortgage to Belknap was unpaid at the time of the trial herein, and was of record in the office of the clerk of the city of Grand Rapids.

8. I am asked to find as to whether in the dealings between the parties, which resulted in the giving of the bill of sale by the defendant to the plaintiff, it was not the intention of the defendant to sell and of the plaintiff to purchase all of a certain livery stock then owned by the defendant, and which included the carriage at the fair grounds, and which did not include more than one two-seated carriage having a top covering both seats. I find in answer to this, that the negotiations between the parties related to the entire livery stock owned by the defendant, but that the plaintiff did not intend to purchase but a single carriage having a top covering both seats, but on the contrary relied upon the representations of Dexter Barker made to Irwin Lampson, as hereinbefore stated, and the statements contained in the bill of sale given him, that there was two two-seated, full-topped carriages in the stock purchased by him. The stock which the defendant owned in fact, included but one two-seated carriage having a top covering both seats.

9. Notice to Irwin Lampson of the character of the carriage at the fair grounds was not notice to the plaintiff. The sending by Irwin Lampson of his brother to examine said stock at the fair grounds, and the subsequent report of this brother to said Irwin, was not in legal effect notice to the plaintiff of the character of the carriage at the fair grounds, which precludes him from maintaining this action.

10. The plaintiff by first declaring in justice court for breach of warranty in the bill of sale to him, did not make an election which precluded him from maintaining an action upon the causes stated in his amended declaration herein. Said amended declaration was filed without objection at the time of the trial herein, the defendant's attorney having previously consented that the plaintiff might file an amended declaration.

11. The plaintiff can maintain this action for a failure to deliver one of a number of articles purchased for a gross amount for the whole, without having first offered to rescind the entire contract.

It is further suggested on the part of the defendant that the proper view to take of the contract of sale is that it is a contract for the sale of the livery stock which the defendant then had, including the carriage on the fair grounds; and if the defendant refuses to accept any part of the property as not being within the description in the bill of sale, he must rescind the contract entirely; he cannot rescind in part and affirm in part. This is an ingenious suggestion, but not a sound one. The plaintiff purchased property which was particularly described, and he is entitled to have what he bought. He does not propose to rescind the contract or any part of it; he demands the fulfilment of the whole of it, and brings this suit for the failure on the part of defendant to perform in one particular. His right seems to us, as it did to the circuit judge, to be clear.

There is a further suggestion that, under the evidence, the carriage that was upon the fair-grounds may be held to be a full-top carriage; but this is not admissible under the findings.

The judgment must be affirmed.

The other Justices concurred.

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GARRETT B. GRAY v. IRWIN STAFFORD.

Suit on attachment bond in justice's court.

An action of covenant lies in justice's court on a money bond given to secure the payment of $150 or less (How. St. § 6820); and on other bonds if the penalty stated therein and the amount involved by breach thereof do not exceed the sum for which suit may be brought before a justice.

Error to Genesee. (Newton, J.) Jan. 18.—Jan. 29.

DEBT on bond. Plaintiff brings error. Reversed.

Wisner & Draper for appellant.

CAMPBELL, J. This was an action brought before a justice of the peace upon a bond in the penalty of $275, conditioned for the forthcoming of certain attached property of less value. The circuit court for Genesee county ordered judgment for defendant on the ground that the action was not within a justice's jurisdiction. This decision was based on the supposed authority of *Bishop v. Freeman* 42 Mich. 533.

The effect of that decision was somewhat misapprehended by the circuit court. In that case a suit was brought before a justice on a bond in the penalty of $2000, which was given to secure the liabilities of a third person, who was agent of a sewing-machine company, to his employers. It was held that the case did not come within the jurisdiction of a justice because the penalty was beyond his jurisdiction, and the condition was not for the payment of any particular sum of money by the obligor.

The justice's statute contains a provision there referred to, which allows a suit before a justice, on a money bond, no matter how large the penalty, if given to secure specific sums of money, in one or several instalments, provided the aggregate shall not exceed $150. Comp. L. § 5255. [How. St. § 6820.] It provides in such cases for an action, not of debt but of covenant, for any separate instalment, and for several successive instalments, if necessary, as independent actions. But where the bond is not strictly a money bond, it is not taken from the rules governing in other cases, and if the penalty exceeds the jurisdiction of a justice no suit can be brought before him. This is what was decided in the case referred to.

In the present case the penalty is under $300, and the breach is for a cause of action involving a still smaller amount. It is therefore within the ordinary jurisdiction of a justice, and there are no statutory provisions to the contrary.

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

The other Justices concurred.

Norman H. Williams v. The Mutual Gas Company.

Gas service—Deposit to secure payment.

1. A gas company is of a public nature if it exercises its rights by virtue of a state law and local ordinances; and wherever, within its assigned limits, it has connected its mains and service pipes with the pipes and fixtures of individuals it is bound to supply them with gas, on reasonable conditions, when they ask for it.
2. A gas company can require those who wish for gas to give security for the payment therefor, or to deposit a fair sum in advance, as a reasonable condition to supplying them. So *held* where the consumer used about sixty dollars' worth a week, and the company required him to keep one hundred dollars on deposit with them. But the requirement that the consumer should also make a special contract with them would be unnecessary as the law would imply whatever contract was needed.

Error to the Superior Court of Detroit. (Chipman. J.) Jan. 22.—Jan. 29.

Case. Plaintiff brings error. Affirmed.

F. A. Baker for appellant.

Meddaugh, Driggs & Harmon for appellee. A gas company is under no legal obligation to furnish gas to consumers: *Hoddesdon Gas & Coke Co. v. Haselwood* 6 C. B. (N. S.) 239; *Paterson Gas Co. v. Brady* 3 Dutcher 245; *Commonwealth v. Lowell Gas Co.* 12 Allen 75; *McCune v. Norwich City Gas Co.* 30 Conn. 521.

Sherwood, J. The plaintiff, in the month of November, 1879, resided in Detroit and was in possession of and keeping the hotel known as the Biddle House, containing a very large number of rooms, all of which were furnished with gas-pipes and fixtures for the purpose of lighting the same, and which had been so lighted for many years.

The defendant corporation was duly organized under the Act of the Legislature for the formation of gas-light com-

panies, approved February 12, 1855, and located in Detroit. On the 15th day of November aforesaid the defendant, in pursuance of said Act of the Legislature and the charter and by-laws of Detroit, was and had been for some time previous carrying on the business for which it was organized, supplying the citizens at hotels and private dwellings with gas in such quantities as desired, and among others had connected its pipes with those of the Biddle House, and for some time previous had been supplying it with gas as its proprietors desired. On that day the defendant refused to supply the Biddle House longer unless its proprietor, the plaintiff, would keep on deposit with the company $100. It was receiving at that time about $60 worth of gas per week, and its requirements were increasing.

The plaintiff regarding the demand as unreasonable, declined to make the required deposit, and tendered the defendant $75 and demanded that the company should furnish him gas at the Biddle House to that amount. This the defendant refused to do and cut off the service at the hotel.

The plaintiff claims that it was the defendant's duty to furnish him with the gas required, and upon the terms demanded; that he has suffered great injury to his business in consequence of the defendant's neglect so to do. And he brings his suit in this case to recover his damages. A trial was had in the Superior Court of Detroit, and the judge directed a verdict for the defendant. The plaintiff brings error and the case is now before us on a bill of exceptions containing all the testimony.

The questions presented and argued before the judge of the Superior Court by counsel for defendant were—*First*, the plaintiff could not recover for the reason the defendant was under no legal duty or obligation to supply any citizen of Detroit with gas; and *second*, if such duty was imposed upon the defendant, the conditions upon which the defendant proposed and offered to perform it were reasonable. The court disagreed with defendant's counsel in the first position, but sustained them in the second. I agree with

the judge of the Superior Court that it is the duty of the defendant, upon reasonable conditions, to supply the citizens of Detroit who have their residences and places of business east of the center of Woodward avenue, with gas wherever the defendant has connected its mains and service pipes with the pipes and fixtures used at such residences and places of business and the owners or occupants shall desire the same.

The defendant is a corporation in the enjoyment of certain rights and privileges, under the statutes of the State and charter and by-laws of the city, and derived therefrom. These rights and privileges were granted that corresponding duties and benefits might inure to the citizens when the rights and privileges conferred should be exercised. The benefits are the compensation for the rights conferred and privileges granted, and are more in the nature of convenience than necessity, and the duty of this corporation imposed cannot therefore be well likened to that of the innkeeper or common carrier, but more nearly approximates that of the telegraph, telephone or mill-owner. The company, however, in the discharge of its duty may govern its action by reasonable rules and regulations, and when it has done so all persons dealing with it, as well as the company itself, must yield obedience thereto. The statute under which the defendant company is organized provides it may ordain and enact by-laws for that purpose; but the record discloses no such action taken on the part of the defendant; neither does it show any general action or custom of the company in making terms with, or for supplying gas to, proprietors of hotels or other persons except as required in this case.

The president of the defendant company was sworn and examined, and testified that the defendant made weekly or monthly collections for gas furnished. He further said that the defendant refused to let the plaintiff have a supply for the Biddle House unless he would first sign a contract with the company therefor, and in addition thereto keep on deposit with the company the sum of one hundred dollars so long as it furnished him with a supply; that the plaintiff

tendered the defendant $75, and demanded that the company should supply the house and offered to give good personal security for payment and performance on his part to the extent it should be furnished or the company require; and that the company refused to accept the terms proposed by plaintiff, or furnish his house with gas as required.

This corporation is authorized and permitted to do business in Detroit only upon the ground of public convenience, and that benefits may accrue to its citizens.

It is true that neither by the charter of the company, its articles of association, or the by-laws of the city authorizing its existence there, has it the exclusive right to manufacture and sell gas. It is, however, within the experience of us all, and I may say, I think, with great propriety, within the judicial knowledge of the courts, that the manufacture and supply of inflammable gas for the purpose of lighting cities, villages, stores, hotels and dwellings, is not a domestic or family manufacture. It is carried on almost exclusively by public or associated capital, and to make it a paying industry requires the exercise and enjoyment of certain rights and franchises only to be acquired from municipal or state authority. Associations of this kind, as has been well said, "are not like trading and manufacturing corporations, the purview of whose operations is as extensive as commerce itself, and whose productions may be transported from market to market throughout the world." It is not a trading corporation; its product is designed for the citizen, and the extent to which it is used depends upon home consumption in the immediate neighborhood and community in which the manufacture is wrought. It is in the strictest sense a local commodity, and not commercial. It can only be used by consuming it, and hence can have no place with articles of trade. The success of the company greatly depends upon the necessity of the citizens in the vicinity of its location, and its operations may seriously affect the public policy and individual convenience of the community. The nature of the article made, the objects of the company, its relations to the community, and the rights and privileges it must necessarily exercise, give the

company a public character, and, to a certain extent, a monopoly which can never be tolerated, only upon the ground of some corresponding duty to meet the public want. Such duty rests upon this defendant, and I think it requires the company to furnish to this plaintiff, at the Biddle House, the supply of gas demanded, under reasonable rules and regulations, but among all such as might be mentioned, it is with the defendant to adopt and rely upon such as it may select. This is its privilege.

The duty of the company towards the citizen, and that of the citizen towards the company, is somewhat reciprocal, and any rule or regulation or course of dealing between the parties which does not secure the just rights of both ought not to be adopted, and cannot receive the sanction of the courts.

When the defendant company made the connection of its service pipes and mains with the pipes and fixtures of the Biddle House, it imposed upon itself the duty to supply the house and premises upon reasonable terms and conditions with such amount of gas as the owner or proprietor might require for its use, and pay for, so long as the company should exist and do business.

If the defendant, as one of such conditions, required the plaintiff to give sufficient security that he would make such payment and perform such conditions, before making such service, I think it would have been reasonable, but in the place of such security the defendant demanded a deposit of money with the company, as had been its custom. This the company had a right to do. The condition was a reasonable one. The requirement of a special contract between the parties, in addition to the deposit of money, may not be unreasonable, still it was quite unnecessary. The law implies all the contract needed, and courts will enforce it in all cases to the extent necessary to secure the rights of the parties.

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

The other Justices concurred.

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EDWIN BYLES v. CLARK B. GENUNG.

Collection of taxes—Supervisor's warrant.

A township treasurer is not liable in trover, or in any action of tort, for enforcing the collection of an excessive tax, if his warrant therefor from the supervisor is fair on its face.

Error to Oceana. (Russell, J.) Jan. 23.—Jan. 29.

ASSUMPSIT. Plaintiff brings error. Affirmed.

Fletcher & Wanty for appellant.

L. G. Rutherford for appellee.

CHAMPLIN, J. This is an action of trover, brought by the plaintiff against the defendant for the conversion of certain pine lumber. The defendant pleaded the general issue and gave notice as follows:

"Upon the trial of the above entitled cause the defendant will give in evidence, under the general issue above pleaded, one certain tax-roll for the year 1882, upon which was listed and assessed the taxes upon the real and personal property of the township of Golden, (township number 15 north, of range number 18 west,) Oceana county, Michigan, upon which was listed and assessed a tax for the year 1882 upon the property of the plaintiff for a large sum of money, to-wit, two hundred dollars, and a warrant of the supervisor of said township, attached to said assessment roll of said township of Golden, for said year 1882.

And the defendant will further give in evidence as aforesaid, and show, that the said defendant, Clark B. Genung, is, and was at the time of the alleged injury complained of in said plaintiff's declaration, the township treasurer of the township of Golden, aforesaid.

And the said defendant will further give in evidence upon the trial of said cause, under said general issue above pleaded, that said tax-roll of said township of Golden for said year, 1882, with the warrant thereto attached, was placed in the hands of said defendant, as such township treasurer, by the supervisor of said township of Golden, to-

wit, on or about the first day of December, A. D. 1882. The said defendant, township treasurer as aforesaid, did as such treasurer, and by virtue of said tax-roll with said warrant thereto attached, with the name of said plaintiff listed upon said tax-roll and opposite the tax above named on said tax-roll, for the tax upon property of the defendant listed and assessed upon the property of said plaintiff, did seize, levy upon and take into his possession, as the township treasurer of said township of Golden, the goods, chattels and personal property of said township, described in said plaintiff's declaration, and sold a sufficient amount of said goods, chattels and personal property to satisfy the amount of the tax so levied and assessed upon the property of said defendant in said township, as directed by said supervisor's warrant, for the purpose of satisfying the said tax so levied and assessed by said supervisor, and listed upon said roll, as directed by said warrant attached to said tax-roll."

On the trial the plaintiff proved title to the property, and its value. He also showed the seizure and sale by defendant. The plaintiff is a resident of Dow, Allegan county, and has been for the last fifteen years. The defendant produced in evidence the tax-roll of the town of Golden for the year 1882, with the supervisor's warrant annexed, from which it appeared that plaintiff was assessed thereon for personal property, for State, county, township, highway and school taxes. The defendant was township treasurer of Golden, and levied upon and sold the property described in plaintiff's declaration, in order to collect the tax in question, which was the conversion complained of.

Plaintiff claims that there was a total want of jurisdiction in the supervisor to levy any tax against him, because he was a non-resident of the township, and "did not hire or occupy a store, mill, place for sale of property, shop, office, mine, farm, storage, manufactory or warehouse in the township of Golden on the second Monday of April, 1882;" and he also claims "that the State and county tax assessed to him are excessive, and hence the warrant is void on its face, and could afford no protection to the officer, even if there had been jurisdiction to levy the tax." If we grant the facts are as claimed, the conclusion does not follow that the plaintiff is entitled to recover in this form of action against

the officer. Merely an excess in the amount of a tax which the supervisor had a right to assess would not render the warrant void, so as to make the officer acting under it liable in an action of tort for enforcing collection of the taxes on his roll. To so hold would make it necessary for the collector to re-cast the entire tax roll, or otherwise to act at his peril. If an excess in the amount of a single tax "makes the warrant void on its face, so as to afford no protection to the officer," then it could afford no protection to the officer in the collection of any of the other taxes on the roll, although in every respect legal. A proposition that leads to such absurd consequences cannot be sound law. The warrant, being fair on its face, was sufficient to protect defendant from personal responsibility, as a wrong-doer, against the illegalities claimed to have been committed by the supervisor. *Bird v. Perkins* 33 Mich. 28.

The judgment of the circuit court is affirmed with costs.

The other Justices concurred.

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JOHN TORRENT AND PATRICK A. DUCY v. ALONZO YAGER.

Taxation of partnership movables—Jurymen.

1. Logs cannot be taxed in the township where they are temporarily left afloat for sawing if the firm to which they belong has its place of business in another township and the partners live elsewhere.
2. Courts should protect the rights of parties in selecting jurors and may properly exclude any incompetent or drunken person, even against objection.

Error to Muskegon. (Russell, J.) Jan. 23.—Jan. 29.

REPLEVIN. Defendant brings error. Affirmed.

Cook, DeLong & Fellows for appellant.

Smith, Nims, Hoyt & Erwin for appellee, cited *Huckins v. Boston* 4 Cush. 543; *Loud v. Charlestown* 103 Mass. 278; *Charlestown v. County Commrs.* 109 Mass. 270.

SHERWOOD, J. The plaintiffs were copartners in the lumber trade, in the year 1882, under the firm name of Torrent & Ducy. They both resided in the city of Muskegon. They carried on their business in North Muskegon, which was the location of the firm, and the place where they had their principal office, but they also had an office in the city of Muskegon. The defendant was township treasurer of the township of Dalton, in Muskegon county.

At the time for taking the assessment in the spring of 1882, the plaintiffs had about 2,000,000 feet of logs and lumber in the township of Dalton. The logs were in a small lake, upon the margin of which one Latimer had a saw-mill, and with Latimer the plaintiffs had a contract for manufacturing the logs into lumber, and cross-piling it at the railroad for market or shipment. Latimer commenced sawing in the spring of 1882, and when he had sawed about 200,000 feet the supervisor of Dalton made his assessment and assessed the property of the plaintiffs in that town, which consisted of the logs and lumber, at a valuation of $2100. The plaintiffs used no premises in Dalton as a lumber yard, or a place of storage, and they had sold but little lumber there; neither did they pay for anything had of Latimer, or used by them, except for sawing and piling the lumber, and for that they paid three dollars per thousand feet. Latimer had no contract of the logs or lumber except for the purpose of sawing and piling. He had sawed but about ten days when the supervisor made his assessment for Dalton. Upon the assessment made, the supervisors carried out upon the roll a tax against the plaintiff amounting to the sum of $62.86.

The record in the case further shows that the defendant, as treasurer of the township of Dalton on the 15th day of February, 1883, by virtue of a warrant attached to said assessment roll, proceeded to collect said tax against the property of said plaintiff, and seized, took into his posses-

sion and offered for sale $500 worth of plaintiffs' lumber, so being in Dalton; whereupon the plaintiffs brought this suit in replevin to recover their property so seized.

It was conceded by defendant that the plaintiffs were the owners of and had in their possession the said property seized at the time it was taken by the defendant. The cause was tried at the circuit, and the foregoing facts were made to appear upon the trial, and were not controverted by the evidence. It was not claimed at the circuit or in this Court that the assessment covered any other property than the aforesaid logs and lumber in the lake and at the mill.

The plaintiffs claimed that the property could not be legally assessed in the township of Dalton, but was properly assessable in the township of Laketon or in the city of Muskegon, where were the residences of the parties, the location of the firm, and its principal offices, that the tax assessed against the plaintiffs and sought to be enforced against their property was unauthorized by law; and that the authorities of Dalton proceeded without jurisdiction. The defendant contended that the township of Dalton had the right to make the assessment under the first clause of section 11 of the tax law of 1882. The circuit judge thought differently, and directed a verdict for the plaintiffs.

The clause of the statute referred to reads as follows:

"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."

Section 5 of the same act provides, among other things, "a copartnership shall be deemed to reside in the township where its business is principally carried on."

Sec. 10. "All personal property, except as hereinafter provided, shall be assessed to the owner in the township of which he is an inhabitant, on the second Monday of April of the year for which the assessment is made."

We think, under the undisputed facts in this case, the

plaintiff's property was not properly assessed in Dalton, but should have been assessed in North Muskegon or in the city of Muskegon, where the plaintiffs resided and had their principal places of business and dealings; that the logs and lumber were in Dalton only temporarily for the purpose of being sawed and fitted for market. The cases of *Putman v. Fife Lake Township* 45 Mich. 125 and *McCoy v. Anderson* 47 Mich. 504 were decided by this Court under a statute but slightly varying from the present, and they necessarily rule this case.

The direction given by the circuit judge upon the evidence undisputed was correct.

Talesmen were called to complete the jury in this case, and one Simon Wilson was one of the number so called. The court excluded him because of his unfitness in consequence of the excessive use of intoxicating liquor while acting as a juror, and another was called to complete the panel. This was done against the objection of defendant's counsel. The ruling was correct. It is the duty of the court to carefully guard and protect the rights of parties in the selection of jurymen and see to it that no person who is incompetent is allowed to sit in the case.

We find no error in the rulings of the court, and the judgment must be affirmed with costs.

The other Justices concurred.

MARTIN RYERSON, CHAS. T. HILLS, HENRY H. GETTY AND MARTIN A. RYERSON v. TOWNSHIP OF LAKETON.

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Highway taxes.

Where a township board votes a highway money tax upon the town property in addition to the labor rate the supervisor must levy it upon all the property in the township, including that of any incorporated village within its boundaries. How. St. ch. 29.

2. The right to work out a highway tax in labor is superseded by a vote of the township electors residing outside of an incorporated village that the tax shall be paid in money. But this does not affect the village, whose inhabitants shall then maintain their own roads by a tax on their own property while the people of the rest of the township maintain their roads by a tax on theirs. How. St. §§ 1354,1356.
3. Where the township board imposes a highway tax they represent the town meeting in doing so, and are confined to the same subjects of taxation.
4. A highway tax cannot be imposed without express warrant of law; and it will be illegal if the mode of levy and collection prescribed by statute is not followed and the tax levied upon the property specified.

Error to Muskegon. (Russell, J.) Jan. 23.—Jan. 29.

Assumpsit. Defendant brings error. Affirmed.

A. B. Allen and *Cook, DeLong & Fellows* for appellant. A municipal corporation that has authority over its streets, alleys and bridges is not subject to the interference of the township or county or of the general law in regard thereto: *Merrill v. Kalamazoo* 35 Mich. 212; *Cross v. Morristown* 18 N. J. Eq. 305; *State v. Morristown* 33 N. J Law 57; *State v. Jones* 18 Tex. 874; *Indianapolis v. Crous* 7 Ind. 9; *Lafayette v. Jenners* 10 Ind. 74; *Cowan's case* 1 Overton 311; *Pope v. Commissioners* 12 Rich. 407; *Fox v. Rockford* 38 Ill. 451; *O'Kane v. Treat* 25 Ill. 567; *Ottawa v. Walker* 21 Ill. 605; *McCullom v. Blackhawk County* 21 Ia. 409; Dillon Mun. Corp. §§ 534–5.

Smith, Nims, Hoyt & Erwin for appellees.

Champlin, J. At the annual township meeting of the town of Laketon, Muskegon county, Michigan, in the spring of 1882, there was no vote taken upon the amount of "money tax" to be assessed for improvements necessary to be made in the highways and bridges during the year, and thereupon on the 21st day of July, 1882, the township board took action in the matter, as appears from the record of the proceedings of the board, as follows:

"At a special meeting of the township board of the township of Laketon, Muskegon county, Michigan, held at the office of the supervisor, pursuant to notice, on the 21st day of July, A. D. 1882, it was moved by N. L. Downie and seconded by Justice Mallock, that a tax of two-fifths of one per cent. be levied upon the taxable property of the township of Laketon, for highway purposes. Motion being put by the chairman and voted upon was declared carried."

The village of North Muskegon is incorporated under the general law for the incorporation of villages, and is located within the corporate limits of the township of Laketon. In 1882 it had an assessed valuation on the township roll of $359,775; and the township of Laketon, outside of the village limits, had an assessed valuation of $135,370. When the supervisor came to spread the highway "money tax" upon the assessment roll, he laid the entire amount upon the taxable property outside of the village. Plaintiffs owned property outside of the village in the township of Laketon, and the amount of highway tax assessed against them was $214.43; whereas, if it had been spread ratably on the whole township, including the village, they would only have been assessed $58.60. Plaintiffs paid the whole tax to the township treasurer under the following written protest:

"*To the treasurer of the township of Laketon, Muskegon county, State of Michigan:* Now come the undersigned and protests, and here pay under protest, the highway taxes assessed against them for personal assessment, and upon assessment against them upon Lots 2 and 3 of Section 21, town 10 N., R. 17 west; lot 4 of said Sec. same town and range; the mill dock and boom.

The west ½ of lot 1, same Sec., town and range,—all upon the said township treasurer's roll for the collection of taxes for the year 1882.

Because no part or portion of the highway taxes levied and spread upon said tax-roll for said year were levied upon the taxable property of that portion of said township which is embraced within the corporate limits of the village of North Muskegon.

Because said highway tax was not levied as it should by law have been, upon all the taxable property of said township;

And because the taxable property, real and personal, in

that part of said township which is embraced within the corporate limits of the village of North Muskegon, was not upon said tax-roll assessed, levied and charged with its proper proportion of said highway taxes;

And because said taxes were levied upon said tax-roll contrary to the statute in such case made and provided.

Laketon, December 30th, '82. RYERSON, HILLS & Co."

—and then brought this action in assumpsit to recover back the surplus over the $58.60.

The judge charged the jury that "the law of this State required the amount of money tax that should be levied for the improvement necessary to be made in the highways and bridges during the year beyond what the estimated highway labor would accomplish, should be assessed against the entire taxable property of the township;" and that plaintiffs were entitled to recover the difference between what they paid under protest and the amount they would have been required to pay had the assessment been laid against the entire taxable property of the township.

The law governing the case is not clear, nor its proper construction free from difficulty. Section 4 of chap. ii of Act 243 of 1881, as amended by Act 10 of 1882, reads:

"In case the electors present at any annual township meeting shall neglect or refuse to vote any rate of highway labor to be assessed, as by the first subdivision of the last preceding section provided, the commissioner, in making his assessment, may assess not exceeding one-half day's labor upon each one hundred dollars of valuation; *and in case* such electors shall neglect or refuse to vote a money tax, as by the second subdivision of the preceding section provided, the township board may order to be levied such sum, within the limit herein above provided, as they may deem necessary, for the improvement of roads and bridges; and a certified copy of the record of the proceedings of the township meeting, township board, and highway commissioner respecting the assessment of such highway labor and highway tax shall be delivered by the township clerk to the supervisor of his township, on or before the first day of October in each year. The amount of such labor, estimating the same at the rate of one dollar for each day, and also the other highway taxes, shall be levied and assessed by the supervisor

upon the township assessment roll for the current year, and shall be collected in the same manner as moneys appropriated for general township purposes. The taxes so levied shall be carried out in the assessment roll as highway taxes. The township treasurer shall keep a separate account of the same as the highway fund." [How. St. § 1328.]

Section 1 of chap. iv provides:

"The qualified electors of any township of this State who do not reside in any incorporated village may, by a majority vote of those voting, determine that the highway tax shall be assessed on a money basis, and paid in money instead of in labor as is provided by chapters two and three of this Act. [How. St. § 1354.]

And section 3 of the same chapter provides that such tax "shall be levied and collected in the same manner as moneys for general township purposes are levied and collected, but no part of such tax shall be levied on property within the limits of incorporated villages." [How. St. § 1356.]

The statute above quoted shows that there are two methods provided by which moneys for highway purposes can be raised. Under chapter ii of the Act the highways are to be kept in repair by highway labor; and if that is not deemed sufficient for the purpose, then by money tax in addition; the amount of both money tax and labor to be assessed is primarily to be determined, within the prescribed limits, by the electors at the annual township meeting. The money tax so voted is to be levied and collected in the same manner as other township expenses. Chapter iv of the Act dispenses entirely with the labor assessment, and provides that the highways and bridges shall be kept in repair by a money tax. When this plan is adopted it supplants the other method. In cases where an incorporated village is situated within the bounds of the township, this method contemplates a separate maintenance by each; and it places it in the power of the electors of the township who reside outside of the village to determine by a majority vote whether the highway tax shall be assessed upon the money basis or not.

The distinction is significant as indicating a legislative intent as to what body of electors the authority is given in

the two cases to impose the tax. In the former, the authority is conferred upon the whole body of the electors of the township; in the latter, those who reside in the incorporated village are excluded. The same distinction is also maintained in relation to the property upon which the tax is to be levied. In the former it is to be levied and collected in the same manner as other township expenses; that is, upon all the taxable property of the township. In the latter, it is to be levied upon that portion of the township outside of the incorporated village.

The tax in question here was laid under chapter ii and therefore, regarding the provisions of the highway law alone, it should have been levied upon all of the taxable property of the township, unless other provisions of the statute, presently to be considered, repeal by implication those of chapter ii in those towns in which there are incorporated villages.

The law respecting incorporated villages provides that "the council shall have power to lay out, establish, open, make, widen, extend, straighten, alter, close, vacate, or abolish any highway, street, lane, alley, sidewalks, sewers, drain, water-course, bridge, or culvert in the village whenever they shall deem the same a public improvement, or necessary for the public convenience." (How. St. § 2858); also that "the expense of constructing and maintaining bridges, and the whole, or such part as the council shall determine, of the expense of improving and working, including grading and graveling upon the streets and highways, may be paid from the general highway fund, to be raised by tax upon all the property in the village." Id. § 2864.

Section 2924 provides that:

"The council shall also have power to raise, by general tax upon all the real and personal property aforesaid, [*i. e.* liable to taxation in the village] such sum not exceeding one-half of one per cent. of the assessed value of said property, as they shall deem necessary for highway and street purposes. Such moneys shall constitute a 'general highway fund,' and shall be expended exclusively for working and improving the highways, streets, lanes and alleys of the village."

One other section bearing upon the question is necessary to be considered in this connection, (§ 2853), and reads as follows:

"The council shall have supervision and control of all public highways, bridges, streets, avenues, alleys, sidewalks, and public grounds within the village, and shall have the like authority over the same as is given by the general laws of the State: *provided*, that the bridges within the limits of any village incorporated under this Act, in the highways leading into or through said village which have been or shall hereafter be laid out by the commissioners of highways of the township or townships in which said village may be located or established by any other lawful authority, except the authority of such village, shall be built, controlled and kept in repair by the township or townships in which they may be located, the same as if said village were not incorporated, and all the other bridges in said village shall be built, controlled and kept in repair by said village."

The evident design of this legislation was to give the corporate authorities of the village exclusive jurisdiction and control over the highways and bridges within its limits, with the single exception mentioned in the proviso, with full power to levy taxes for the purpose of carrying out the authority given.

Here the duty to keep the highways and streets in repair within the corporate limits is plainly enjoined; and it is equally clear that no tax can be imposed upon the township at large for this purpose. While this is so, chapter ii provides the method to keep the township highways in repair. The highway law remains unaltered in that respect.

It is claimed that the effect of the legislation placing the control of the streets in the incorporated villages in the village council, and giving them power to raise money by taxation to open and repair streets, not only operates to repeal that portion of the statute relating to the assessment for highway labor within the corporate limits, but excludes also from its operation the remaining portion relating to the money tax. And it is argued that since no part of the money tax can be expended for repairs within the corporate limits of the village, therefore no part of the

property lying within such corporate limits can be assessed to raise such money tax. But this by no means follows. The duty of keeping highways in repair, and the property which shall be taxed for that purpose, are not reciprocal and have no necessary connection with each other. It was perfectly competent for the Legislature to provide that all the taxable property in the township should be assessed for the repairs and improvements of highways in the township, although those highways should lie wholly outside of the village. Not the least expense in keeping up highways is the building, repairing and preservation of bridges.

There is no good reason why the property lying within the village limits should not bear its just proportion of this burden. The Legislature was careful to provide that the whole township should bear the expense of keeping the bridges on its highways in repair even when they are located within the corporate limits of the village.

If we should hold that the portion of chapter ii which authorizes the township meeting to vote a highway money tax, and to levy and collect it as other township expenses, is repealed by implication by the statute relating to incorporated villages above cited, it would follow that no authority exists for the imposition of the money tax, nor for levying and collecting the same. We cannot interpolate into this statute the language contained in chapter iv, so as to exclude the electors of incorporated villages from voting upon the question, and also so change the statute as to exclude the property in the village from being assessed for the money tax. To do so would require something more than construction; it would require legislation establishing a positive change in the design of the law.

No distinction is made between those residing within and those without the corporate limits of the village. Those within are regarded as citizens of the township, and as being mindful of its welfare, and the law has vested in all the electors indiscriminately the power of imposing this money tax. When the township board do it, they act as representing the township meeting, and are confined to the same subject of taxation as the township meeting.

When a tax is levied for any purpose, it must have express warrant of law to authorize its imposition. And when the mode is pointed out, and the manner it is to be levied and collected mentioned, that mode must be followed and the tax levied upon the property specified, or it will be illegal. The law points out definitely the mode and manner the highway money tax is to be authorized, levied and collected. The tax in question, although properly authorized, was levied and collected contrary to express provisions of the statute, and is therefore clearly illegal.

Judgment affirmed.

The other Justices concurred.

ROLLIN H. PELTON, SUPERVISOR OF TALLMADGE TOWNSHIP v. OTTAWA COUNTY SUPERVISORS.

Alteration of town bounds—Notice—Map.

1. "Notice in writing" must be posted of any application to a board of supervisors to detach territory from one township and add it to another. How. St. § 487. *Held* that such notice may not only be printed, but the names thereto attached, if properly authenticated, may also be printed.
2. The map which petitioners for a change in township boundaries are required by How. St. § 486 to furnish to the board of supervisors need not show the full topography of all the townships to be affected; it is enough to give the boundaries and sections or parts of sections for each, together with the place and course of any natural boundaries, if any, that are to be established as limits.
3. Where notices of the hearing of an application to alter township boundaries are shown to have been seasonably given, it is immaterial that an affidavit showing that the notices were posted on different specified days does not show on which day the first was posted.

Certiorari to the Board of Supervisors for Ottawa county. Jan. 23.—Jan. 29.

George H. White for plaintiff in certiorari. Where notice in writing of proceedings to detach territory is

required, the proof of notice must show compliance: *Perrien v. Fetters* 35 Mich. 235; *Scrafford v. Gladwin Supervisors* 41 Mich. 649; *Chandler v. Nash* 5 Mich. 416; *Weed v. Lyon* Walk. Ch. 78; *Shadbolt v. Bronson* 1 Mich. 85; *Van Aulen v. Highway Commissioners* 27 Mich. 414; printed signatures will not answer: *Taylor v. Burnap* 39 Mich. 739; *Sharpshooters' Ass'n v. Highway Com'rs* 34 Mich. 38; *Davis v. Shields* 26 Wend. 350.

Geo. C. Stewart and *H. M. Campbell* for defendant in certiorari. A printed signature is sufficient within the statute of frauds: Browne Stat. Frauds § 356; 2 Story Cont. § 1453; 1 Pars. Cont. 544: 3 id. 8; Edwards on Bills 466; *Durrell v. Evans* 1 H. & C. 174; *Schneider v. Norris* 2 M. & S. 286; *Saunderson v. Jackson* 3 Esp. 181: 2 Bos. & P. 238; *Com. v. Ray* 3 Gray 447; *Henshaw v. Foster* 9 Pick. 312; *Wheeler v. Lynde* 1 Allen 402; *Com. v. Foster* 114 Mass. 319; a notary's signature to a protest may be in print: *Fulton v. Maccracken* 18 Md. 528; *Munroe v. Woodruff* 17 Md. 159; an adopted signature is legal: *Eggleston v. Wagner* 46 Mich. 610; *Johnson v. Van Velsor* 43 Mich. 208; *Just v. Wise* 42 Mich. 573.

Sherwood, J. Certiorari to review the action of the defendant in detaching a part of the territory of the township of Tallmadge and attaching the same to the township of Allendale in the county of Ottawa, under Comp. L. §§ 480–1. [How. St. §§ 486–7].

The plaintiff claims the defendant did not acquire jurisdiction to detach such territory and make such change, because the statutory notice of the proceeding was not given and no map of all the townships to be affected thereby showing the proposed alterations was furnished to the board of supervisors as required by statute. The action complained of was taken on the following proceedings:

First. A petition to the board of supervisors praying for such action was subscribed by forty-one persons under the heading "Names Allendale," and by twenty-one persons under the heading "Names Tallmadge." The petition

stated that they were freeholders of the townships of Allendale and Tallmadge. Attached to it is an affidavit of William A. Davis, made December 30, 1882, stating that twelve or more of them are resident freeholders of Tallmadge; also the affidavit of Robert Prichard, made same day, stating that twelve or more of them are resident freeholders of Allendale.

Second. A notice was also printed having thereto subscribed sixteen of the signatures of each column of the petition, stating that they would apply to defendant January 2, 1883, to detach said territory (describing it) from Tallmadge, and attach it to Allendale. To it was attached the affidavit of Levi Jackson, made December 22, 1882, naming sixteen of the persons whose names were printed to the notice in the column headed "Allendale," and stating that they are resident freeholders of that township; and also to the affidavit is attached the affidavit of Horace A. Cooley, made December 22, 1882, showing them to be the same who signed the annexed notice. To such notice is also attached the affidavit of Sylvester J. Hall to the same effect as that of Levi Jackson. These three affidavits were attached to a printed notice, the signatures to which are also printed.

Third. The affidavit of William A. Davis attached to a duplicate printed copy of last named notice, made December 22, 1882, named fifteen persons whose names are printed to the notice in the column headed "Tallmadge," and stated them to be resident freeholders of that township; and also another affidavit of William A. Davis attached, made same day, stating that the above-named persons are the same who signed the annexed notice; and also to said notice is attached the affidavit of A. J. Davis, of same date, naming those fifteen persons and saying that they are resident freeholders of the township of Tallmadge.

Fourth. The affidavit of William G. Barnes, attached to a duplicate copy of said printed notice (that the application would be presented to the defendant January 2, 1883), made January 1, 1883, stating that the annexed notice was pub-

lished in the Coopersville *Observer*, a newspaper, &c., once each week for five successive weeks, and that the first publication of it was November 30, 1882.

Fifth. The affidavit of Horace A. Cooley, attached to a duplicate printed notice (same as last mentioned), made December 30, 1882, stating that on November 30 and December 1, 1882, he posted up "true copies" of the annexed notice in five of the most public places in each of said townships, describing the places, and that he caused a "copy of said notice" to be published in the Coopersville *Observer*, a newspaper, etc., once in each week for four successive weeks immediately preceding January 2, 1882.

The aforesaid petition, accompanied by the subsequent proceedings herein stated, was duly presented to the board of supervisors on the 2d day of January, 1883, with a plat of the townships attached thereto, which the petition stated was a map of all the townships to be affected by the division prayed for, and showed the proposed alteration of said townships to be made thereby.

Action was duly had by the defendant on said petition, and prayer thereof granted, and the alteration duly made.

The error complained of relates wholly to the sufficiency of the notice and the map. The statute, speaking upon the subject, says: "Notice in writing of such intended application, subscribed by not less than twelve freeholders * * shall be posted in five of the most public places in each of the townships to be affected thereby, four weeks next previous to such application to the board of supervisors." Comp. L. § 481. [How. St. § 487].

The words "written" or "in writing" may be construed to include printing, engraving and lithographing, except in cases where the written signature is required by law. Under these statutes counsel for plaintiff argued that while the body of the notice might perhaps be printed or lithographed, still both the original notice and copies posted must be authenticated by the genuine written signatures of the signers, and it being a statutory requirement, it is jurisdictional and must affirmatively be made to appear.

We are not able to agree with learned counsel for plaintiff in this conclusion. We see nothing in the proceedings under review requiring such a construction to be given to the statute. The object of the notice is to inform the people of the townships to be affected, of the designed change or alteration of the boundaries of the townships, and that the necessary proceedings are being taken by persons authorized by the statute to prosecute the same. And this is as well done by the printed notice as by the written; and the former will be much more likely to be noticed and read than if in writing. The whole purpose of the notice, though printed, was surely accomplished in this case, because the record discloses that a very strong and numerously-signed protest was presented on the hearing of the petition before the supervisors.

The Statute of Frauds is quite as mandatory in its language as the one now under consideration, and still the clause requiring the contract to be in writing and signed by the party to be charged, has always been held sufficiently complied with by printed memoranda and signatures. Browne Stat. of Frauds § 356; 2 Story on Cont. § 1453; 1 Pars. on Cont. 544; 3 Pars. on Cont. 8; Edw. on Bills; *Durrell v. Evans* 1 H. & C. 174; *Schneider v. Norris* 2 M. & S. 286; *Saunderson v. Jackson* 3 Esp. 181: 2 Bos. & Pul. 238.

If the printed signature is sufficient in these and other cases to create liability to the extent of millions, it is difficult to see why the notice and signatures in this case ought not to be held sufficient. *Com. v. Ray* 3 Gray 447; *Henshaw v. Foster* 9 Pick. 312; *Com. v. Foster* 114 Mass. 319. It has also been held that the signature of a notary to a protest may be printed, and need not be written. *Fulton v. Maccracken* 18 Md. 528; *Munroe v. Woodruff* 17 Md. 159. We find no error in the record upon this point.

The statute requiring the petitioners in this class of cases to furnish the board of supervisors with a map of all the townships to be affected by the divisions showing the proposed alterations, we think was sufficiently complied with in this case. [How. St. § 487].

If the statute is, as claimed by counsel for plaintiff, mandatory, we think he has fallen into an error as to the character and kind of map necessary to be furnished. It does not require the topography,—an exact delineation of the surface and several places in the townships,—to be given, but only the boundaries and sections, or parts thereof, contained in each, together with the place and course of any natural boundaries (as in this instance the stream) constituting the proposed changed limits of the townships. And we think the map furnished in this case quite sufficient for that purpose.

The defect claimed in the proof of posting notices of hearing (one having been posted November 30th and the other December 1st, but the affidavit not showing on which day the first was posted) is immaterial, as time quite sufficient intervened before the hearing, if both had been served on the latter day.

We find no error in the record and the action of the board of supervisors of the county of Ottawa in the premises must be sustained and the writ dismissed, but without costs.

The other Justices concurred.

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MARY A. THOMPSON v. MICHIGAN MUTUAL BENEFIT ASSOCIATION.

Demurrer—Waiver of defects of jurisdiction.

1 A demurrer is an appearance and a general demurrer waives objections to jurisdiction of the person.

2. Defects in jurisdiction of subject matter can not be waived, even where the nature of the action is local or any element of locality is necessary to the jurisdiction.

3. Defendant's objection that the court has no authority in the particular case must be specifically and seasonably taken if the court is one of general jurisdiction; and it is properly taken by a plea to the juris-

diction. But if a general demurrer has already been filed this objection is waived and the plea presents an immaterial issue and should be stricken from the files.

4. A non-resident waives his exemption from the process of even a local court of general jurisdiction if he does not object seasonably.

5. The circuit courts of Michigan are courts of general jurisdiction and can take cognizance of suits on contracts, irrespective of the locality of their origin, provided the parties, by service of process or otherwise, are before them.

6. Costs of the issue on an immaterial plea to the jurisdiction and of the Supreme Court on error were exacted upon granting leave to plead to the merits.

Error to Ingham. (Gridley J.) Jan. 24.—Jan. 29.

ASSUMPSIT. Plaintiff brings error. Reversed.

S. L. Kilbourne for appellant. A defendant by pleading submits to the jurisdiction and raises an issue of law on which final judgment can be entered: 1 Green's Pr. 124; *Blair v. Compton* 33 Mich. 423; see *Wheeler v. Wilkins* 19 Mich. 81; amending or answering after demurrer is not of right: 1 Green's Pr. 288; *Tefft v. McNoah* 9 Mich. 206.

B. P. Shepard and *Huntington & Henderson* for appellee. A corporation can not be sued outside of the jurisdiction of its locus; *Det. F. & M. Ins. Co. v. Saginaw Circ. Judge* 23 Mich. 492; *Dewey v. Central Car Mfg. Co.* 42 Mich. 399.

COOLEY, C. J. The defendant is a corporation organized under chapter 94 of the Compiled Laws of 1871 [How. St. ch. 118], and having its business office in the county of Hillsdale. The plaintiff, who is a resident of the county of Ingham, began suit by the filing of a declaration in the office of the clerk of that county, and by service of the same on the proper officer of the defendant in the county of Hillsdale. The defendant, by attorney, filed a demurrer to the declaration, assigning nine special causes of demurrer, all of which were for formal defects. The demurrer was sustained on argument, and the defendant had judgment

for costs with leave in the plaintiff to amend. An amended declaration was filed under this permission. The defendant then pleaded to the jurisdiction of the court, and this plea, after argument, was sustained and the proceedings quashed.

The ground for this judgment was that the defendant was liable to be sued only in the county where its business office was located, there being no statute authorizing suits to be brought against such corporations elsewhere. Whether this position would be sound if taken seasonably we shall not consider at this time, as we are all of opinion that any objection which might have existed to the jurisdiction in this case has been waived.

If the defect had been of jurisdiction of the subject-matter, no waiver, however formal, could have been effectual. *Attorney General v. Moliter* 26 Mich. 444; *Burckle v. Eckhart* 3 N. Y. 132. And this principle will apply where the action is in its nature local, or where the jurisdiction of the court requires in the cause of action any element of locality. *Wheelock v. Lee* 74 N. Y. 495. But there is no such element in the cause of action in this case. The circuit court for the county of Ingham is a court of general jurisdiction, and may take cognizance of suits upon contracts like the one here sued upon, irrespective of the locality of their origin, provided the parties, by service of process or otherwise, are before the court. The only difficulty suggested in the present case is that the defendant was suable only in the county where it had its business office; but it has been held that even in the case of city courts, a non-resident who could claim exemption from their process, must make the claim seasonably, or he will waive it. *Grand Rapids etc. R. R. v. Gray* 38 Mich. 461; *Gott v. Brigham* 41 Mich. 227. These cases are in point in this suit.

A demurrer is an appearance in the cause. *New Jersey v. New York* 6 Pet. 323. And filing a general demurrer is a waiver of objections to the jurisdiction over the person. *Ogdensburg etc. R. R. Co. v. Vermont etc. R. R. Co.* 63 N. Y. 176, 181; *Handy v. Insurance Co.* 37 Ohio St. 366;

Miller v. State 35 Ark. 276; *Rowland v. Coyne* 55 Cal. 1. If a court has general jurisdiction, but not authority, in respect to the particular case, the objection should be specifically taken. *Webb v. Mann* 3 Mich. 139. The plea to the jurisdiction was proper,—*Dewey v. Car Co.* 42 Mich. 399, but it was not seasonable; and as the record showed the defendant had submitted to the jurisdiction, the plea presented an immaterial issue, and should have been stricken from the files.

The judgment must be reversed and the cause remanded with leave to the defendant to plead to the merits on the payment of all costs of the issue on the plea and of this Court.

The other Justices concurred.

THOMAS STORY v. MARY A. LAMB.

Negotiability.

An instrument promising to pay a stated sum, with interest, "on or before two years after date," but providing that if it be paid within one year no interest shall be paid, is not a promissory note, as it lacks certainty in time and amount. And as it is not negotiable it can only be transferred by assignment, and though the payee may perhaps assign it by indorsing it he does not thereby make himself liable for the amount to be paid.

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Error to St. Clair. (Stevens, J.) Jan. 25.—Jan. 29.

ASSUMPSIT. Defendant brings error. Reversed.

Wright & McCall for appellant.

Stevenson & Phillips for appellee.

SHERWOOD, J. In March, 1878, the defendant in this case obtained a horse of the plaintiff, and gave him in exchange therefor, beside a twenty-five dollar note endorsed by his father, the following contract, viz:

"$150. COLUMBUS, July 18th, 1877.

On or before two years after date we promise to pay to John A. Lamb, or order, the sum of one hundred and fifty dollars, value received, with ten per cent. interest, and current rate of exchange or express charges. This note is given for the purchase of the instrument below, which instrument is to remain the property of John A. Lamb until this note is paid in full, it being optional with said John A. Lamb upon default of payment, to take possession of said instrument, or to collect the note by process of law, and in case he shall take such instrument, said John A. Lamb shall not be liable to refund any money heretofore paid by the purchaser thereof, and said instrument shall not be removed from the township of Columbus without the consent of said John A. Lamb. DANIEL HICKEY.

SARAH HICKEY.

Style 16th, No. 52704, organ. Payable at Wales, Michigan. If this note is paid within one year no interest to be paid.

[Endorsed on back]

Pay to Thomas Story JOHN A. LAMB."

After Story had the note about two weeks he met the defendant at township meeting and obtained the endorsement of the defendant's name as it appears above. When the money became due upon the contract, Story brought suit against Lamb in assumpsit to recover the balance due upon the contract, filing his declaration upon the common counts. The defendant pleaded the general issue and gave notice that he would show his endorsement was made several days after the sale and delivery of the contract to the plaintiff.

The parties were both sworn in the case, and each testified as to the circumstances and conversation that occurred between them when the defendant's name was obtained upon the note.

The plaintiff states he told the defendant the note was not good as he had represented, and said to him he must endorse it or plaintiff would have his horse back, and that defendant thereupon made the endorsement of his name upon the note as above shown. On the contrary, the defendant testifies that plaintiff came to him and asked him to endorse his name upon the note for the reason plaintiff

could not collect or sue upon it until he did so because it was payable to defendant's order, and that was the reason why he endorsed the instrument.

The cause was first tried at the circuit in March, 1880, when the plaintiff had judgment, and on appeal to this Court it was held that the contract sued upon is not a negotiable promissory note; and that it is competent for the defendant to show the circumstances under which he placed his name on the back of the instrument; that the instrument is a peculiar one. It was given for the purchase price of an organ, which had been and was by its terms to remain the property of Lamb, and he had authority to retake possession of the same and retain what had been paid thereon, or collect the so-called note, at his option, in case of failure to perform, and this right he did not in terms assign to Story. The judgment at the circuit court was reversed and a new trial ordered. 45 Mich. 488. That trial has been had, and the case is again before us.

Since the first trial plaintiff has amended his declaration by adding to the common counts a count upon the endorsement; and the second trial was had upon the theory that defendant was liable as endorser. Judgment was again obtained against the defendant, and the case is now before us for review.

The case as now presented requires a construction of the instrument, and of the legal effect of the endorsement made by the defendant thereon, and this may be very briefly given.

The instrument is not, under the authorities in this State nor under the elementary authorities, a promissory note, either negotiable or non-negotiable, and is not therefore subject to the rules governing commercial paper. It lacks the required elements of certainty in time and amount of payment. See this case in 45 Mich. 488; *Fralick v. Norton* 2 Mich. 130; *Brooks v. Hargreaves* 21 Mich. 254; 2 Bl. Com. 467; Bayley on Bills 1; Edw. Bills & Notes 141; Smith on Merc. Law 253; Story on Prom. Notes 1; 1 Pars. Notes & Bills 35, 37.

The so-called note being no more than a simple contract, not a note, and without negotiability, could only be transferred by assignment; and the endorsement "pay to Thomas Story" on the contract, does no more than transfer the right to recover the money payable on the instrument, and the right to sue therefor, to Story. It is not an unusual way of transferring such claims, but such endorsement imports no legal liability on the part of the endorser to pay the amount of the claim in case of failure by the debtor. This would be giving the endorsement the character, and subjecting the maker of it to the liability, of the endorser of commercial paper. The amended declaration counts upon such liability, and it cannot be sustained by the facts. The circuit judge submitted the case to the jury upon the theory that the defendant might be held under the contract of endorsement, but the ruling was erroneous. The error is radical.

There is no count in the declaration against the defendant as guarantor of the paper, and if there was it is difficult to see how it could be supported under the circumstances as they appear upon the record.

We can see no ground upon which the judgment can be sustained. It must be reversed and a new trial granted.

The other Justices concurred.

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TOWNSHIP BOARD OF BEAVER CREEK v. THADDEUS E. HASTINGS, TOWNSHIP CLERK.

Town board meeting.

Meetings of a township board, unless duly called and notified, are not legal if not attended by all the members.

Mandamus. Submitted and denied January 29.

Main J. Conine for relator.

PER CURIAM. Motion for mandamus to compel the respondent, who is township clerk of Beaver Creek, to enter upon the records of the township the proceedings of a meeting of the township board.

Held, that no meeting of the township board could be legal which was not attended by all the members, unless it appeared that the meeting was duly called and notified. The mere attendance of a quorum does not make a legal meeting, but every member has a right to be present and participate in its action.

Mandamus denied.

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ELI FREDERICK v. CIRCUIT JUDGE FOR MECOSTA COUNTY.

Replevin from sheriff—Mandamus to correct judgment entry.

1. Where goods held by the sheriff under an attachment or execution are taken from him on writ of replevin a judgment in his favor, before the attachment proceedings are decided, must be for the return of the property and not for the special value of his lien; and if the judgment has been erroneously entered mandamus will lie upon a seasonable application to change the journal entry thereof accordingly, unless such change will prejudice the rights of strangers.
2. A judgment, the entry of which was corrected by mandamus, was ordered to take effect from the date of the correction, so that full opportunity to ask for a review thereof might be saved.
3. Costs were not allowed on mandamus where the occasion for its issue was the error of relator's counsel.

Mandamus. Submitted January 18. Granted February 6.

Glidden & Marsh, *Geo. W. Mead* and *Corbin & Cobb* for relator.

J. H. Palmer and *M. Brown* for respondent. Mandamus will not lie to change a verdict or alter the note of it to correspond with facts, nor to compel a court to alter its

record to correspond with facts shown by affidavit: High Ext. Leg Rem. §§ 153–4; a court may set aside a verdict but cannot alter it: Wells on Replevin § 741.

CHAMPLIN, J. We are all of opinion that a peremptory mandamus should issue in this case.

The action out of which these proceedings arose was replevin brought by one Nathan Wolf against Frederick, who, as sheriff of Mecosta county, had served attachments against the goods of one Abram Markson. These attachments were three in number, issued on behalf of different plaintiffs, two of them bearing teste January 20, and one January 22, 1883. The sheriff seized the goods on the 23d of January, and afterwards, on the same day, Wolf replevied the goods from the sheriff. Issue was joined in this cause, and the sheriff gave notice, under his plea, of his special interest in the goods as sheriff by virtue of the attachments, and other special matter of defense. The replevin suit came on to be tried May 15, 1883, before judgments had been obtained in the attachment suits, and resulted in a verdict for defendant, and also that he had a lien or special property in the goods by reason of the several writs of attachment, specifying them; and they also found that the plaintiff was the general owner of the goods subject to the attachment liens of defendant, and that the defendant did not unlawfully detain them. It appears that before the cause was submitted to the jury, the attorneys for the defendant expressly waived a return of the property mentioned in the writ, and elected instead thereof to take a judgment for the special interest of the defendant. This was erroneous.

Section 6754, Comp. L. 1871, (How. St. § 8342,) provides:

"When either of the parties to an action of replevin, at the time of the commencement of the suit, shall have only a lien upon, or special property or part ownership in, the goods and chattels described in the writ, and is not the general owner thereof, that fact may be proved on the trial, or on the assessment of value, or on the assessment of damages, in all cases arising under this chapter; and the finding

of the jury, or court, as the case may be, shall be according to such fact, and the court shall thereupon render such judgment as shall be just between the parties."

This section must be construed in connection with § 6763, (How. St. § 8351) namely:

"If any goods or chattels which are replevied had been attached, they shall, in case of judgment for a return, be held liable to the attachment, until final judgment in the suit in which they were attached, and for thirty days thereafter, in order to their being taken in execution; and if such final judgment be rendered before the return of the property, or if the property when replevied was seized and held on execution, it shall be held subject to the same attachment or seizure for thirty days after the return, in order that the execution may be served thereon, or the service thereof completed, in like manner as it might have been if such property had not been replevied."

It is apparent from the foregoing sections that in the plight in which this case was at the time of trial, no judgment for the value of the special interest of the defendant in the goods could be taken. There was no way of determining at that time what the value of his special interest was. No judgment had been obtained fixing the amount, and it was legally possible that no judgment would be obtained at all, in which case his special interest would at once cease. It is evident that the section of the statute first above cited refers to liens other than those of attachment or execution, while the latter section controls in all cases where goods are held by attachment or execution, and in the latter case the only judgment that can be taken is for a return of the property. The design of the law is to protect the rights of parties by restoring the goods to the hands of the officer in order to enable him to complete the execution of his process which had been obstructed by the proceedings in replevin. Parties are thus enabled to try the title and ownership of the property seized and the liability of the same to be taken in execution or attachment, and while these proceedings are in progress the goods may be considered as in custodia legis. If the officer's lien is established by showing that the goods were liable to be seized

as the property of the debtor, they are to be returned to him; otherwise not. The statute in this respect is mandatory, and it is the duty of the court in such cases to render a judgment for a return of the property.

When, therefore, in this case the defendant's attorneys discovered their error, and moved the court for leave to withdraw the waiver of judgment for a return of the property, and that judgment be entered for a return of the property taken under the writ of replevin, he should have granted the motion. Instead of this he denied the motion with costs, including an attorney fee of ten dollars, and seeks to justify his action "upon the ground that the said circuit court had not the power to change the said verdict of said jury and the judgment that had been duly rendered and entered thereon, and to substitute in its stead a new and different verdict, and to render and cause to be entered another and different judgment thereon."

The verdict and judgment referred to as entered in the journal of the court [and as given in the court's return to the order to show cause in this case] read as follows:

NATHAN WOLF v. ELI FREDERICK. The jury heretofore impaneled and sworn in this cause sat together again and heard the arguments of counsel and the charge of the court, retired from the bar under the charge of Thomas Shaw, Sr., an officer of court duly sworn for that purpose, to consider of their verdict to be given, and after being absent for a time, return into court and say upon their oath that the said defendant did not unlawfully detain the goods and chattels mentioned, in manner and form as the said plaintiff hath in his declaration in this cause alleged, *and the jury by whom the issue joined in this cause was tried having found, by their verdict, that the said defendant did not unlawfully detain the goods and chattels in the said plaintiff's declaration specified as is therein alleged, and the said jurors having further found* that the said defendant has a lien upon or special property in said goods and chattels by reason of a certain writ of attachment issued out of this court, wherein Sydney A. Cushing, Moses W. Thompson, Charles A. Olmstead and Lovell S. Snow are plaintiffs, and Abram Markson is defendant, and a further lien or special property in said goods and chattels

under and by virtue of a writ of attachment issued out of and under the seal of this court wherein Daniel J. Cushing is plaintiff and said Abram Markson is defendant, and a further lien or special property in said goods and chattels by a writ of attachment issued out of and under the seal of this court, wherein Charles M. Marshall, Marshall E. Rumsey and Arnold Walker are plaintiffs, and Abram Markson is defendant; they also find that the said plaintiff is the general owner of the said goods and chattels subject to the lien aforesaid of the said defendant, and the jury by whom the issue joined in this cause was tried having found, by their verdict, that the said defendant did not unlawfully detain the goods and chattels in the said plaintiff's declaration specified as is therein alleged; *and the jury having found as hereinbefore set forth, therefore it is considered that the said plaintiff take nothing by his suit and that the said defendant do go thereof without day; and it is further considered that the said defendant do recover against the said plaintiff the amount of the claims of the said Sydney A. Cushing, Moses W. Thompson, Charles A. Olmstead and Lovell S. Snow and of the said Daniel J. Cushing and of the said Charles M. Marshall, Marshall E. Rumsey and Arnold Walker to be assessed and not exceed in amount the sum of seventeen hundred and sixty-seven dollars; and that said defendant is not the general owner thereof, but being the amount of his special property in the said goods and chattels so by the jurors in form aforesaid found, together with his costs and charges by him about his defense in this behalf expended to be taxed, and that the said defendant have execution thereof.*

And it is further ordered that all proceedings in this cause, except taxation of costs, be stayed until the first day of the next term of this court to enable the plaintiff to move for a new trial, settle bill of exceptions or take such steps as he may be advised.

Read, approved and signed in open court.

C. C. FULLER, Circuit Judge."

This record shows that the verdict of the jury was not entered separately and afterward a judgment rendered thereon, but that the two were combined in one entry. There is no difficulty in separating or distinguishing that portion of the entry which is the verdict of the jury, from the judgment entered, presumably by the clerk, nor in vacating that portion which is the judgment of the court,

without interfering with or affecting the verdict of the jury as recorded. The motion did not call upon the circuit court to change the verdict of the jury, nor was it necessary that he should do so in order to vacate the judgment entered and enter a new one for a return of the property replevied.

There is no doubt that the court possessed the power to vacate the judgment entered, on the motion made, and to enter the proper judgment required by the mandate of the law. The amendment asked was in furtherance of justice. It is not claimed that any unnecessary delay had occurred before the attention of the court was directed to the error; nor is it claimed that the rights of third persons would be prejudiced by making the amendment.

Under such circumstances courts have frequently exercised the power, not only after the lapse of terms of the court, but of years. 6 Cush. 354; *Balch v. Shaw* 7 Cush. 284; *Usher v. Dansey* 4 M. & S. 94; *Atkins v. Sawyer* 1 Pick. 351; *Tilden v. Johnson* 6 Cush. 354; *Hall v. Williams* 1 Fairf. 278, 288; *Close v. Gillespey* 3 Johns. 526; *Waldo v. Spencer* 4 Conn. 71; *Fay v. Wenzell* 8 Cush. 316; *Rugg v. Parker* 7 Gray 172; *Bacon v. Lincoln* 2 Cush. 124; *Holmes v. Remson* 2 Cow. 410; *Marsh v. Berry* 7 Cow. 344: *Owners &c. v. Hale* 1 Doug. (Mich.) 313; *Lyman v. Becannon* 29 Mich. 466; *Kenyon v. Woodward* 16 Mich. 332; *Cook v. Perry* 43 Mich. 625.

The circuit judge is directed to vacate the order denying the motion to amend the record, and to amend the record by vacating that portion of the journal entry printed in italics in his return to the order to show cause, and to enter a judgment in favor of the defendant and against the plaintiff in the replevin suit, for a return to him of the property described in the writ of replevin. The judgment so entered will take effect from date of entry, and parties will have the same rights and remedies to obtain a review of such judgment as they would have had if entered at the time of the rendition of the verdict.

Let a peremptory writ of mandamus issue.

Inasmuch as the entanglement in which this case has been brought was owing, in the first instance, to the error of the defendant's attorneys, no costs will be allowed.

The other Justices concurred.

JOSEPH KELLER v PERRY HANNAH, DAVID J. PARSONS AND JOHN J. BUSH.

Good faith of second mortgagee.

The good faith of a second mortgagee in taking his mortgage on the strength of a forged discharge of the former one, is no defence to the foreclosure of the earlier mortgage if the holder had nothing to do with deceiving the later mortgagee. And as the foreclosure is an original equity proceeding which covers all questions as to the validity and amount of the security, the question of forgery is for the court to decide and not for a jury.

Appeal from Manistee. (Judkins, J.) Jan. 22.—Feb. 6.

BILL of foreclosure. Defendant Hannah appeals. Affirmed.

A. V. McAlvay for complainant.

Ramsdell & Benedict for defendant Hannah. A bona fide purchase for value without notice, is a good defense not only against all prior equities, but against all adverse proceedings in equity: *Bassett v. Nosworthy* 2 Lead. Cas. in Eq. 49; *Howell v. Ashmore* 1 Stock. 82; *Demarest v. Wynkoop* 3 Johns. Ch. 147; *Hagthorp v. Hook* 1 Gill & J. 270; *Goodtitle v. Cummins* 8 Blackf. 179; *Varick v. Briggs* 6 Paige 323; *Owings v. Mason* 2 A. K. Marsh. 380; *Magwood v. Lubbock* 1 Bailey's Eq. 382; *Heilner v. Imbrie* 6 S. & R. 401; *Jones v. Powles* 3 Myl. & K. 581; *Cottrell v. Hughes* 15 C. B. 532, 554; *Boyce v. Waller* 2 B. Mon. 91; *Ledyard v. Butler* 9 Paige 132; *Frazer v. Western* 1 Barb. Ch. 220; *Wood v. Mann* 1 Sumn. 507;

Rowley v. Bigelow 12 Pick. 307; *Hood v. Fahnestock* 8 Watts 489; *Erskine v. Decker* 39 Me. 467; *Coleman v. Cocke* 6 Rand. 618; *Baggarly v. Gaither* 2 Jones Eq. 30; *Lamont v. Stimson* 5 Wis. 443.

CAMPBELL, J. Complainant filed his bill to foreclose a mortgage given him in 1878 by David Parsons and wife. Defendant Hannah holds a subsequent mortgage from Parsons, which he was induced to take by the representation that complainant's mortgage had been discharged of record. The record contains a discharge, apparently regular in form, and purporting to be made by complainant and acknowledged in another state. Complainant asserts this to have been a forgery. The court below so held it, and ordered foreclosure.

The only legal position taken for Hannah on this hearing is, that he should have this question tried by jury, and that he should not be molested because he is a bona fide mortgagee. This latter point has no force, because if the discharge is forged complainant has both a legal and an equitable right, superior in time to Hannah's, and it is not his fault that the latter was deceived. Neither is there any ground for the other claim, because the foreclosure of a mortgage is an original equity proceeding, and all questions touching the validity and amount of the security must be litigated in the suit.

There is no serious question of fact in the case. The forgery is positively made out, and there is no testimony whatever to throw substantial doubt upon it.

The decree must be affirmed with costs.

The other Justices concurred

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ELIZABETH BRINSMADE'S APPEAL.

Error—Order vacating appointment of administrator.

The writ of error lies to bring up proceedings according to the course of the common law; and it is not appropriate for the review of an order of the circuit court setting aside the appointment of an administrator.

Error to Ottawa. (Arnold, J.) Jan. 22.—Feb. 6.

Appeal in probate. Petitioner brings error. Dismissed.

Hampden Kelsey for appellant.

J. C. FitzGerald for appellee. Error does not lie in a proceeding that is not at common law, like the appointment of an administrator: *Cross v. People* 8 Mich. 113; *Churchill v. Burt* 32 Mich. 490; *Smith v. Supt. of the Poor* 34 Mich. 58; *Auditor Gen. v. Pullman Palace Car Co.* 34 Mich. 59; *Mower's Appeal* 48 Mich. 446.

CAMPBELL, J. The probate court of Ottawa county, upon application of Orleans L. Jordan and Hampden Kelsey, admitted to probate, on proof of foreign probate, the will of Thomas C. Brinsmade, deceased. Mrs. Brinsmade, his widow, was afterwards on a showing allowed to appeal from this order, which she claimed to have been made without sufficient cause and improperly. The appointment and probate were set aside by the circuit court, and Kelsey brought the case into this Court by writ of error.

There was no issue in the circuit court involving the validity of the will or of the New York probate, and the only questions were the propriety of the intervention of petitioners below, and of the appointment of Kelsey as administrator. It is now objected by appellee that the wrong remedy has been sought here, and this objection we regard as well taken.

It has been decided in this Court several times that a writ of error is only allowable to bring up such controversies and questions as are according to the course of the common-law. Probate appeals sometimes involve such questions where there is a contest over the will itself or over contested claims. In other cases they include equitable matters, as in case of accounting, and matters involving more or less discretion. Where no such issue is involved as could ever be a common-law question, the relief must be had by some other process, if it can be had at all. In *Besancon v. Brownson* 39 Mich. 388, a case like the present came up on certiorari. In *Holbrook v. Cook* 5 Mich. 225; *Conrad v. Button* 28 Mich. 365; *Cameron v. Bentley* 28 Mich. 520; *Fletcher v. Clark* 39 Mich. 374 and *Gott v. Culp* 45 Mich. 265 the varying character of probate appeals was considerably discussed and in some of them the proper mode of review was referred to. There was no question presented on which the intervention of a jury could have been a matter of right, and no common-law issue whatever.

The writ must be dismissed with costs.

The other Justices concurred.

WILLIAM SMITH v. JANE SMITH.

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Replevin by husband for household goods.

1. A Michigan wife has special statutory rights in such household goods as would be exempt from execution; and if her husband leaves her he cannot get possession of them by writ of replevin, even if they consist of books, a shot-gun and a revolver.

2. Replevin cannot be made to lie on a demand which, when made, was in violation of the injunction of a court of competent jurisdiction.

Error to Muskegon. (Russell, J.) Jan. 23.—Feb. 6.

REPLEVIN. Defendant brings error. Reversed.

Cook, DeLong & Fellows for appellant.

A. B. Allen for appellee.

CAMPBELL, J. Plaintiff replevied from defendant, who is his wife, a number of items of household furniture which he had left in her possession in the dwelling which they had occupied jointly as a boarding-house, and which he departed from. The value of the articles was less than $100, and the jury found the important facts referred to specially. The court below held that if the parties were not living together when suit was commenced, and if defendant was owner of $1200 worth of property of her own, and was not using this property for household purposes, plaintiff could recover. The jury found a general verdict for plaintiff, with several special findings which bear, as it is claimed, somewhat differently. They found expressly that the parties were husband and wife; that all of the property had been used by them as household goods while they lived together; that plaintiff left it in defendant's possession; and that when this suit was begun he had been enjoined at her suit from taking or interfering with it.

By section 7686 of Howell's Statutes the household goods, furniture and utensils of a householder and some other things are exempt from execution to a considerably larger amount than the sum involved here. By the same section a mortgage made by the husband on such property is void without the wife's signature; and by § 6297 she is allowed to sue for such exempt property as if it were her separate property.

Without considering the important questions presented, touching the power of a husband to sue his wife in such an action as this, we think that he cannot take away the household furniture over which the wife has been granted such particular rights. It would be a very singular thing if he could abandon his wife and household, and get rights by his wrong-doing which he could not exercise while performing his duty. We think that when he leaves his household, and leaves his wife in possession of the property, he cannot deprive her of that possession in this way. Neither do we think that he can found a right of replevin on a demand which was, when made, in direct violation of the injunction

of a court of competent jurisdiction. Such an act cannot be the basis of any legal right against the wife.

It is claimed that the articles taken consisted partly of a few books, a shot-gun and a revolver, and that these are not household goods. We are not prepared to say that arms may not be so included, and we can see no reason why books may not be. The jury found that all belonged to the same category.

As the facts found by the jury negatived any right in plaintiff to recover, and showed a clear possessory right in defendant, it would be useless to consider the other questions in the case. In our opinion the judgment should be reversed with costs and judgment rendered for defendant for a return. The case is not one for a new trial.

The other Justices concurred.

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ISAAC NULL v. FREDERICK ZIERLE, DRAIN COMMISSIONER, AND BENJAMIN TACKABURY, CLERK OF FABIUS TOWNSHIP.

WILLIAM GROSE v. FREDERICK ZIERLE ET AL.

Drain proceedings—Petition—Certiorari.

1. A petition to lay out a drain does not give the drain commissioner jurisdiction to act if the description of the proposed drain is so indefinite as to leave it to him to determine the direction it shall take.
2. Certiorari may be resorted to for the review of drain proceedings in cases where the drain commissioner has acted without jurisdiction.

Error to St. Joseph. (Pealer, J.) Jan. 24.—Feb. 6.

PROCEEDINGS to lay out drains. The township officers bring error. Affirmed.

Howell, Carr & Barnard for appellants. Certiorari to review drain proceedings was refused in *Dietz v. Frazier* 50 Mich. 227; *Whitbeck v. Hudson* id 86.

Dallas Boudeman for appellees.

CHAMPLIN, J. The matters here at issue involve the validity of the proceedings to establish a certain drain in the township of Fabius by the defendant Zierle as drain commissioner, said drain crossing the lands of the relator, and a portion of the expense of which he has been ordered to pay. The alleged drain purports to have been established under the laws of 1881 of this State, and upon application of the relator to the circuit court for the county of St. Joseph, a writ of certiorari was issued to the drain commissioner and township clerk to bring up the proceedings for review. These officers made due return to the writ, and, upon the hearing, the circuit judge held the proceedings to be absolutely void, and reversed them. The case is brought into this Court by writ of error.

The application to the drain commissioners described the drain applied for as follows:

"Commencing at the north-east corner of the S. E. ¼ of S. E. ¼ of section 2, in township south 6, and range 12 west; thence south on west side of highway to the S. W. corner of land belonging to Jonathan Baker; thence east on line of lands belonging to said Jonathan Baker and C. E. Dock, by the most feasible route, for 80 rods; thence north or south as in your estimation seems most proper, for outlet into the Rocky river."

This was entirely insufficient to confer jurisdiction. It was too indefinite and uncertain to form the basis of any action by the commissioner. *Kroop v. Forman* 31 Mich. 144; *Milton v. Drain Com'r* 40 Mich. 229.

There are other grave errors disclosed in the record, but as the commissioner obtained no jurisdiction to establish the drain in question, it is unnecessary to call attention to them.

Defendants claim that the circuit court had no authority to review these proceedings by certiorari, and they contend that section 40 of Act 269 of 1881 applies to and controls all cases which may arise in laying out or establishing drains. This section provides that the proceedings shall not be declared absolutely void in consequence of any error of any officer or board in the location or establishment thereof, nor

by reason of any error or informality appearing in the record of the proceedings by which any drains shall have been located or established, nor for want of proper release or condemnation of right of way. And in support of this position they cite *Tucker v. Parker* 50 Mich. 5. We there held that for mere irregularities, and for substantial defects even in the proceedings which could be remedied by the court in which the proceedings were pending, the process of certiorari should not in general be resorted to; but we also held that the statute did not take away the jurisdiction to review in a proper case the proceedings by certiorari. We think the present case is one where the exercise of this jurisdiction is proper.

The judgment of the circuit court is affirmed.

The other Justices concurred.

[William Grose v. Frederick Zierle et al.]

CHAMPLIN, J. The facts in this case are precisely similar to those of the case of *Null v. Zierle*, ante, p. 540, and it is governed by the principle there announced.

The judgment of the circuit court is affirmed.

The other Justices concurred.

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KITTY KNORR ET AL. v. JOSEPH B. MILLARD, EXR.

Wills—Advances from accumulation fund—Error.

1. A bequest to the children of a specified person, or to their survivors, to be placed at interest by the executor and equally divided when they become of age, and providing that if any of them die under age leaving children, the children shall take their shares, provides for an accumulation to be distributed at the times specified; and the probate court has no power to require the executor to advance money from the fund. But such advances, if necessary to the

support of the beneficiaries, may be made by the circuit court in chancery on a proper original application.

2. The refusal of the circuit court to affirm a probate order to an executor to advance moneys from an accumulation fund to the beneficiaries under a will, does not present a common law issue, and cannot be brought up on writ of error.

Error to St. Joseph. (Pealer, J.) Jan. 24.—Feb. 6.

Appeal from probate order allowing advances to be made by an executor, from the estate. Petitioners therefor bring error on reversal of the order. Dismissed.

H. P. Stewart for appellants.

Dallas Boudeman for appellee, cited in opposition to the application for advances from an estate, 2 Williams on Executors (7th ed.) 1507; *Hinckley v. Harriman* 45 Mich. 343; *Miles v. Boyden* 3 Pick. 213; *Sparhawk v. Buell* 9 Vt. 41; *Kent v. Dunham* 106 Mass. 586.

CAMPBELL, J. Petitioners, who are infant legatees under the will of William Hutchinson, deceased, applied through their mother, Rebecca Knorr, as next friend, to the probate court for St. Joseph county, for an order on the executor to advance money from the income of the property in his hands for their support, on the ground that their father did not and could not adequately support them. The probate court granted the relief prayed, which was on appeal to the circuit court rescinded, and the case is brought here for review.

In the probate court the action proceeded on the ground that the income of the fund was designed to be expended, and not to be accumulated. The will, which divided testator's estate into five equal shares, gave four of these shares to a surviving sister and to the heirs of a deceased sister and of two deceased brothers. These four portions were disposed of absolutely and unconditionally. The fifth share he dealt with as follows: To his nephew Albert H. Knorr, father of petitioners, he gave the amount of his

promissory note held by the testator, for $150. The rest of the fifth portion he gave to Knorr's children or the survivors of them, to be placed at interest by the executor and divided equally between them when they should severally become of age, and in case any of them died under age leaving children, then to such children the share of their parents.

We are inclined to think this was designed to have the fund accumulated for distribution at the times specified. If so, the probate court does not appear to have any power to interfere.

But inasmuch as these bequests are not contingent except as to time of payment, and as the chances of all the children are equal, the power has been recognized in the court of chancery, in its administration of trusts, to provide for making necessary advances out of the income when the infants are otherwise likely to suffer, even where by the terms of the trust itself an accumulation is contemplated. The doctrine is fully discussed and cases cited in Perry on Trusts, sections 615–617 and notes. Our statutes have expressly provided for the application of this same doctrine to trusts in land. Comp. L., § 4106. [How. St. §§ 5555]. We see no reason why, on a proper original application to the circuit judge sitting in equity, on a petition with sufficient showing, he may not, if in his opinion the exigency warrants it, give such relief as will be proper, under such safeguards and conditions as will secure its honest use.

We have made this suggestion because the matter seems to have been brought up with a willingness on the part of the executor to act fairly and liberally, so far as his own safety will allow. But there is no way in which such aid can be granted on this record. This was an application originally to the probate court, and not to a court of chancery. The circuit court refused to affirm the order giving the relief, and we are asked to review such refusal on writ of error, which is not a proper form of writ to bring up such questions as present no issues of a common-law nature. See *Brinsmade's Appeal*, decided at this term, ante, p. 537.

The whole proceeding has been misunderstood. The parties must apply, if they desire relief, to the circuit court. We can make no suggestions in advance as to the propriety of granting or refusing aid, which must depend on such showing as will satisfy the circuit judge.

The present writ must be dismissed without costs.

The other Justices concurred.

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FREDERICK N. CHADWICK v. WILLIAM E. CHADWICK, ADMINISTRATOR.

Claim against estate—testimony as to dealings—jury.

1. In prosecuting a claim against an estate for moneys lent to the decedent by claimant, but not in connection with his business, general testimony from his book-keeper that he, the book-keeper, found no such item debited on the cash account, would be irrelevant and could not be admitted in defense to the claim, especially if it did not appear that he would know what amounts were received by his employer; it would also be improper to show by him or others that he or they had been present when claimant and decedent had talked about other claims, and had never heard this one mentioned. Nor would the decedent's widow be allowed to testify that she did not know of her husband's borrowing from claimant.

2. Jurors cannot ordinarily take books, papers and depositions with them to the jury-room. But the irregularity of permitting it is waived by failing to object thereto.

3. A survivor cannot testify adversely as to private dealings with a deceased person, even in rebuttal of another's testimony as to a conversation between them overheard by the witness.

Error to Van Buren. (Mills, J.) Jan. 24.—Feb. 6.

Appeal from allowance of claim against estate. Claimant brings error. Reversed.

Howard & Roos for appellant.

Benj. F. Heckert and *Dallas Boudeman* for appellee.

SHERWOOD, J. The claimant and Evered E. Chadwick named in this case were brothers, and previous to the decease of the latter, for several years prior to April 4, 1879, carried on business together as copartners at Decatur in this State. At that date the copartnership was dissolved, a settlement had, and a division of most of the property made between them. A third brother, Theodore, assisted and arranged the settlement, which was finally concluded between the parties, and made the division of the property for them, and both the settlement and division of the property was reduced to writing at the time by him.

Upon the division of the property the deceased was found indebted to claimant in the sum of $1878.78, and therefor gave his note, dated April 5, 1875, due in ten days for that amount.

After the dissolution the deceased continued business in the store until he died, paying $250 as rent for claimant's half interest therein.

The plaintiff's claim presented against the estate of E. E. Chadwick to the judge of probate for allowance, consisted of the said note, rent of claimant's half of the store from the time of settlement till May, 1882, some other miscellaneous items, and an item of $500 for money borrowed, in all amounting to the sum of $3717.55, upon which credit was given for a large number of items amounting to $1,147.58. The claim was allowed the claimant with interest, in probate court, at the sum of $1168.05. The administrator took an appeal to the circuit, when the amount allowed claimant was reduced by the verdict of the jury to the sum of $375.75, and the claimant now brings error.

The principal contest at the circuit was as to the $500 item for money borrowed by the deceased on the 15th day of April, 1879. The administrator denied that the deceased ever borrowed the money as claimed. The brother, Theodore, testified that he was present on the 15th of April, when the money was loaned by the claimant to the deceased, and saw the transaction, and saw the latter enter the item in his book K, which, with the entry therein, was

introduced in evidence. The claimant then made proof of the other items in his account, by admissions and otherwise, and rested his case.

The defendant then placed Marion Chadwick (who was son of the deceased, twenty-four years old, and administrator of his father's estate) upon the stand, and he testified that after the dissolution he worked in his father's store and commenced taking charge of the books and looking after the business generally; that on the 12th of April, 1879, his father returned from Chicago; that on the 15th of April his mother and other ladies were in the store, and he commenced to state what they did.

Counsel for claimant here objects to what the ladies did and what goods were placed in the store that day, as immaterial. The court permitted the testimony. This testimony was offered as tending in some way to show that the claimant did not make the loan to his brother. The testimony given was subject to the objection taken, though we think the answer given could have hardly influenced the result.

The administrator sought to avoid or contradict the positive testimony of Theodore Chadwick that he was present and saw his brother let E. E. Chadwick have the $500 on the 15th of April, and for this purpose was permitted to show, against objection of claimant, that deceased kept a cash account; that some of the entries were made by the witness and some by his father; that he had the book in the court-room, and on his cross-examination said he kept the book.

"I got the items entered out of the drawer at night. There was always cash in the drawer at night. I was generally there myself. The cash-book represents what I took out of the drawer myself. I think I kept a correct account of the cash received by my father in and about his business there. I was generally there to know what he did receive. If he received any when I was not there I would generally see it when I got back, on the book. I would not know anything about transactions my father did when I was not present. I do not find any place where my father is debited with $500 to cash account. If the money was not put in the drawer I would not put it on the book. If it was

placed in the safe I would not make an entry on the cash-book."

We think the objection was well taken to this testimony. It was irrelevant and immaterial and should have been excluded. The testimony lacks the element of certainty; and it nowhere appears that the money claimed to have been borrowed had any connection with the business of the store, or that on the store-books would have been a proper place for it to have appeared.

The testimony of Marion Chadwick to the effect that he was present on several different occasions when conversation occurred between the deceased and claimant about other claims claimant held against deceased, but never heard him say anything about the $500, was also incompetent and had no tendency to show the money was not borrowed.

The same is true of the testimony of the witness Rosewarren, which was objected to. Jurors believe testimony competent for the purpose for which it is admitted, and though very slight evidence of the fact sought to be proved, its weight cannot be controlled by the court; hence the danger of irrelevant testimony of this kind. Much of the negative testimony put in this case was not only irrelevant, but clearly misleading, and the testimony offered from various witnesses that they did not know of deceased having any such amount of money about him or in his hands or "about the establishment," was of the same character and mischievous. It should not have been allowed.

The testimony of Marion Chadwick relating to the set-off, being derived entirely from an inspection of the book or from what the deceased told him, was clearly hearsay and immaterial, and it was error to admit it.

It is not disclosed what connection a purchase of goods in Chicago by the deceased eight or ten days before the $500 was borrowed, on a credit of 30, 60 and 90 days, had with the issues in the case; still the fact was admitted as relevant and competent testimony. It certainly had no tendency to prove the money was not borrowed as claimed, and should not have been admitted.

The widow of the deceased was allowed to testify that she did not know of her husband borrowing any money of claimant. This was irrelevant, and this, with the other testimony of the same class, was hurtful to claimant's interests. She had also been permitted to testify to a conversation she claimed to have heard between her husband and the claimant the next day after the settlement, which was prejudicial to rights of complainant and was offered as such. On the rebuttal the claimant took the stand and proposed to contradict the witness, but was refused leave so to do by the court on the ground that he was prohibited by statute from testifying as to that matter. This ruling was correct. The case comes within the statute and the former ruling of this Court in *Downey v. Andrus* 43 Mich. 65.

It is usually improper to let the jury take the testimony, consisting of books, papers and depositions etc., with them to the jury-room. The jury are to receive the testimony in open court. The plaintiff, however, waived the irregularity by allowing it to be done in this case without objection. It is unnecessary to discuss the case further.

The judgment must be reversed and a new trial granted.

The other Justices concurred.

MILTON A. HAMILTON v. REBECCA P. LANGLEY.

Mortgage on leased premises—Presumption of error.

1. A clause in a lease providing that anything placed on the premises shall be liable for the rent, and that the lease shall constitute a mortgage to secure it, and that on default the lessor may seize and sell the property on certain notice, and may retain from the proceeds the rent and the "costs of such sale," does not justify the detention of property so seized if the rent is paid without sale and there is no showing of actual costs or of information thereof to the lessee, or of any notice of proceedings to be taken.

2. Error cannot be presumed; but on the other hand it may be presumed that an appellant's record is as favorable to him as he is entitled to have it as to facts that are so essential that they cannot be overlooked.

Error to Wayne. (Chambers, J.) Jan. 25.—Feb. 6.

REPLEVIN. Defendant brings error. Affirmed.

Hawes & Phelps for appellant.

Charles B. Howell for appellee.

CAMPBELL, J. Plaintiff recovered in replevin against defendant, before a justice and on appeal, for her unlawful detention of personal property, which she seized under claim for rent and refused to restore without payment of certain alleged charges. She now brings error to this Court on exceptions to the charge, which was in favor of plaintiff's recovery.

It appears from the record that plaintiff was her tenant, and in arrear for some rent. On the 21st of October, 1882, at some time, which is only characterized in the record as before sunset, while his place of business was closed, and he absent, defendant by means of a key which she had kept without his knowledge got into the store and carried off the property in question. The next day, October 22d, he offered to pay the rent due, but she refused to let him have the property unless he would also pay her $9.50 which she claimed as costs of proceedings, under her claim to the rights of a mortgagee. It does not appear from the record what these costs were, and as far as it shows anything it indicates that no expenses, or none of any account had been incurred. It does not appear that she had taken any steps to give notice, or that the notice, if begun, could have cost this sum. Neither does it appear that she explained to him or to any one what these charges were.

On the 1st of November, 1882, she began proceedings to oust plaintiff, and he paid up the rent and the commissioner's costs, but refused to pay her the other sum before demanded. The property was not seized on the writ of replevin, and on the 2d of November, while her proceeding was pending before the commissioner, she advertised the property for sale.

On the trial defendant asked five charges, each of which insisted on a direction that the verdict should be for defendant, for various assumed reasons. The circuit court refused these charges, and ruled that plaintiff was entitled to a verdict.

The defendant's claim to possession arose out of a clause in the lease, whereby it was agreed that all property which was or should be placed on the premises, should be liable, and the lease should constitute a lien or mortgage to secure the rent. It was further provided that on default she might seize the property and sell it as under a default on chattel mortgage, on six day's notice, to be posted in three places in Detroit, and from the proceeds retain the rent and "costs of such sale."

It is not important on this record to consider what is the precise nature of such a security. There is nothing whatever in the record to show that she gave evidence at the circuit of any costs or expenses incurred. It is manifest that there were no costs of sale, and it seems to be fairly implied that she had taken no steps to post notices when she refused to give up the property to plaintiff. It is certain no legitimate costs could have been incurred to the amount claimed, and it is equally clear that she could not hold plaintiff in the wrong until she had informed him distinctly of costs which he was bound to pay. As error cannot be presumed, and as the facts, if existing, were so essential that no one could overlook them, there is no reason to suppose that the record is not as favorable for her as she was entitled to have it. If so, she was evidently in the wrong, and plaintiff was entitled to the judgment which both courts awarded him.

The judgment should be affirmed.

The other Justices concurred

Mary M. Wendell v. Siegfried Highstone, James A. McDonald and Josiah E. Wendell.

Mortgagee's lien—Cost of redemption from prior mortgage—Additional security—Opening case on hearing for further proofs.

1. The cost to which the assignee of a second mortgage is put to redeem from the foreclosure of the first is a necessary outlay in aid of the assigned security, and the assignee is entitled to hold the assignment as security for it, but not to make it a personal charge against the assignor.
2. A court of chancery may sometimes award issues or other modes of inquiry, in order to satisfy its own conscience, where the testimony on well-defined issues is conflicting.
3. After the proofs in a chancery cause have been taken, especially if they have been taken in open court, it is not proper upon the hearing to open the case generally for the reception of further proofs, nor to open it at all without special reasons, and then usually for the admission only of formal or documentary evidence, or of testimony that has been overlooked by excusable inadvertence.
4. One who has secured another's debt is entitled to the benefit of any further security which the lien-holder obtains from the debtor; and if the latter security consists of a chattel mortgage and the lien-holder disposes of the property which it covers, for his own benefit and without the consent of the person giving the first security, the latter is released, to the extent, at least, of the property so disposed of. And its proceeds must be first applied to the satisfaction of the oldest mortgage if the securities have been so confused by the lien-holder as to make it impossible to distinguish between them.

Appeal from Mackinac. (Steere, J.) Jan. 25.—Feb. 6.

Bill to obtain release of securities. Complainant appeals. Reversed.

Mark Norris and *Norris & Uhl* for complainant. After proofs are closed in equity further proofs cannot be taken without a showing of cause: *Hamersly v. Lambert* 2 Johns. Ch. 432; *Boyardus v. Trinity Church* 4 Sandf. Ch. 369; *McClung v. McClung* 40 Mich. 496; *Slater v. Breese* 36 Mich. 90; *Abbott v. Alsdorf* 19 Mich. 161; *Thayer v. Swift* Walk. Ch. 384

P. N. Packard, Chas. R. Brown and *E. D. Barry* for defendants..

CAMPBELL, J. The bill in this case was filed by complainant to obtain the release of certain securities given by her to Highstone to obtain credit for the other defendants who were hotel owners at Mackinaw. In July, 1878, they desired to obtain furniture for the St. Cloud Hotel to be purchased at places in the Lower Peninsula, and she gave Highstone an assignment of a note and mortgage made by her brother Josiah for $2000 and about $300 interest accrued, and her own mortgage for $1000 at ten per cent. interest. These two securities she claims, and in our opinion truly, to have been given to secure only such purchases as should be made and were made in Detroit and Grand Rapids, and not any other dealings with Highstone.

In August, 1879, she gave Highstone a further mortgage for $775, to secure outlays on a cottage to be used with the hotel. We agree with the court below that nothing was ever shown to have created any liability under this latter mortgage.

The immediate occasion of this bill was the proceeding by Highstone to foreclose by advertising under the statute the securities of July, 1878. And the ground of complaint is that by receipt of money and by various dealings with the other defendants and their property, she is entitled to a discharge. She prays an accounting and redemption, and the release of securities as her rights appear.

The mortgage from Josiah Wendell to complainant was a second mortgage, there being an earlier one given to one McCann, which was foreclosed, and which Highstone redeemed to save the security. As this was a necessary outlay and in aid of the assigned security, defendant Highstone was entitled to hold the assignment as security for it, but not to make it a personal charge on complainant.

The main dispute arises out of dealings by Highstone with his co-defendants, and payments and property received by him from them, which complainant insists on as discharging her.

Before the dealings of July, 1878, Highstone had some pecuniary dealings with Wendell and McDonald, and he subsequently furnished them some furniture not purchased below, and considerable supplies. He received money and other payments, and some mortgages. Immediately after the arrangement with complainant he took from his co-defendants a chattel mortgage for $2500, the main purpose of which, and probably the only purpose, was to secure the purchase price and a bonus for the furniture obtained below. In September, 1878, he took a further furniture mortgage for $310, and in July, 1879, a still further one for $1275, which covered, as possibly the second mortgage did, some new furniture sold by himself. Some other securities we need not refer to.

Afterwards, by some arrangement with Wendell and McDonald, to which complainant was not a party, he took possession of the furniture mortgaged, and when the bill was filed, had, as he claimed, disposed of most of it at private sale, and then had on hand what was worth at cash value, as he claimed in his answer, about $450. The court below had some difficulty in tracing out all the sales and receipts definitely, but there can be no reasonable doubt of the actual results exceeding $3000, beyond any other receipts of money from other sources.

On the original hearing, which was on proofs in open court, taken under an interlocutory order defining the issues, the circuit judge, instead of making a final decree, made an order reciting that deeming it impossible to find the sum realized by defendant on the furniture, it was referred to the circuit court commissioner to take proofs upon that point, and upon such other points as the counsel for the respective parties might deem material, according to the rules and practice of the court, and report the same to the court. Defendants' counsel then entered a general order to take proofs, and defendant Highstone was presented and examined before the commissioners and gave testimony as to various payments and applications of payment to which he had not before fully alluded, and gave various lists of property sold, but without any very tangible explanation.

Complainant's counsel treated this proceeding as unauthorized, and paid no attention to it.

We do not think this order was warranted. There are cases where upon particular issues well defined and on conflicting testimony, a court is warranted in awarding issues or other modes of inquiry for the satisfying of its own conscience. But the only other cases where further proofs are allowed at the hearing are in general, at least, cases where the proof is merely formal and documentary, or cases where by some excusable inadvertence some testimony has been overlooked. 1 Barb. Ch. Pr. 322. But it is not proper on the hearing to open the case generally, or to open it without special reasons at all. It is the duty of parties to furnish their proofs before hearing, and the case must be very particular where they can be allowed to do so after they have introduced all that they regarded as necessary before hearing.

In the present case the particular difficulty met by the court was not on any distinct question of fact on which the testimony was in conflict, but upon a matter which was so plainly within the controversy as not to be overlooked, and so entirely within the defendant's means of proof as to be open to no misapprehension on his part. And the opening of the entire case was, under the circumstances, not sustainable on precedent or usage. It is further to be considered that the case had been set down for the examination of witnesses in open court, and not only were the parties entitled to that mode of examination in the presence of the judge, but that method of hearing furnishes means for the production of testimony from time to time as seems expedient.

The question then arises, how the case stood on its merits. It is certain that when Highstone, not content with complainant's security, undertook to get distinct security for the same debts, she became entitled to have them faithfully applied for her benefit. And when, without her consent, he departed from the ordinary usage and appropriated the articles mortgaged to his own disposal, he released her, either entirely or to the extent of the property. Before the hearing, if he desired to reduce this pre-

sumptive satisfaction it devolved on him to show clearly and affirmatively such facts as would so reduce his liability. The statements of accounts are not clear or very intelligible, and there is a lack of testimony to indicate that the whole debt which was secured by her, was not fully paid. Taking the ordinary course of business, the proceeds of the goods, which in all exceeded, as we are satisfied, by a large sum, the amount of the debt, should, when the goods were so mixed and appropriated, have been first applied to the oldest mortgage. There is nothing which we have been able to discover in the record which indicates that complainant is not fairly entitled to be discharged from any further liability, and to have back her property.

The court below, while holding that defendant had made out no claim under the $775 mortgage, nevertheless left him at liberty to prosecute it. It was distinctly brought within the issues in this case, and testimony was given bearing upon it. We think nothing is due under it, and it must be decreed to be given up, as must also the mortgage for $1000. As the advance made by Highstone to redeem the McCann mortgage was solely justified by his holding the assignment of the subsequent $2000 mortgage, he is only entitled to hold the latter as security until this advance is repaid, but he can have no personal claim on complainant for that amount. This is the only claim which he has established as still uncanceled.

The decree must be reversed as to complainant, and she is entitled to a decree for the immediate cancellation and discharge of the two mortgages given by her to Highstone, and for the reassignment of the $2000 mortgage, and of the claim of Highstone arising out of the redemption, upon payment to him of the amount of the redemption money and ten per cent. interest from such redemption. In default of her so refunding within four months, Highstone to be at liberty to enforce the security for that amount, accounting to her for the balance, by sale under the decree in the cause in the usual manner of mortgage sales. Complainant to recover costs of both courts.

The other Justices concurred.

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In the Matter of the estate of George B. Warren. Appeal of the Grand Rapids Savings Bank.

Bank debts—Liability of non-resident stockholders.

1. The estate of a non-resident stockholder in a bank may be held ratably liable for debts of the bank that matured before the passage of Act 141 of 1877, and to such debts the limitations imposed by that Act as to service within the jurisdiction, cannot apply. And a judgment against the corporation is prima facie evidence of the liability; and the entries on the stock-ledgers are admissible to show that decedent was a stockholder.

2. A shareholder in a bank is, as regards creditors, not only a surety for the bank but as one of the associates therein, he is held to have undertaken, by the terms of association, to be bound for the debts which it contracts. How. St., § 3174. And the liability of th shareholders is commensurate with that of the corporation and extends to costs and interest on judgments.

3 A statute giving the creditors of a banking corporation a new remedy against stockholders cannot affect those who took shares in the corporation before its passage; nor can it, so far as existing claims are concerned, supersede the remedies in force when they arose and in reliance upon which they were contracted.

Error to Kent. (Montgomery, J.) Jan. 25—Feb. 6.

Appeal from disallowance by probate commissioners of claim against estate. The estate brings error. Affirmed.

Norris & Uhl for appellant. Under the individual liability law in Michigan a stockholder is a mere surety (*Hanson v. Donkersley* 37 Mich. 184. *Peck v. Miller* 39 Mich. 594; *Powell v. Eldred* id. 552) for the debt contracted, and not for judgment on it and costs: *Bailey v. Bancker* 3 Hill 188; *Moss v. McCullough* 5 Hill 134; *Witherhead v. Allen* 3 Keyes 562; *Jackson v. Griswold* 4 Hill 522; *McMahon v. Macy* 51 N. Y. 164; *Thomas v. Hubbell* 15 N. Y. 405; *Rorke v. Thomas* 56 N. Y. 565; judgment against the principal alone is, as a general rule, evidence against the surety of the fact of its recovery only

and not of any fact which it was necessary to find in order to recover such judgment: Brandt on Suretyship § 524; *Miller v. White* 50 N. Y. 137; *Thomas v. Hubbell* 15 N. Y. 405; *M'Kellar v. Bowell* 4 Hawks 34; *Douglass v. Howland* 24 Wend. 53–59; as for cases adverse to this view: *Belmont v. Coleman* 21 N. Y. 96 and *Slee v. Bloom* 20 Johns. 669 are questioned if not overruled in *McMahon v. Macy* 51 N. Y. 162–3; *Moss v. Oakley* 2 Hill 265 is criticised in *Moss v. McCullough* 5 Hill 134; *Moss v. McCullough* 7 Barb. 279 is doubted in *Miller v. White* 50 N. Y. 143; the following decisions rest wholly on the express words of a statute: *Marcy v. Clark* 17 Mass. 333; *Holyoke Bank v. Goodman Paper Co.* 9 Cush. 578; *Farnum v. Ballard Vale Machine Shop* 12 Cush. 510; *Utley v. Union Tool Co.* 11 Gray 140; as to the effect as evidence of judgments against a principal, see *Bridgeport Ins. Co. v. Wilson* 34 N. Y. 281; *Annett v. Terry* 35 N. Y. 261.

Taggart & Wolcott for appellee.

Cooley, C. J. This case was tried in the circuit court upon an appeal from the report of commissioners on claims appointed by the probate court. The circuit court, sitting without a jury, made the following findings:

"1. The Grand Rapids Savings Bank is a corporation doing business at the city of Grand Rapids and elsewhere in the State of Michigan.

2. On about the month of March, 1871, the Exchange Bank of Big Rapids was organized under the general banking law of the State of Michigan; the capital stock of said bank was fixed at one hundred and fifty thousand dollars, divided into one thousand five hundred shares of one hundred dollars each.

3. That George B. Warren, now deceased, who was a resident of the state of New York, subscribed for fifty shares of the said capital stock and paid the regular assessment of fifty per cent. of the face thereof, which was called in for the working capital of the bank soon after the last date mentioned.

4. The said Exchange Bank of Big Rapids commenced

business in 1871 and carried on a banking and exchange business at Big Rapids, Michigan, until about the year 1875, when, it having become deeply involved, its business was discontinued.

5. The said George B. Warren continued to hold his aforesaid stock in said bank until the time of his death in the year 1879.

6. Between the 26th day of July, 1873, and the 13th day of April, 1874, both inclusive, the Exchange Bank of Big Rapids became liable to the Grand Rapids Savings Bank, as endorser of six promissory notes, all of which were dishonored and unpaid at maturity. Judgments were thereafter recovered in the circuit court for the county of Mecosta, by the Grand Rapids Savings Bank, against Exchange Bank of Big Rapids and others, for the sum due and unpaid upon said several notes. One of said judgments was recovered October 12, 1875, and the remainder of them October 24, 1876. A writ of execution was issued October 18, 1875, upon the first of said judgments, which writ was addressed to the sheriff of the county of Mecosta, and was in due course returned by the sheriff wholly unsatisfied. A writ of execution was also issued October 30, 1876, upon each of the judgments recovered October 24, 1876, all of which writs were addressed to the sheriff of the county of Mecosta, and were in due course returned by the sheriff wholly unsatisfied. The aggregate amount remaining due and unpaid upon said judgments, including interest to April 30, 1883, is the sum of twenty-eight thousand four hundred and eighty dollars and seventy-three cents ($28,480.73).

"From the foregoing facts I find the following conclusions of law:

1. That no demand for the framing of any issue in this cause having been made by either party, and both parties having repeatedly noticed the cause for trial in this court, and the questions involved being such as appear to the court capable of trial and determination without the framing of any formal issue, it was competent for the court to proceed to try the cause without the framing of a formal issue, and any objection upon that ground must be deemed to have been waived.

2. That the remedy given by Act number 141 of the Session Laws of 1877, is not exclusive of the remedy claimed in this cause.

3. The entries in the stock-ledger of the Exchange Bank

of Big Rapids are competent evidence to show that George B. Warren was a stockholder in that bank, although the same fact was fully proven by the testimony of the witnesses sworn upon the trial, and the letters of George B. Warren.

4. That the Grand Rapids Savings Bank, appellant, is entitled to recover judgment in this case against the estate of George B. Warren, deceased, for the sum of nine hundred and fifty-three dollars and fifty-seven cents ($953.57), that being the ratable proportion due from the said estate as owner of fifty shares of the capital stock of the Exchange Bank of Big Rapids of the entire $28,607.03, due the Grand Rapids Savings Bank from the Exchange Bank of Big Rapids, upon the judgments aforesaid."

Upon these findings judgment was rendered against the estate in the circuit court, and the case is brought to this Court by writ of error.

Proof of the plaintiff's case was made by showing by the stock-ledger of the Exchange Bank of Big Rapids that Warren in his life-time had a certain amount of stock in that bank which did not appear to have been transferred, and then by showing a judgment recovered by the plaintiff against that bank. This showing gave a basis upon which to compute the liability of the defendant estate. It is insisted on the part of the defense that the judgment against the bank was not evidence of the demand as against the stockholder. It is admitted that it would have been evidence under the General Banking Law before the amendment made to it in 1871. By the original law suit against a stockholder was only to be brought after return of execution against the bank, unsatisfied in whole or in part; and the recovery against a stockholder was upon the basis of the judgment already obtained against the bank; Comp. L. 1857 p. 1648 § 40; but this was so amended in 1871 as to provide that "the officers and stockholders of every corporation or association formed under this act shall be individually liable for all debts contracted during the term of their being officers or stockholders of such corporation or association, equally and ratably, to the extent of their respective shares of stock in any such corporation or associa-

tion." How. St. § 3174. There is no doubt, we think, that before this amendment the judgment against the bank would have been evidence against the stockholder; whether conclusive, we need not determine; but we doubt if there was any purpose in the amendment of 1871 to introduce any new rule of evidence, or to make the remedy of the creditor in any respect more difficult or uncertain. On the contrary, the purpose would seem to have been to make the remedy of the creditor more speedy and certain, and to permit him, if he should so elect, to proceed against the shareholders more directly. The shareholder, it is true, occupies as regards the creditor the position of surety for the bank; *Hanson v. Donkersley* 37 Mich. 184; but he is something more than a surety; he is one of the associates in the bank, and by the very terms of the association he is deemed to undertake for the debts which the bank contracts. *Bank of Australasia v. Nias* 16 Q. B. 717; *Copin v. Adamson* L. R. 9 Exch. 345. And a judgment purporting to be rendered for a debt of the corporation is at least prima facie evidence that a debt was contracted, if not conclusive. *Milliken v. Whitehouse* 49 Me. 529; *Wilson v. Pittsburg &c Coal Co.* 43 Penn. St. 424; *Hawes v. Anglo-Saxon Co.* 101 Mass. 385, 397; *Grund v. Tucker* 5 Kan. 70; *Donworth v. Coolbaugh* 5 Ia. 300; *Bohn v. Brown* 33 Mich. 257, 263. In New York, where the decisions have been somewhat conflicting, a different view is taken, and a creditor who pursues the shareholders is not permitted to rely upon the judgment against the corporation, but is compelled to make proof of the indebtedness upon which the judgment was recovered. *Miller v. White* 50 N. Y. 137, and cases cited. The reason for this conclusion is said to be that statutes giving this remedy are highly penal. *Hastings v. Drew* 76 N. Y. 9; *Stephens v. Fox* 83 N. Y. 313. A statute giving creditors a remedy against corporate officers for official defaults is certainly penal: *Breitung v. Lindauer* 37 Mich. 217; but we cannot class in the same category the statute upon which this claim is based. All the shareholders assent to it when they form the corporation,

and it imposes upon them no liability except to pay the debts contracted for their own advantage. And their undertaking to do this is supposed to be relied upon by the party contracting with the corporation and giving it credit.

It is contended, however, that the Legislature of 1877 provided for these cases a different remedy to that which has been sought in this case, and in express terms made it exclusive. The statute referred to is found in Public Acts, 1877, p. 129. It provides by its first section that "whenever, by the Constitution or laws of this State, the stockholders of any corporation are individually liable for any debts of such corporation, the remedy for the enforcement of such liability shall be as hereinafter prescribed, and *not otherwise;* provided, that this Act shall not apply to cases where the suit is for labor, and the action is brought by the person who performed the labor." The Act then proceeds to make provision for suits after judgment against the corporations themselves, and among the requirements are that process shall be personally served within the State. And apparently the Act contemplates no redress against the estates of deceased stockholders. The fourteenth section provides that "all acts and parts of acts inconsistent with this act, or giving any other or different remedy, or form of remedy, are hereby repealed."

The liability for which this proceeding is instituted arose previous to the passage of this statute, and the claimant at the date of this statute had a right to recover its demands of the stockholders of the Exchange Bank of Big Rapids, on the failure of the bank to pay them. If the Act of 1877 is to be applied to these demands, it takes away the right as to all the stockholders who are non-residents, unless they voluntarily come to the State so that process may be served upon them. It also enables any resident stockholder to escape liability by absenting himself from the State so that process may not be served. And apparently it takes it away as to all estates of deceased stockholders. But an act which could have this effect would be clearly inoperative, at least as to the cases in

which its enforcement would release parties before liable, because it would to that extent impair the obligation of contracts. It would be inoperative, therefore, as to this estate. And this, we think, not only in so far as it undertook or assumed to give a new remedy but also in so far as it took away those which existed before.

We agree, therefore, with the circuit judge, that the claimant was entitled to prove its claim as was done against the estate. We also think that the liability of the shareholders is commensurate with that of the corporation itself, and extends to costs and interest on the judgments.

Some questions of evidence which were raised we think were rightly decided, and we discover no error in the record requiring a reversal. The allowance of the claim will therefore stand affirmed, and will be certified to the circuit and probate courts. The claimant will recover his costs of this Court and of the circuit court.

The other Justices concurred.

THE PEOPLE v. JOHN W. MOORE.

Exceptions before sentence—Review of evidence.

1. The Supreme Court will not, on exceptions before sentence, review the evidence to determine whether it was sufficient to justify conviction, as that is a question for the jury.

2. A request, in a criminal case, for an instruction that there is no evidence whatever on some essential part of the case, presents a question of law that is a proper subject of exception.

Exceptions before judgment from the Recorder's Court of Detroit. (Swift, J.) January 29.—February 6.

INFORMATION for larceny from the person. Conviction affirmed.

Attorney General *Jacob J. Van Riper* and Assistant Prosecuting Attorney *George F. Robison* for the People.

John G. Hawley for respondent.

COOLEY, C. J. The respondent has been convicted of larceny from the person, and the conviction is brought up on exceptions before sentence.

Some criticism is made of the instructions to the jury, but without, as we think, sufficient reason. The exception principally relied upon is that the trial judge refused to instruct the jury that no case was made to be submitted to the jury.

We do not in this State review the evidence to determine whether in our opinion it was sufficient to justify a conviction. That is a question to be determined by the jury with the assistance and under the supervision of the trial judge. But if on some essential part of the case it is supposed there is no evidence whatever, a request for an instruction to that effect presents a question of law which is the subject of exception, and we are inclined to consider the exception in this case as presenting such a question, and have looked through the record to see whether it is well taken. The record plainly shows that it is not. There was evidence to go to the jury which tended to establish every element of the offense charged.

The Recorder should be advised to proceed to judgment.

The other Justices concurred.

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THE PEOPLE v. WILLIAM HENSHAW.

Witnesses named on information.

1. In a prosecution for larceny from the person the refusal of the court to require the prosecuting attorney to call a particular witness whose name was indorsed upon the information was *held* to be no error where there was no claim that the witness was present at the commission of the offence.

2. The conclusions of a jury in a criminal case cannot be disturbed upon exceptions before judgment, if there was any evidence tending to prove the fact agreed on.

Exceptions before judgment from the Recorder's Court of Detroit. (Swift, J.) Jan. 29.—Feb. 6.

INFORMATION for larceny from the person. Conviction affirmed.

Attorney General *Jacob J. Van Riper* and Assistant Prosecuting Attorney *George F. Robison* for the People.

Henry N. Brevoort and *Henry M. Cheever* for respondent. The People are bound to call witnesses whose names are indorsed on the information. *Hurd v. People* 25 Mich. 415; *Maher v. People* 10 Mich. 225; *Chapman's Case* 8 C. & P. 558; Roscoe's Crim. Ev. 164 n.

CHAMPLIN, J. The respondent was charged with larceny from the person of Milton H. Butler, September 1, 1881. He was brought to trial in October, 1883, in the Recorder's court of the city of Detroit, which resulted in a conviction. The case comes here on exceptions before judgment.

That the crime of larceny from the person was committed was not questioned, but whether the prisoner was the person who committed it was disputed. Evidence was introduced tending to prove the identity of the prisoner as the one who committed the offense, and the question as to whether he was the guilty party was fairly submitted by the court to the jury; and so long as there was evidence having a tendency to prove the fact we cannot disturb the conclusion at which they have arrived.

A person by the name of James McGuire, who was at the time of the larceny on the police force, and who helped to arrest the parties who robbed Butler, was present in court at the time of trial. His name was indorsed on the information as one of the witnesses for the People. He was not present at the robbery, but assisted in making the arrest at the foot of Woodward avenue. The prosecution

was about to rest the case when the counsel for respondent requested the court to direct the prosecuting attorney to call James McGuire as a witness, which he declined to do and the respondent's counsel excepted. And this is claimed to be error; and in support of the proposition the case of *Wellar v. People* 30 Mich. 23 is cited. That case is distinguishable from the present in two important particulars—*first*, it was a case of homicide; and *second*, the witnesses referred to were those who could give testimony going to the proof of the corpus delicti. And the court said "The fact that the name of a witness is indorsed on the information does not of itself involve any necessary obligation to do any more than have the witness in court ready to be examined." It was not claimed that McGuire was present at the robbery, and upon the question of identification he was no more qualified to testify than any other person who had acquaintance with the person to be identified.

There is no error in the record and the Recorder's court is advised to proceed to judgment.

The other Justices concurred.

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The People v. Henry Blake.

Sunday liquor-selling—Identification—Agency.

1. In a prosecution for keeping a saloon open on Sunday, testimony that respondent kept the saloon in question, and that the witness knew him tends to identify the respondent as the proprietor of the saloon.
2. Where a saloon-keeper is prosecuted for violating the law which requires all saloons to be closed on Sunday, the respondent's intent in allowing his saloon to be open is immaterial, even if the opening was the act of his bar-tender and without his knowledge or express authority.

Error to Ottawa. (Mills, J.) Jan. 30.—Feb. 6.

Complaint for keeping saloon open on Sunday. Conviction affirmed.

Attorney General *Jacob J. Van Riper* for the People.

S. L. Lowing for respondent.

SHERWOOD, J. The respondent was charged in the complaint and warrant in this case with keeping his saloon open on Sunday, the 15th day of October, 1882, at the city of Grand Haven, and upon a trial thereof before a justice of the peace was convicted. Upon certiorari to the circuit court for Ottawa county, the judgment of the justice was affirmed and the respondent brings the case here by writ of error.

The first and second errors alleged are that there was no testimony tending to show Blake was proprietor of the saloon or responsible for its being open on the Sunday stated, or that he authorized or sanctioned the opening of the saloon by the bartender. The third error alleged does no more than affirm the statement made in the first two, and may be considered with them.

The record contains all the testimony, from which it appears one J. O'Brien was sworn and testified that he had known the respondent a year and over, and that he kept a saloon for the sale of liquor at the place stated in the complaint and warrant; that he was at the same on the Sunday mentioned in the warrant in the forenoon and saw the bartender there behind the bar, and witness bought some whisky there of him; that he went into the saloon with another man and had no trouble getting in; stood there about ten minutes; that Blake kept the saloon; "the door was locked, but the bar-tender let us in; we went in and out by the side door."

John Vogel also testified that he knew Blake and his place of business on the day named, and that he kept a saloon; that he had been in his place several times; he could not be certain about the day, but thinks he got a glass of liquor there that morning; another man was with him.

I think enough appears in the foregoing statements to sustain the conclusion of the justice that Blake kept the saloon and it was open on the day charged. But aside from

this testimony it is admitted by respondent that parties were admitted into the saloon on that day by the bar-tender. We think the justice was correct in his rulings upon this branch of the case.

The remaining three alleged errors relate to the authority from defendant to the barkeeper to do the unlawful act complained of. The law sought to be applied in this case is a wholesome regulation, found necessary to be made under the police power of the State, in order to preserve the peace and quiet of the community where saloons are located and the orderly conduct of such persons on the Sabbath as are in the habit of frequenting such places,—and requires such construction, if it can be done, and keep within its letter or spirit, as will enable courts to apply it in such manner as to secure the beneficial results intended by the law-making power. And I can see no difficulty in making the desired application in this case.

It is the keeping open such places on Sunday that the statute prohibits. Sunday is not a day for lawful secular labor, or business of any kind, and it is not only the duty of the respondent in this case to keep his saloon closed on that day but to see to it that it is not opened by others in his employ while the same is under his control. Chief Justice Cooley has fully expressed my views upon this subject, and upon the proper scope and application of the statute, in *People v. Roby* (post p. 577) at the present term of this Court.

And I also agree with Mr. Justice Marston, in the case of *People v. Broughton* 49 Mich. 339, that "the question of intent is wholly immaterial under the statute. The Legislature, in order to guard against the danger of sales being made, has directed that the place where liquors are kept shall be closed, so that no opportunity to violate by making sales shall be afforded. The person who engages in the business of carrying on a saloon must, at his peril, see that no necessity exists for keeping the same open by carrying on any other business therein which would require the doors to be open, or for persons to enter therein."

There can be no question under the testimony in this case but that the bartender had the right and authority both to be in the saloon of defendant and go in and out at his pleasure on the Sunday in question, and remain as long as he pleased, and being thus in there his business gave him the control of the saloon and its general management. He was in the employ of the defendant; his business was to sell the liquor and as much of it as he could. Under such circumstances and the evidence in this case, to say his action was unauthorized by his employer, or at least prima facie so, would be doing violence to the experience of the most common understanding among men.

I quite agree with the magistrate who convicted this defendant, when he said "There is evidence tending to show that the defendant authorized and sanctioned the opening of said saloon on that Sunday," and it appears that Judge Mills, presiding in the Ottawa circuit when the case was heard, took the same view of the case as is here presented, and affirmed the judgment of the justice.

I think his judgment was correct and should be affirmed with costs.

COOLEY, C. J. and CHAMPLIN, J. concurred.

CAMPBELL, J. I have given my reasons for a different view in *People v. Roby*, post, p. 577.

THE PEOPLE v. RILEY DAVIS.

Adultery—Bill of particulars—Complainant—Privileged communications—Prosecuting attorney—Remote evidence—Affidavit for capias.

1. The respondent in a prosecution for adultery is entitled to a specification of the times and places of the acts relied on for conviction in any case in which he might otherwise be misled in preparing for defense.

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2. A prosecution for adultery may be instituted on complaint of the husband of the woman with whom it was committed. How. St. § 9279.

3. Communications made to a prosecuting attorney by the complaining witness in a criminal case are not privileged, so far as the witness is concerned, for he is not the prosecutor's client and cannot control the use of the communications, which are made for purposes of public justice. Whether the State cannot sometimes claim the privilege—Q.

4. The prosecuting attorney is a sworn minister of justice whose duty it is to see that the innocent are protected as well as that the guilty are brought to punishment.

5. The complaining witness in a prosecution for adultery testified that he caught the parties thereto in the act upon a certain date and at a particular place. *Held* that respondent was entitled to show, by the testimony of a former prosecuting attorney, that the complainant, in laying the case before him, had stated that at the place and date specified he saw nothing wrong between them.

6. A prosecution for adultery must be instituted within a year after the offence; and evidence of acts which at most would raise only a suspicion of improper relations should not be admitted if they occurred more than a year before the commission of the alleged offence, unless they were shown to belong a continuous series of improprieties.

7. An affidavit for a capias in a civil action for criminal conversation ought to be admitted on a prosecution for adultery, based upon the same act, if the complaining witness took it out and it tends to contradict his testimony in the criminal case.

8. An information in a criminal case is presumed to have been framed with reference to the facts disclosed on the preliminary examination; and the date of the offence as given therein is supposed to correspond fairly with the facts then stated.

Exceptions before judgment from Macomb. (Stevens, J.) Jannary 30.—February 6.

INFORMATION for adultery. Conviction set aside.

Attorney General *Jacob J. Van Ryper* for the People. Prosecution for adultery may be begun on complaint of the husband or the wife of either of the guilty persons: How. St. § 9279; *Bayliss v. People* 46 Mich. 221; *Parsons v. People* 21 Mich. 509; *State v. Roth* 17 Ia. 336; a bill of particulars is properly refused in a prosecution for adultery

if no showing is made that it is necessary: *People v. McKinney* 10 Mich. 92; Tiff. Cr. Law 382; disclosures to a prosecuting attorney by complaining witness are privileged: 1 Whart. Cr. Law § 773; 1 Greenl. Ev. § 239; evidence of previous conduct of the parties showing intimate relations is admissible: *Com. v. Lahey* 14 Gray 91; *Com. v. Merriam* 14 Pick. 518; 2 Whart. Ev. § 34; *People v. Jenness* 5 Mich 305; *Com. v. Nichols* 114 Mass. 285.

Weeks & Selfridge for respondent. Prosecution for adultery can be begun on complaint only of the consort of the person to be prosecuted: *Lyon v. Waldo* 36 Mich. 345; *People v. Knapp* 42 Mich 269; *State v. Wilson* 22 Ia. 366; *State v. Roth* 17 Ia. 337; Bish. Stat. Crimes § 662.

Cooley, C. J. The information in this case charges the respondent with having committed adultery with one Sarah M. O'Rourke, the wife of Thomas O'Rourke, at the township of Armada in Macomb county, on the first day of September, 1881. Before the case came on for trial the respondent moved the court that the prosecuting attorney be required to furnish to respondent's counsel a particular statement, specifying the times and places where the alleged acts of adultery upon which he expected to rely for a conviction were supposed to have been committed. The motion was denied.

The record does not show whether respondent had had any preliminary examination upon the charge; but if he had, it is to be presumed the information was framed with reference to the facts then disclosed, and that the evidence was directed to some transaction of or near the date mentioned in the information. But as the prosecution would not be restricted on the trial to the time mentioned in the information—*People v. Jenness* 5 Mich. 305—we think the particulars called for should have been required. The justice of such a requirement was made apparent by the very first step taken by the prosecution in the cause; for instead of attempting to prove an act of adultery occur-

ring on or near September 1, 1881, the complaining witness swore to having caught the parties flagrante delicto on the night of April 30, 1882; and it was upon this evidence that a conviction was sought and obtained. If the prosecution when the information was filed, intended to rely upon proof of a transaction in April, the information—which was verified by the oath of the prosecutor himself, testifying as of his own knowledge,—should have given that as the time of the alleged offense; for the defendant might otherwise be altogether misled in his preparation for a defense. And whenever it is possible that such a result might follow, the court should guard the respondent against it by requiring a statement of particulars, if the defense calls for it. This may perhaps be a matter of discretion in the court, but as the case must go back for a new trial on other points, we think it proper to call attention to it.

Thomas O'Rourke was the complainant in the case. It is objected that only the respondent's wife is authorized by the statute. How. St. § 9279. But the contrary was held in *Bayliss v. People* 46 Mich. 221, and we have seen no reason for doubting the correctness of that decision.

The prosecutor gave his evidence in the case at length, and when the defense entered upon their proofs Mr. Lowell, who was prosecuting attorney of the county when the prosecution was begun, was called to the stand and was asked, with a view to impeaching the prosecutor, whether in the statement O'Rourke made to him he did not say that on the occasion when he saw his wife and respondent together on April 30, 1882, he saw nothing wrong between them. Objection was made to this question by both Mr. Lowell and the present prosecuting attorney, on the ground that communications made by the prosecutor to the prosecuting attorney were privileged; and the court sustained the objection.

It does not appear to have been claimed that Mr. O'Rourke had any privilege in the case, nor could it be; for he was not as to this prosecution the client of the prosecuting at-

torney, nor was that officer in any sense his counsel. He was on the other hand a sworn minister of justice, whose duty it was, while endeavoring to bring the guilty to punishment, to take care that the innocent should be protected. *Wellar v. People* 30 Mich. 17, 24; *Meister v. People* 31 Mich. 99. Communications made to him for the purpose of invoking official action are supposed to be made for the purposes of public justice, and the party making them can assume no control as to the use that shall be made of them subsequently.

If, then, there is any privilege in the case, it must be the privilege of the State in whose interest O'Rourke assumed to act when making his communication to the prosecuting officer. And we are not called upon in this case to consider whether there may not be cases in which the prosecuting attorney would be excused, in the interest of the State, from disclosing what had been told to him with a view to the commencement of criminal proceedings. There would be strong reasons in many cases why the counsel of the State should be inviolably kept; and nothing we shall say in this case will be intended to lay down a rule except for the very case at bar and others standing upon the same facts.

In this case the prosecutor testified that on a particular day and at a place specified he witnessed the commission of the crime charged. The defense then offered to show that in laying the case before the prosecuting officer the prosecutor stated that on the day and at the place specified he witnessed nothing wrong between the parties. If he did so state at that time, when he was laying before the public authorities the very case they were to prosecute, and if he now swears to a case altogether different, it may well be argued that he is unworthy of belief; and the State has no interest in interposing any obstacle to the disclosure of the facts, unless it is interested in convicting accused parties on the testimony of untrustworthy persons. But surely the State has no such interest; its interest is that accused parties shall be acquitted unless upon all the facts they are

seen to be guilty; and if there shall be in the possession of any of its officers information that can legitimately tend to overthrow the case made for the prosecution, or to show that it is unworthy of credence, the defense should be given the benefit of it. There was, therefore, no privilege to preclude the giving of the testimony for which the defense called.

To give color to the charge made against the respondent and raise a presumption of its truth, the prosecution was allowed to prove certain suspicious acts alleged to have occurred in 1879, and which are said to show improper familiarities at that time between the parties accused. The acts proved were the going to the prosecutor's house at unusual hours when he was known to be absent. This might raise a suspicion of improper relations between the respondent and the prosecutor's wife, but an inference of such relations would not be a necessary one from the facts proved. We doubt, therefore, if the evidence can be considered sanctioned by *People v. Jenness* 5 Mich. 305, under which it was received. But we think there was a further objection in the remoteness of the acts in point of time. A prosecution for adultery is by statute limited to one year; and to allow the guilt to be established by the aid of proof of acts committed earlier, and which, if actual offenses, would not now be punishable, it ought to be made to appear that they were not isolated acts separated by a considerable interval of apparently proper conduct from the act relied upon for conviction, as for aught that appears was the case here. The difficulty in meeting such charges when the respondent has had no notice in advance of the intention to prove them, is so great that the liberty of making proof of them ought commonly, we think, to be restricted to the statutory period, unless a continuous course of improprieties is relied upon, which was not the case here.

A civil action, it appears, had been brought by the prosecutor against the respondent to recover damages for the same criminal conduct; and the defense offered in evidence

the affidavit for the capias, for the purpose, as was stated, of contradicting the evidence given by the prosecutor on this trial. The court excluded it. The affidavit is not given in the record, and we cannot therefore know whether its tendency would have been as claimed, but if it would, it should have been received.

The circuit court is advised that the exceptions are well taken, and that the verdict should be set aside and a new trial granted.

The other Justices concurred.

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The People v. Welton Francis.

New trial.

1. The discretion of the circuit court in denying a new trial is not reviewable by the Supreme Court,
2. New trial need not be granted on the ground that the jury were not kept in a private place until they rendered their verdict if in fact they agreed upon it before leaving their room.
3. The verdict of a jury in a criminal case cannot be disturbed on exceptions if the evidence had any tendency to support it and the case was properly presented to the jury on the law.

Exceptions before judgment from Kent. (Montgomery, J.) January 30.—February 6.

Information for larceny. Conviction affirmed.

Attorney General *Jacob J. Van Riper* for the People. Irregularity in the conduct of the jury will not be ground for setting aside their verdict unless it be such as might affect their impartiality: *State v. Babcock* 1 Conn. 401; *People v. Douglass* 4 Cow. 26; *Whitney v. State* 8 Mo. 165; *Com. v. Roby* 12 Pick. 519; 3 Whart. Cr. Law § 3283.

E. S. Eggleston for respondent appellant.

SHERWOOD, J. The information in this case charges the defendant with the larceny of a pair of horses and harness at Cadillac, in Wexford county, of the value of $200, and being the property of Rose Ann Cramer. A conviction was had at the circuit and the case comes before us on exceptions before judgment.

The respondent claimed that he obtained the property and its possession from two young men who had it in charge for the owner and for sale, and who gave him a bill of sale thereof, and that he had no wrongful or felonious intent in obtaining it and disposing thereof.

On the other side it was claimed in behalf of the People that the respondent had followed the young men and the property from Kalamazoo to Cadillac, where through fraud and false pretenses to them, and with the felonious intent to defraud the owner of the property, he contrived to secure possession of the same under a pretended bill of sale, paying nothing therefor, and subsequently sold the property to another party.

Upon these theories the case was tried and the jury found a verdict against the defendant. The respondent moved before the circuit judge for a new trial. The motion was heard and granted. A second trial was had with a like result.

At the close of the People's proofs, the respondent's counsel moved for his discharge upon the ground that a case of larceny was not disclosed by the evidence. This motion was denied by the court and we think he ruled correctly. Motion was then made for a new trial based upon two grounds—*first*, that the verdict was against law and the evidence given in the case; *second*, that the sheriff did not keep the jury in a private place till they rendered their verdict, but brought them from their room into the court-room about an hour before they rendered their verdict. It does, however, appear that they were not permitted to leave their room until after they had agreed upon the verdict and the judge so finds the fact.

We are not permitted to review the discretion of the

circuit judge on a motion for a new trial, but if we were we see nothing in this motion requiring the court to grant it.

There were no exceptions taken to the charge, which seems to have been well considered. The only question raised upon the bill of exceptions is, Was respondent entitled to his discharge when the People rested their case? We have carefully examined the record and the points presented by the respondent's counsel and we are clearly of the opinion that the case was a proper one for the jury, and that the circuit judge committed no error in so ruling.

The trial seems to have been very fair and the case clearly presented to the jury on the law, which we have no doubt was properly regarded, and the decision upon the facts we cannot disturb.

The circuit judge is therefore advised to render judgment upon the verdict.

The other Justices concurred.

THE PEOPLE v. JUNIUS W. ROBY.

Saloons must be kept closed on Sunday.

How. St. § 2274 requires all saloons to be closed on Sunday, and any person who violates this requirement is liable to punishment as for a misdemeanor. Id. § 2275. *Held* that under these sections a saloon-keeper was properly convicted whose clerk, without his knowledge or consent, but while he was on the premises, had opened the saloon on Sunday morning to have it cleaned out and had meanwhile sold a drink to a casual customer who insisted on having it.

Exceptions before judgment from Allegan. (Arnold, J.) Jan. 30.—Feb. 6.

Complaint for keeping saloon open on Sunday. Conviction affirmed.

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Attorney General *Jacob J. Van Riper* for the People.

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Jacob V. Rogers for respondent appellant.

COOLEY, C. J. The respondent who is keeper of a hotel in the village of Plainwell, in which there is a bar for the sale of spirituous and malt liquors, was prosecuted and convicted for not keeping his bar closed on Sunday, May 6, 1883. The evidence was that on the morning of that day the clerk of the hotel was in the bar-room and had a servant with him scrubbing it out when a person came in from the street. He appeared to be known to the clerk, who told him he did not want him there Sundays. The man said he wanted some whisky. The clerk told him he must get his whisky Saturday night. After some more words between them the clerk told him if he was going to get the whisky to get it and get out as soon as he could. He got the whisky, handed pay for it to the servant, and went off. The respondent was not at the time present. The clerk testifies that he was somewhere about the house, but he thought he was not up yet; the servant says he was about there shortly afterwards. There was no evidence in the case to show that respondent assented to the opening of the bar on that day, or expected or desired that it should be opened; neither was there any evidence to the contrary. He was not a witness on his own behalf.

The case comes to this Court on writ of error, and the only question of importance is whether there was any evidence to be submitted to the jury.

The statute under which the conviction was had provides that "all saloons, restaurants, bars, in taverns or elsewhere, and all other places where any of the liquors," etc. "may be sold, or kept for sale, either at wholesale or retail, shall be closed on the first day of the week, commonly called Sunday," etc. How. St. § 2274; Public Acts, 1881, p. 350.

It will be observed that the requirement that the saloons and other places mentioned shall be closed is positive. The

next section of the statute provides that any person who shall violate this, among other provisions, shall be deemed guilty of a misdemeanor, and shall be punished as therein prescribed. In terms, then, the penalties of the statute are denounced against the person whose saloon or other place for the sale of intoxicating drinks is not kept closed, and no other fact is necessary to complete the offense.

It is contended, nevertheless, that to constitute an offense under the section referred to, there must be some evidence tending to show an intent on the part of the respondent to violate it; and *People v. Parks* 49 Mich. 333, which was a prosecution under another section of the same statute, is cited as authority. It should be said of that case that the facts are not fully given in the report, and that there was positive evidence in the case to negative the intent in the respondent that the criminal act should be committed. But the case is plainly distinguishable from this. The section under which Parks was prosecuted makes not only the proprietor, but his clerks, agents, etc., individually liable for the conduct prohibited, and imposes upon them severally the duty to abstain from it. The section under which Roby is prosecuted makes the crime consist, not in the affirmative act of any person, but in the negative conduct of failing to keep the saloon, etc., closed.

I agree that as a rule there can be no crime without a criminal intent; but this is not by any means a universal rule. One may be guilty of the high crime of manslaughter when his only fault is gross negligence; and there are many other cases where mere neglect may be highly criminal. Many statutes which are in the nature of police regulations, as this is, impose criminal penalties irrespective of any intent to violate them; the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible. Thus, in Massachusetts a person may be convicted of the crime of selling intoxicating liquor as a beverage, though he did not know it to be intoxicating; *Commonwealth v. Boynton* 2 Allen 160; and of the offense of selling adulterated milk, though he was

ignorant of its being adulterated. *Commonwealth v. Farren* 9 Allen 489; *Commonwealth v. Holbrook* 10 Allen 200; *Commonwealth v. Waite* 11 Allen 264; *Commonwealth v. Smith* 103 Mass. 444. See *State v. Smith* 10 R. I. 258. In Missouri a magistrate may be liable to the penalty for performing the marriage ceremony for minors without consent of parents or guardians, though he may suppose them to be of the proper age. *Beckham v. Nacke* 56 Mo. 546. Where the killing and sale of a calf under a specified age is prohibited, there may be a conviction though the party was ignorant of the animal's age. *Commonwealth v. Raymond* 97 Mass. 567. See *The King v. Dixon* 3 M. & S. 11. In *State v. Steamboat Co.* 13 Md. 181, a common carrier was held liable to a statutory penalty for transporting a slave on its steamboat, though the persons in charge of its business had no knowledge of the fact. A case determined on the same principle is *Queen v. Bishop* 5 Q. B. Div. 259. If one's business is the sale of liquors, a sale made by his agent in violation of law is prima facie by his authority; *Commonwealth v. Nichols* 10 Met. 259; and in Illinois the principal is held liable, though the sale by his agent was in violation of instructions. *Noecker v. People* 91 Ill. 494. In Connecticut it has been held no defense in a prosecution for selling intoxicating liquor to a common drunkard that the seller did not know him to be such. *Barnes v. State* 19 Conn. 398. It was held in *Faulks v. People* 39 Mich. 200, under a former statute, that one should not be convicted of the offense of selling liquors to a minor who had reason to believe and did believe he was of age; but I doubt if we ought so to hold under the statute of 1881, the purpose of which very plainly is, as I think, to compel every person who engages in the sale of intoxicating drinks to keep within the statute at his peril. There are many cases in which it has been held under similar statutes that it was no defense that the seller did not know or suppose the purchaser to be a minor; *State v. Hartfiel* 24 Wis. 60; *McCutcheon v. People* 69 Ill. 601; *Farmer v. People* 77 Ill. 322; *Ulrich v.*

Commonwealth 6 Bush 400; *State v. Cain* 9 W. Va. 559; *Commonwealth v. Emmons* 98 Mass. 6; *Redmond v. State* 36 Ark. 58; and in *Commonwealth v. Finnegan* 124 Mass. 324, the seller was held liable, though the minor had deceived him by falsely pretending he was sent for the liquor by another person. So a person has been held liable to a penalty for keeping naptha for sale under an assumed name, without guilty knowledge; the statute not making such knowledge an ingredient of the offense. *Commonwealth v. Wentworth* 118 Mass. 441. Other cases might be cited, and there is nothing anomalous in these. A person may be criminally liable for adultery with a woman he did not know to be married: *Fox v. State* 3 Tex. App. 329; or for the carnal knowledge of a female under ten years of age though he believed her to be older. *Queen v. Prince* L. R. 2 Cr. Cas. 154; *State v. Newton* 44 Ia. 45. And other similar cases might be instanced.

If intent were necessary to be found I should be of opinion there was enough in the case to warrant its submission to the jury. The bar was opened on Sunday by respondent's servants and on his business while he was about the premises. The purpose for which it was opened was immaterial; the offense was committed by opening it for cleaning as much as it would have been by opening it for the sale of liquors. *People v. Waldvogel* 49 Mich. 337. But the statute requires the proprietor at his peril to keep the bar closed. The purpose in doing so is that persons shall not be there within the reach of temptation. This respondent did not keep his bar closed and he has therefore disobeyed the law. And he has not only disobeyed the law, but the evil which the law intends to guard against has resulted; that is to say, there has been, either with or without his assent,—it is immaterial which,—a sale of intoxicating liquors to a person who took advantage of the bar being open to enter it.

I think the circuit court should proceed to judgment.

SHERWOOD and CHAMPLIN, JJ., concurred.

CAMPBELL, J. In this case the charge of the judge was properly guarded as to the necessity of showing complicity of respondent in the act charged against him, and as to the presumption of his innocence. But in my opinion the rules he laid down were inconsistent with the sufficiency of the facts to sustain a conviction. I think this conviction can only be maintained on the principle that an agent appointed for a confessedly legal purpose is presumed to be authorized to act illegally. I can see no reason why such presumption should be lawful in one case and not in another. In all crimes the presumption of innocence must be the same. The charge here is distinctly criminal, and while the offense is one of importance to the public order, I think that the decisions which set up exceptional rules of evidence to prove it are of dangerous tendency and would not be safe precedents.

THE PEOPLE v. HENRY KROPP.

Selling liquor without giving bond.

Selling a pint of liquor in a single instance without having given the bond required of liquor-sellers is a violation of How. St. § 2270, whatever be the intent of the offender as to going into the business of liquor selling.

Exceptions before judgment from Leelanaw. (Ramsdell, J.) Jan. 30.—Feb. 6.

Complaint for selling liquor without having given bond. Conviction affirmed.

Attorney General *Jacob J. Van Riper* for the People.

Pratt, Hatch & Davis for respondent appellant.

COOLEY, C. J. The complaint in this case charges that "on the 12th day of March, A. D. 1883, at the township

of Centerville and in the county aforesaid [Leelanaw], Henry Kropp, of said township of Centerville, did sell and furnish to him, the said complainant Frank Bodus, a certain quantity, to-wit, one pint of spirituous liquor as a beverage, without first having executed and delivered to the county treasurer of said Leelanaw county the bond required by section nine (9) of Act No. 259 of the Public Acts of Michigan for the year 1881, contrary to the form of the statute in such case made and provided." The respondent pleaded not guilty to this complaint, and on trial was convicted. The proof was that he made sale of a single pint of spirituous liquor as charged. There was no showing that he was engaged in the business of selling spirituous or other liquors, except the sale which has been mentioned.

The statute provides "that it shall not be lawful for any person except druggists to sell, furnish to, or give any spirituous, malt, brewed, fermented, or vinous liquors, or any beverage, liquor or liquids, containing any spirituous, malt, brewed, fermented, or vinous liquors, without first having executed and delivered to the county treasurer of the county in which such business is proposed to be prosecuted or carried on, the bond required by section nine of this Act." How. St. § 2270. The bond referred to is the bond required to be given by dealers, and approved by the proper public authorities. Another section imposes a penalty for the violation of the section above recited.

It is contended for the respondent that the statute applies only to persons engaged in the sale of spirituous and other liquors as a business; and that the complaint is fatally defective for not showing that the respondent was such a person. And further, that even if the complaint is sufficient the offense is not made out without evidence that respondent was so engaged in business. This view of the statute was presented in the circuit court and was overruled.

We think the circuit court ruled correctly. The statute punishes single sales by those who have failed to give the required bond, and the offense is made out by proof of the sale and by the fact that the bond has not been given.

There is perhaps an assumption in the statute that a party does not sell unless he purposes to make such sales his business, but his intent in that regard is not made an ingredient in the offense, and does not become the subject of evidence.

The conviction is affirmed.

The other Justices concurred.

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The People v. Frank Baumann.

Keeping open saloon on a legal holiday.

1. A complaint and warrant for selling liquor on a legal holiday were *held* sufficient where they set forth that on the date specified the respondent, "being then and there a keeper of a saloon in said village and the same being a place where spirituous and malt liquors are sold at retail, and the said 4th of July, A. D, 1882, being a legal holiday, did not keep the said saloon closed, and did then and there on the said 4th day of July, A. D. 1882, a legal holiday, keep the said saloon open for the purpose of selling spirituous and malt liquors at retail therein, the said [respondent] not being then and there a druggist nor a person whose business consists in whole or in part of the sale of drugs and medicines" etc.
2. The presence upon jury of talesmen over sixty years old is not ground for challenge to the array, but will sustain a challenge for cause, as the only persons qualified for talesmen are those who are not exempt from jury duty. How. St. § 7555.
3. Upon a prosecution for keeping a saloon open testimony that the saloon was open on a certain day and identifying respondent as keeper of the saloon and as keeping liquor and being about the building though the bar-tender was in charge, is enough to go to the jury upon the main charge.
4. In identifying the proprietor of a saloon it was *held* proper to ask a witness as to the contents of a license card which he testified he had seen in the saloon.

Error to Kalamazoo. (Mills, J.) Jan. 30.—Feb. 6.

Complaint for keeping saloon open on a legal holiday. Respondent brings error. Affirmed.

Howard & Roos and *Edwin M. Irish* for respondent appellant.

Attorney General *Jacob J. Van Riper* for the People.

SHERWOOD, J. The defendant was arrested and tried in justice's court on a complaint and warrant[1] charging him with keeping his saloon open on the 4th day of July, 1882, in Kalamazoo, contrary to How. Stat. § 2274. He was convicted on a trial had before a jury, and on certiorari to the circuit court the judgment was affirmed by Judge Mills, and the case is now brought here for review, the respondent relying upon the same errors for reversal as at the circuit.

It is alleged for error that the complaint and warrant charge no offense. No particular defect is pointed out. We think they both sufficiently comply with the statute, and that the judgment was not without jurisdiction, as claimed by counsel for defendant.

In obtaining the jury in the case, three talesmen were summoned. Of these, two were over sixty years of age, and upon that ground defendant challenged the array. The challenge was overruled, and this ruling is alleged as

[1] *State of Michigan, County of Kalamazoo—ss:* The complaint and examination, on oath and in writing, of Chauncey Gates, taken and made before me, Isaac N. Wattles, a justice of the peace in said county, upon the 14th day of July, A. D. 1882, who, being duly sworn, says that he has just cause to believe, and does believe, heretofore, to-wit, on the 4th day of July, A. D. 1882, at the village of Kalamazoo and in the county aforesaid, one Frank Baumann, being then and there a keeper of a saloon in said village, and the same being a place where spirituous and malt liquors are sold at retail, and the said 4th of July, A. D. 1882, being a legal holiday, did not keep the said saloon closed, and did then and there on the said 4th day of July, A. D. 1882, a legal holiday, keep the said saloon open for the purpose of selling spirituous and malt liquors at retail therein, and the said Frank Baumann not being then and there a druggist, nor a person whose business consists in whole or in part of the sale of drugs and medicines, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the State of Michigan; wherefore the said Chauncey Gates prays that the said Frank Baumann may be apprehended and held to answer this complaint, and further dealt with in relation to the same as law and justice may require. CHAUNCEY GATES.

Taken, subscribed and sworn to before me the day and year first above written. ISAAC N. WATTLES,
Justice of the Peace.

error. The ground taken was good challenge for cause but not to the array. It is also insisted that there was no evidence to go to the jury that the defendant "kept open any place where liquor was sold on the 4th day of July, 1882." Mr. Gates, the marshal of the village, was sworn and testified on his direct examination that the defendant kept a saloon on that day on Main street, and that he kept whisky, beer and liquors of different kinds; on his cross-examination he said he knew defendant was keeping the saloon on the 4th of July, 1882; that he saw Baumann around there that day, in the front part of the saloon where cigars and tobacco were kept, but not in the part where liquors were sold. On the re-direct examination he said that the doors of the saloon were open and he saw a good many men going in and out of the saloon that day; that the front doors of the saloon were open.

Theodore Merrill testified in substance that he knew defendant and his business July 4, 1882. He kept a saloon

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State of Michigan, County of Kalamazoo—ss:

To the Sheriff or Constable of any County, Greeting: Whereas, Chauncey Gates hath this day made a complaint in writing and on oath to me, Isaac N. Wattles, a justice of the peace in and for said county, that he has just cause to believe, and does believe, heretofore, to-wit, on the 4th day of July, A. D. 1882, at the village of Kalamazoo, in the county aforesaid, one Frank Baumann, being then and there a keeper of a saloon in said village, and the same being a place where spirituous and malt liquors are sold at retail, and the said 4th of July, A. D. 1882, being a legal holiday, did not keep the said saloon closed, and did then and there on the said 4th of July, A. D. 1882, a legal holiday, keep the said saloon open for the purpose of selling spirituous and malt liquors at retail therein, and the said Frank Baumann not being then and there a druggist nor a person whose business consists in whole or in part of the sale of drugs and medicines, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the State of Michigan. And, whereas, on examination, on oath of the said Chauncey Gates and two other persons by me, the said justice of the peace, it appears to me, the said justice of the peace, that said offense has been committed, and there is just cause to suspect the said Frank Baumann to have been guilty thereof; therefore, in the name of the people of the State of Michigan, you, and each of you, are hereby commanded forthwith to arrest the said Frank Baumann and bring him before me, the said justice of the peace, to be dealt with according to law.

Given under my hand and seal, at the village and township of Kalamazoo, in said county, on the 14th day of July, A. D. 1882.

ISAAC N. WATTLES [L. S.]
Justice of the Peace.

on Main street. Baumann told Mr. Knappen that he was proprietor of the saloon. Witness was in the saloon on that day two or three times. Saw a large number of persons in the saloon standing around the bar drinking liquor which in his judgment was beer and whiskey. That defendant's bartender was behind the bar selling it. W. W. Peck testified he was internal revenue collector and had his office in same building; knew respondent's saloon and that he kept it open on July 4, 1882, and saw men going in and out of it frequently on that day.

All this evidence was given and no evidence was offered to contradict it. This testimony shows no ground for the objection that there was no evidence showing defendant kept his saloon open on the 4th day of July as charged in the complaint.

Witness Merrill, for the purpose of showing that the respondent was proprietor of the saloon, was asked if he saw a license card in the saloon on that day and what it contained. This was objected to as irrelevant and immaterial. We think the objection properly overruled. For the purpose stated the testimony was proper.

Several other objections were taken and urged, but we think none of them tenable, and that they need no further consideration.

The judgment must be affirmed with costs.

The other Justices concurred.

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WALLACE DAVENPORT v. ESTATE OF NATHANIEL DAVENPORT.

Claim against estate—Covenant against incumbrances

A claim against an estate cannot be based upon a covenant against present incumbrances in a deed from decedent to claimant's grantor, if the latter has not assigned to claimant the right of action for the breach but has only conveyed the land.

Error to Ionia. (V. H. Smith, J.) Jan. 30.—Feb. 6.

Appeal from disallowance by commissioners of claim against estate. The claimant brings error. Affirmed.

Webster, Davis & Millard for appellant, cited as similar, *Byrnes v. Rich* 5 Gray 518; *Smith v. Strong* 14 Pick. 128.

Morse, Wilson & Trowbridge for appellee. A covenant against incumbrances is a covenant in presenti, and is broken, if at all, at the time it is made, and is incapable of transmission by the covenantee to his grantee by a deed of the premises merely; when broken it becomes a chose in action in the covenantee, and is not transferred by the covenantee's deed: Sutherland on Damages, 311 n. 1; 2 Washb. R. P. (2d ed.) 708; Rawle on Cov. 336, 346, 373, 374; *Davidson v. Cox* 10 Neb. 150; *Clark v. Swift* 3 Met. 391; *Whitney v. Dinsmore* 6 Cush. 124; *Thayer v. Clemence* 22 Pick. 490; *Smith v. Lloyd* 29 Mich. 382; *Matteson v. Vaughn* 38 Mich. 375; *Post v. Campau* 42 Mich. 90; *Johnson v. Hollensworth* 48 Mich. 140.

Cooley, C. J. The plaintiff presented to the commissioners appointed to audit and allow claims against the estate of Nathaniel Davenport, a claim arising on a breach of a covenant against encumbrances contained in a deed from the decedent to Elizabeth, the wife of the claimant, bearing date July 29, 1872, and conveying certain lands in the county of Ionia. The commissioners disallowed his claim, and he appealed to the circuit court where it was again disallowed.

The plaintiff's case was that the deed to the wife was made on an oral understanding with her that she should hold the land for him and deed to him on request—he having paid the consideration; that afterwards, on August 28, 1878, she did convey to him in recognition of this understanding; that when the deed to her was given the land was encumbered by a mortgage given by the decedent, and that this mortgage was paid by the claimant in 1879. This was all the showing that was made of the plaintiff's right to recover upon the covenant. Whether the deed to the claimant contained covenants does not appear.

It is obvious from this statement that if the claimant can enforce any claim upon the covenant he can only do so by virtue of the transfer to him of the claim by his wife's deed. The oral understanding was a mere nullity, except as the wife saw fit to give effect to it afterwards by the execution of a deed. The mortgage which was upon the land fell due February 11, 1873. There had therefore not only been a technical breach of the covenant but the grantee in the deed of the decedent was in position where, by paying off the incumbrance, she might recover the whole amount as damages by breach of her covenant. Her right of action was complete; and it may be added that several payments of interest had been made on the mortgage before she conveyed to her husband. There is nothing in the record to indicate any intent on her part to transfer this personal claim, which her husband could only claim as assignee. We are referred to *Post v. Campau* 42 Mich. 90 as authority for the position that the deed of the wife carried the covenant against encumbrances; but in that case the covenant looked to the future, and was intended to give protection to the title against demands coming against it subsequently. The actual decision made in that case has therefore no bearing upon this. The doctrine that a covenant against present encumbrances cannot run with the land was discussed with unfavorable comments by one member of the Court; but the present case is scarcely within any of the reasons then assigned for a change of the rule. The record before us is remarkably meager in its statement of dates; but apparently the mortgage must have been overdue for six years when the decedent died. It needs no argument to show that the covenantee cannot thus indefinitely prolong the liability of the covenantor by leaving the mortgage unpaid, and that if she could, the mere transfer of the title without covenants and without mention of the claim would not evidence an intent to transfer her right of action.

The judgment must be affirmed.

The other Justices concurred.

Charles Reynolds v. Benjamin S. Patrick et al.

Partnership settlement a question of fact.

In assumpsit against former partners for the amount found due plaintiff on a partnership settlement, and which defendants had promised to pay him, the facts of settlement and of the joint promise to pay were for the jury.

Error to Ionia. (V. H. Smith, J.) Jan. 31–Feb. 1—Feb. 6.

Assumpsit. Defendant Patrick brings error. Affirmed.

Mitchell, Bell & McGarry for appellant. In Vermont a partner can recover only a balance found due to him upon dissolution after an adjustment of all the partnership dealings: *Spear v. Newell* 13 Vt. 288; *Warren v. Wheeler* 21 Vt. 323; *Sawyer v. Proctor* 2 Vt. 580; so in Illinois; *Davenport v. Gear* 2 Scam. 495; *Chadsey v. Harrison* 11 Ill. 151; in New York, South Carolina and Illinois assumpsit will not lie between partners for a final balance, except upon an express promise to pay it: *Casey v. Brush* 2 Cai. 293; *Halsted v. Schmelzel* 17 Johns. 80; *Westerlo v. Evertson* 1 Wend. 532; *Townsend v. Goewey* 19 Wend. 424; *Frink v. Ryan* 3 Scam. 325; *Course v. Prince* 1 Rep. Const. Ct. 416; in Massachusetts and Pennsylvania, where there has been an actual settlement and ascertainment of the final balance, in consequence of their peculiar condition, having no courts of equity, a suit may be maintained upon such balance without a promise: *Ozeas v. Johnson* 1 Binn. 191; *Williams v. Henshaw* 11 Pick 79.

Moses Bartow and *Morse, Wilson & Trowbridge* for appellee. Where three people are in partnership and one wishes to withdraw, and they meet, settle the partnership business, strike a balance in favor of the retiring partner, and the remaining partners jointly promise to pay him the amount, such a promise can be enforced in assumpsit: 5

Wait's A. & D. 151; Pars. on Partn. (2d. ed.) 278, 282; *Frink v. Ryan* 3 Scam. 322; *Davis v. Merrill* 51 Mich. 480; also *Gibson v. Moore* 6 N. H. 547; *Sprout v. Crowley* 30 Wis. 356; *Gulick v. Gulick* 14 N. J. Law 578; *Gauger v. Pautz* 45 Wis. 452; *Coffee v. Brian* 3 Bing. 54; *Riarl v. Wilhelm* 3 Gill 356; *Collamer v. Foster* 26 Vt. 754; *Neale v. Turton* 4 Bing. 149; *Casey v. Brush* 2 Cai. 293; *Shennefield v. Dutton* 85 Ills. 503; *Hanks v. Baber* 53 Ill. 292; *Clark v. Dibble* 16 Wend. 601; *Wilby v. Phinney* 15 Mass. 116.

CHAMPLIN, J. On the trial of this cause in the court below the plaintiff gave testimony tending to prove that on the 6th day of April, A. D. 1882, the defendants were, and for some time prior thereto had been, engaged together in the business of buying and selling live-stock. On or about that date the plaintiff entered into copartnership with said defendants for the purpose of carrying on together the same business; the three continued in said business for about three weeks until about the 29th of April. During this time quite an amount of stock of various kinds had been purchased.

Some of the stock had been resold and the remaining portion was still on hand, when, at the time last mentioned, the copartnership between the three was dissolved by the withdrawal of the plaintiff from the same. The two defendants continued to carry on the business. About this time the said plaintiff and said defendants met together and settled the partnership business in which they had been engaged, in so far as to figure up and determine the amount that was due to the plaintiff out of the business.

The live-stock that was on hand at the time of dissolution, which it seems had been paid for by the plaintiff, was taken by him, he being charged with the increase in value of the same, and a balance was then struck, which showed that there was due to the plaintiff, from the defendants, out of the business, the sum of $526.

This amount was agreed upon by the parties, and the

defendants then and there promised jointly to pay to the plaintiff the amount so found due to him by the settlement, and upon the subsequent refusal of the defendants to carry out such agreement this action was brought, resulting in a verdict and judgment for the plaintiff, from which the defendant Benjamin S. Patrick appeals to this Court.

On the other hand, the defendant Patrick claimed, and gave testimony tending to prove, that no settlement was consummated and no joint promise was made to pay the amount which plaintiff claimed. The question was one purely of fact, and was submitted to the jury and they found a verdict in plaintiff's favor.

There is no error in the record and the judgment is affirmed.

The other Justices concurred.

In the Matter of the Estate of Austin H. Odell. Appeal of Eleanor K. O. Young.

Claim against estate by grass-widow.

1. A woman who by mutual agreement with the man with whom she was living had parted from and released all claims upon him and left the State and married another man, cannot maintain a claim for widow's allowances against the estate of her original companion, as against a woman who in good faith lawfully married him, without, at least, showing very clearly that she, the claimant, had been his lawful wife.

2. A proceeding to obtain widow's allowances is not binding upon a woman who had in good faith married decedent after the claimant had left him and was living with him as his wife at the time of his death, but was not made a party to the proceeding brought by her predecessor.

Error to Kalamazoo. (Mills, J.) Feb. 1.—Feb. 6.

Appeal from probate decree denying a petition for a widow's allowance from the estate. The estate brings error. Reversed.

Hawes & Shakespeare for appellant estate.

Howard & Roos for petitioner appellee.

SHERWOOD, J. The petitioner, Eleanor Knight Odell Young, claims to be the widow of Austin H. Odell, late of the county of Kalamazoo, deceased, and in her petition prays the probate court of that county to decree to her from the estate of said deceased her statutory allowances. She claims to have been many years ago married to Odell, and for some time lived with him as his wife, but very soon, by agreement, they separated with the understanding that they released each other from all obligations growing out of the relations existing between them, and that not long thereafter petitioner married Albert Young, with whom she left the State, and that they have lived together ever since.

The deceased was twice married after the petitioner left the State. He lived with the first wife until she died, and with the second wife until he died, and always lived upon his farm in Kalamazoo county.

Barnard Vosburg was duly appointed administrator of his estate, and thereupon Mrs. Young presented her petition in this case, she still being a non-resident of the State living with her husband, and the last wife of deceased residing upon the farm and in possession of the property thereon. The probate court denied the prayer of the petitioner, and on the hearing of her appeal before the circuit judge, without a jury, she succeeded.

The administrator brings the case into this Court for review upon exceptions and special findings by the circuit judge.

The opinion of this Court was pretty clearly intimated on the hearing, and a careful review of the record and briefs of counsel fully confirm the views then expressed. The deceased, when he died, was living with a woman whom he had married and claimed to be his lawful wife, and who, as the circuit judge says, "undoubtedly married

him in good faith and lived with him, supposing her marriage to be lawful;" she was left in full possession of his home, and so remained quietly until disturbed by petitioner.

The findings of the circuit judge have been carefully examined, and in none of them do we discover the fact found that the petitioner at the time of the decease of Austin H. Odell or at any other time was his lawful wife.

This was the important question in the case, and it is left wholly undetermined. Some circumstances are made to appear bearing on the subject, but nothing that can be received as evidence of a valid marriage. Very important social relations and property interests may be seriously affected and in many instances disappointed or completely destroyed by the destruction of family relations thus irregularly established. And when that relation so exists and has long been acquiesced in by all parties interested and the technicalities of the law are invoked as the means for producing such consequences, courts will require full and convincing proof of all the facts necessary to effect such a consummation. The petitioner in this case not having brought her proofs within this equitable and just rule imperatively demanded by the best interests of all the parties interested as well as society, must necessarily fail.

The deceased's last wife is not made a party to this proceeding and her interests are in no way affected thereby.

The judgment of the circuit court must be reversed, and the petition dismissed with costs of both courts to the estate, and the circuit court will so certify the same to the probate court of Kalamazoo county whose judgment in the premises is affirmed.

CAMPBELL and CHAMPLIN, JJ. concurred.

COOLEY, C. J. I concur. The complainant's case, as she makes it, is utterly wanting in equity, and she has no claim to be permitted to cure any defects in it if it were possible for her to do so.

ALVAH E. LEAVITT v. THE JUDGE OF THE SUPERIOR COURT OF DETROIT.

Mandamus to enforce stipulation to settle case.

Mandamus does not lie to enforce a disputed stipulation to settle a case even though money has been paid thereunder. The parties to the stipulation are entitled to have the fact as to the settlement tried on a regular issue before a jury; and if the validity of the stipulation is contested it should be brought into the case by plea and not by motion.

Mandamus. Submitted Feb. 5. Denied Feb. 6.

F. A. Baker and *H. M. Cheever* for the writ.

Stewart & Galloway against.

PER CURIAM. Relators ask a mandamus the purpose of which is to give effect to a stipulation signed by the parties to a litigation pending in the Superior Court of the city of Detroit, and which was to settle and discontinue such litigation. It seems that a sum of money was paid when the stipulation was signed, but the party receiving the money claims that his signature was improperly obtained, and he refuses to abide by it, though he has not returned the money. Relators claim that the stipulation is not successfully impeached, and they also claim that it is affirmed by the money not being returned. The judge of the Superior Court refused to give effect to the stipulation by directing a discontinuance to be entered.

The case is a peculiar one and involves somewhat complicated facts, but we agree with respondent that the questions arising could not be determined in favor of the relators on a summary hearing. The parties were entitled to have the question of the settlement tried upon a regular issue, and to submit the issue to a jury if they saw fit to do so. The stipulation, if its validity was contested, should be brought into the case by plea; not by motion.

Writ denied.

JULIA CROUCH v. THE CIRCUIT JUDGES FOR WAYNE COUNTY.

Estates of decedents—Appeal from allowance of claim.

An appeal from the allowance by probate commissioners of claims against an estate is a matter of right to those who are interested, and such person may take it if the administrator declines to; and if the probate judge allows an appeal to some one else he thereby passes upon the fact of the administrator's refusal.

Mandamus. Submitted Feb. 5. Granted Feb. 6.

Henry M. Duffield for the writ.

William Look against.

PER CURIAM. We think the circuit judge took an erroneous view of the statute permitting other parties than the administrator to appeal from the allowance of claims. The right is not to be put upon the same footing with cases where the law does not permit a party to be vexed with legal proceedings until good cause is shown. Under the statute an appeal by some party is matter of right; and there is no special reason why it should be taken by the administrator rather than by some person interested, if such person will take it. The appeal will not disturb the other proceedings of the administrator; and as the appellant is required to give security for the protection of the estate, the appeal might well have been allowed irrespective of the will of the administrator. The statute, however, gives an appeal to another only when the administrator declines to take it; but we think the right is to be liberally construed, and if the probate judge allows the appeal, he thereby passes upon the question of fact. The application for appeal in this case was somewhat informal, and if the substantial rights of the estate were to be affected, it might be criticised. But they are not to be affected; and justice would not be subserved by permitting the administrator to come in and have the opportunity for a hearing in the circuit court precluded.

Motion granted.

ALFRED R. CARTER v. CASTLE SUTHERLAND.

Malicious prosecution—Malice—Assault—Unnecessary force—Variance.

1 B. took the whiffletrees from C 's wagon and C., who had a wagon stake in his hand, threatened to break his head. S. thereupon had C. arrested for assault and C. sued him for malicious prosecution. The judge charged that while a man had a right to protect his property he would only be justified in using just force enough to do so; and that while C. might have been justified in taking away the whiffletrees from B. and using only enough force for that purpose he would not be justified in striking him on the head with a stick as that would be inflicting punishment. *Held* that this was correct and was not objectionable as taking from the jury the question whether C. was chargeable with using more force than was necessary. And it was proper to instruct the jury that they might make allowance for excitement on the part of S. as bearing on the question whether he acted maliciously in having C. prosecuted.

2. A justice's mistake in filling out a complaint as one for assault and battery when the actual complaint, on which the warrant was issued, was for an assault only, cannot in an action for malicious prosecution prejudice the person making the complaint.

Error to Saginaw. (Gage, J.) Jan. 18.—Feb. 8.

CASE. Plaintiff brings error. Affirmed.

Trask, Grout & Smith and *Ferdinand Brucker* for appellant. The owner of property may use whatever force is needed to protect it: *Bobb v. Bosworth* Litt. Sel. Cas. 81; *Baldwin v. Hayden* 6 Conn. 453; *State v. Taylor* 82 N. C. 554.

L. C. Holden and *J. M. Harris* for appellee. A threatening demonstration is an assault: 2 Archb. Cr. Pr. 42; *State v. Morgan* 3 Ired. 186; *Bloomer v. State* 3 Sneed 66; *Keefe v. State* 19 Ark. 190; allowance for excitement is properly made in determining the question of probable cause in instituting a prosecution: Cooley on Torts 181; *Cole v. Curtis* 16 Minn. 182; *Hill v. Taylor* 50 Mich. 549.

COOLEY, C. J. This is a suit for an alleged malicious

prosecution of the plaintiff on a charge of assault and battery upon one Brown. In the circuit court the defendant had judgment.

It appears that the parties had had a controversy over the division of certain grain which plaintiff had raised on the land of defendant's wife upon shares, and which plaintiff was then proposing to take away from the farm without dividing it. Brown was present with defendant and apparently in his interest, and he removed the whiffletrees from plaintiff's wagon and started to go away with them. Plaintiff, according to defendant's statement, picked up a wagon stake and told Brown if he did not put down the whiffletrees he would break his head, and Brown dropped them. For this threat and menace defendant made complaint against plaintiff before a justice of the peace. The complaint, as is clearly shown in this case, was for assault only, but the justice filled out an ordinary printed blank for assault and battery, and the plaintiff was arrested for it, tried and acquitted. The justice before whom the trial took place certified that the complaint was made upon probable cause. The plaintiff, after his acquittal, instituted this suit.

When the evidence was in, the plaintiff requested the following instructions:

"1st. If the jury find from the evidence in this case that Brown was a stranger to plaintiff, and that he came upon the premises which plaintiff was in the lawful possession of, and without any explanation to plaintiff began to remove plaintiff's whiffletrees from plaintiff's wagon, and upon being requested by plaintiff to return them refused or neglected to do so, or to explain his intention in so removing them, plaintiff had a right to threaten Brown with violence if he did not return the property, and his doing so would constitute no offense.

2d. A party has no right to enter upon the property of another and without leave of the owner, and more particularly in violation of the orders of the owner remove the property of such other party; and if he persists in such acts despite the commands of the owner, he cannot complain if the owner assaults him to compel him to desist

from such acts; and an assault by the owner of such property, made in good faith to prevent such removal, would be a justifiable assault.

3d. If the jury find the plaintiff used no more violence or threats than were necessary to protect his property, then he committed no crime in what he did."

These were not given in terms, but the judge instructed the jury as follows:

"The burden of proof is upon the plaintiff to show that this prosecution instituted by Mr. Sutherland was not only malicious in its character, but that it was also instituted without probable cause on the part of Mr. Sutherland. Even if he had an ill-will against Mr. Carter, yet if the facts and circumstances were such as justified him, if there was probable cause there to make the charge, he could not be held in this action, although he may have entertained ill-will, or may have instituted it from some improper motive, if in fact there was probable cause. The evidence in this case will disclose that there was no assault and battery. It is not claimed by either side that there was an assault and battery committed. If the facts are as stated by Mr. Carter—if he states the facts correctly—there was no assault. A party is not guilty of assault by simply making a threat. Threats do not constitute an assault. If he simply picked up a stick and held one end of it on the ground, and remained there stationary, as he says, and then uttered a threat without proceeding to carry it into execution, or do anything that represented a design on his part to carry it into execution, there would be no assault. If, however, Mr. Carter picked up that stick and raised it with both hands in a threatening attitude, and was near enough at the time to have inflicted bodily injury on Mr. Brown when he so raised it, and you find from testimony that he intended to use it in accordance with the threat, that is, to break his head, or strike him on the head in case he did not put the whiffletrees down, and he was only prevented from carrying that threat into execution because the whiffletrees were put down, he would be guilty of an assault. Or, if he raised that stick and advanced towards Mr. Brown, if you so find, with the intent to use it to inflict personal injury on him with it, and advanced for that purpose and only desisted because Mr. Brown complied with his demand to put down the whiffletrees, that would be an assault. While a party has a right to protect his property, yet he would be only justified in using just force enough to pre-

tect his property. He might have been justified in this instance in taking away the whiffletrees from Mr. Brown, and using only enough force to do it. But he would not be justified in striking him on the head with a stick or inflicting injury of that character because he did not put the whiffletrees down; that would not be defending his property, but it would be inflicting punishment because he took the property, for which he would not be justified. There is quite a variance in the testimony as to what occurred there on that day. If you feel satisfied that Mr. Sutherland saw this transaction, as the witnesses in his behalf have testified,—that is, if you find, as he claims, he saw the transaction, that Mr. Carter raised his stick and advanced toward Mr. Brown, with an intent to strike him on the head, and with a design to carry it into execution, or that Mr. Sutherland so understood it, and that Mr. Carter only desisted because Mr. Brown complied with his request,—there was an assault committed, but no battery, and he would be entirely justified in making this complaint.

But the complaint is for something more than assault; it is for an assault and battery. Mr. Sutherland attempts to explain that by saying that he explained the facts to the magistrate, and did not read the complaint as printed here, and supposed that the complaint was for the offense that he had stated to the magistrate. If you find that to be true you may treat his complaint to the magistrate as for an assault simply, and not for an assault and battery; but if you find that he made the complaint understandingly, knowing that it was a complaint for an assault and battery, I cannot very well see how you can find that he was justified in making a complaint, for he himself admits that there was no battery committed, and none of the witnesses claim that there was. That is a question of fact for you to find."

And after some discussion between counsel, the judge added:

"Mr. Sutherland is a man of age and is supposed to have the ordinary discretion of mankind. The jury must find, of course, that he honestly believed that an offense had been committed, but they must also find that the facts and circumstances were such that a man of ordinary prudence and discretion would have come to the same determination that Mr. Sutherland did. Yet you will make some allowance for the position of the parties at the time, for any excitement that may have been occasioned or may have existed there in the mind of Mr. Sutherland, he being there

upon that farm and engaged in some discussion with Mr. Carter with regard to the property there; that may be taken into consideration by the jury in considering the matter, as to his belief and as to what occurred. In other words, you are to view the case as the parties viewed it there."

These instructions are complained of, but they seem to us entirely fair. They are not open to the criticism which the plaintiff makes, that they took from the jury the question whether the plaintiff was chargeable with more force than was necessary in defense of his property. The judge stated correctly what force would be excessive and what not, and he went no further. *Ayres v. Birtch* 35 Mich. 501, which is relied on by the plaintiff, is not inconsistent with this charge.

What the judge said to the jury about making allowance for the excitement on the part of Sutherland when the affray took place was proper enough. It is evident from the testimony of all the parties that there was some excitement at the time, and it was natural that each should to some extent misjudge and exaggerate what he considered the unlawful conduct of the other. In judging of a man's malice it is often very important to know whether he was provoked to anger in what he did, or whether he has proceeded in cool blood and with deliberation; and if a jury are to be the judges it is proper to tell them so.

What the judge said respecting the complaint being made for a battery as well as for an assault is also complained of, but it was not erroneous. The error in making out the complaint was the fault of the justice rather than of the party, and it did not injure the plaintiff. The complaint orally made was for an assault only; and it was upon that that the justice decided to issue a warrant. The written complaint was of course intended to follow the one orally made.

An error is assigned on the admission of evidence, but we do not think it well taken or that it requires discussion.

The judgment must be affirmed.

The other Justices concurred.

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GEORGE E. FELT v. THE REYNOLDS ROTARY FRUIT EVAPORATING COMPANY.

Statute of limitations—Trial of goods sold.

1. Where a contract for the sale of machinery contemplates that it shall be tested and put in running order, a cause of action does not arise upon the warranty therein until a reasonable time has been allowed for the necessary tests; and the time taken by the parties in trying to make the machinery fulfil the conditions of the contract is a proper criterion as to what is reasonable.
2. The sale of goods by a purchaser who has accepted them on condition that they comply with a warranty makes the conditional acceptance absolute; but a conditional acceptance alone does not perfect his right of action upon the warranty until it appears, upon reasonable trial, that the goods do not comply with it.
3. Payment for goods sold with a warranty does not necessarily preclude the purchaser from tendering them back for non-fulfilment of conditions if the payment was made as an accommodation and without waiving any rights.
4. Two months' delay in tendering back an unsatisfactory machine that had been sold with a warranty and did not fulfil its terms was not unreasonable where the vendor was allowed for the greater part of that time, to continue his efforts to make it work.
5. The right of action upon a contract for breach of the warranty therein is assignable. How. St. § 7344.

Error to Wayne. (Jennison, J.) Jan. 22.—Feb. 8.

ASSUMPSIT. Defendant brings error. Affirmed.

Carpenter & Hannan and *F. A. Baker* for appellant, as to the time when unsatisfactory goods should be returned before suing for breach of warranty, cited *Crippen v. Hope* 38 Mich. 344; *Boothby v. Scales* 27 Wis. 638; *Paige v. McMillan* 41 Wis. 341; *Street v. Blay* 2 B. & Ad. 456; *Mansfield v. Trigg* 113 Mass. 351; Benj. Sales § 703.

Conely, Maybury & Lucking for appellee, as to reasonable time, cited *Phelps v. Whitaker* 37 Mich. 78; *Bell v.*

Harvey 50 Mich. 59; *Evans v. Hardeman* 15 Tex. 483; *Freeman v. Clute* 3 Barb. 425; *Adam v. Richards* 2 H. Bl. 573.

COOLEY, C. J. Felt, suing in his own right and also as assignee of Joseph Griswold, brings suit on the contract evidenced by the following papers:

"*To the Reynolds Fruit Evaporating Company, Detroit, Mich.*—GENTLEMEN: You will please furnish us one of your evaporators, size No. 2, for which we agree to pay $1200 twelve hundred dollars; of this amount one-fourth is to be paid in cash upon the setting up of the machine, ready to operate, and one-fourth in ninety days, with interest after thirty days, and one-half to be paid in dried apples put in new barrels and delivered at the depot in the village of Brooklyn, Jackson county, Michigan; apples to be made of good fruit and dried with the said evaporator and put up in a merchantable order, at 15 cents per lb. and to be delivered on or before last of November, A. D. 1876, or pay for the same in cash. GEORGE H. FELT,
JOSEPH GRISWOLD.

This order is subject to the agreement on the back."

On the back of the above was written as follows:

"AUGUST 31, 1876.

The Reynolds Evaporating Company of Detroit agree to furnish George H. Felt and Joseph M. Griswold of Brooklyn, Michigan, one of their evaporators complete, on the terms of the within order, with the exception of the brick work, and guarantee and warrant the same to work well, and to make as good a quality of fruit as any other evaporator in use, and to have a capacity of 150 bushels of apples per day of twenty-four hours.

REYNOLDS EVAPORATING CO.
Pr. H. N. SWEENY, Agent."

N. B. If the parties named in the within order wish to change the size of machine to either No. 3 or No. 1, the price is also to be changed for No. 3, $1000 one thousand dollars; and for No. 1 to $1500 fifteen hundred dollars, he to determine within six days date. The capacity of machine is also to be changed in the same proportion; the evaporator is to be furnished and shipped within five days from the receipt of this order by the company. The com-

pany further agrees to put the said evaporator up and put it in good running order before payment is made.

REYNOLDS EVAPORATING CO.,
Pr. H. N. SWEENY, Agent."

This suit was begun October 18, 1882. Plaintiff gave evidence which showed that the evaporator was delivered and set up October 10, 1876. October 14, 1876, the purchasers paid for the machine in cash and notes, and on the notes fruit dried with the machine was subsequently paid. When the notes were given the machine had been tried somewhat and was not working satisfactorily, and it never worked satisfactorily afterwards. In the latter part of the following month the superintendent of defendant made an effort to fix it so as to make it comply with the warranty, but without success. About December 15th it was tendered back. It is now conceded that the machine never answered the terms of the contract.

Defendant contends that the action is barred by the Statute of Limitations; that the warranty was broken immediately on the machine being delivered and its deficiency made apparent, which was as early as October 14, 1876, and any suit not brought within six years from that time was not in season.

The statute governing the case provides that actions of assumpsit shall be brought "within six years next after the cause of action shall accrue, and not afterwards." How. St. § 8713. The question then is, When did the cause of action accrue? If the purchasers might have brought suit upon the warranty October 14, 1876, this suit is not in time.

We do not think an action had accrued at that time. The contract contemplated that the machine should be tested, both as to its capacity and the quality of fruit turned out by it; and this test the evidence shows was being made for a considerable time after the fourteenth of October. If suit had been brought at any time during that month, it would apparently have been a defense to it that there had not as yet been a reasonable time for testing the results of its workings; for the parties respectively were continuing

their experiments with it for some time longer; the one trying it and the other endeavoring to perfect it; and their acts are the best criterion as to the time required for these purposes.

It is said the vendees might, at any time after October 14th, have sold the machine and conveyed a good title. This may be true enough. They had accepted it conditioned on its compliance with the warranty, and if they had sold it they would have converted the conditional into an absolute acceptance. But they did not sell it, but on the contrary elected to tender it back when its worthlessness was proved. This was their right. There was nothing in the fact that payment had been made before the machine was fully tested that can conclude any rights. There was evidence that the early payment was made as an accommodation, and not as an acceptance or as waiving any right, and there was no ground for claiming a waiver.

It is argued that the offer to return the machine, which was made December 15, 1876, was not reasonable. Under the facts testified to we think otherwise. The delay after it had been fully determined that the machine was worthless was neither serious nor injurious to defendant.

The jury gave as damages the purchase price and interest. This is said to be erroneous, not only because the offer to return the machine was not seasonable,—which we have already decided untenable,—but also because a part of the payment made was in fruit dried with this evaporator, and which was received at a price much above the cost, so that the purchasers realized a considerable profit in preparing the fruit by the use of this machine. We do not think this appears by the record. It was shown that the cost of preparing fruit was considerably less than defendant allowed for what was received; but what the purchasers paid defendant was prepared during the process of testing the machine; and there was no attempt to show that the price they were allowed for the fruit exceeded the whole cost of testing. If it did not, there were no profits for which the purchasers could justly be held chargeable.

The question is made whether the claim was assignable so as to enable the plaintiff to sue alone. We have no doubt it was. It has been several times held that rights to sue to recover damages for fraud or deceit are not assignable; *Dickinson v. Seaver* 44 Mich. 624; *Dayton v. Fargo* 45 Mich. 153; see *Brush v. Sweet* 38 Mich. 574: but there is no doubt of the right to assign a claim like this. The statute provides that the assignee of "any bond, note or other chose in action, not negotiable under existing laws," may sue upon it in his own name; How. St. § 7344; and we have held that even actions for torts, if they were such as would survive to the personal representatives, are within the statute. *Final v. Backus* 18 Mich. 218; *Brady v. Whitney* 24 Mich. 154; *Grant v. Smith* 26 Mich. 201; *Finn v. Corbitt* 36 Mich. 318. But the present is not a case sounding in tort, and it is within the reason of the statute as well as its terms.

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

The other Justices concurred.

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MARY C. CARTWRIGHT v. THE CHICAGO & GRAND TRUNK RAILWAY COMPANY.

Railway injury—Passenger alighting.

1. Where a railroad train pulls up at a platform so that nothing but the forward end of the smoking car is at the platform, passengers in the rear cars, especially ladies, are not bound to go through the smoker to alight; and if, in consequence of the position of the train, they are injured in getting off from the car in which they have been riding, it is the fault of the company.

2. It is not negligence in a railway passenger to leave a car at its rear end in the absence of any rule or general custom making the forward end the only proper place.

Error to Genesee. (Newton, J.) Jan. 23.—Feb. 8.

CASE. Defendant brings error. Affirmed.

E. W. Meddaugh and *M. V. Montgomery* for appellant. Railway companies must afford passengers a safe place of exit from cars, and, this being done, the passenger must avail himself of it and not seek another: *Forsyth v. Boston & Albany R. R.* 103 Mass. 510; *Penn. R. R. Co. v. Zebe* 37 Penn. St. 420; *M. C. R. R. Co. v. Coleman* 28 Mich. 440.

H. R. Lovell and *C. D. Long* for appellee.

COOLEY C. J. This is an action for personal injury, and the plaintiff recovered in the circuit court. The only questions that need to be considered are, *first*, whether there was any evidence of negligence on the part of the defendant to be submitted to the jury; and *second*, whether the evidence conclusively showed contributory negligence on the part of the plaintiff.

The injury occurred December 28, 1881. The plaintiff was a woman sixty years of age, and resided with her husband, who was still older and rheumatic, at Davison, a country station about nine miles west of Flint. On the day named she went to Flint with her husband, and returned on the evening train which arrived at Davison about nine o'clock. The train was composed of six cars, made up as follows: Mail car, express car, baggage car, smoker, way car and sleeper. Plaintiff and her husband entered the way car, which they found full, and took the rear seat behind the door. It was a dark, cloudy and wet evening. When the train stopped at Davison the evidence tends to show that the smoker stood partially along-side the station platform, but the way car was not up to it. No light was displayed at the rear end of the way car, nor, as we conclude from the record, at the front end, but there was a light on the platform which would possibly aid in alighting there. A drunken man in one of the cars further forward appears

to have had the attention of the men on the train when the train stopped, and aid was not given to the passengers in leaving the way car. The most of them went forward and alighted safely, but plaintiff and her husband got out at the rear end of the car. There is a road crossing at that place, and plaintiff was familiar with the locality. She had seen the cars stop there before, and passengers step down into the road, and she thought the car then stood where if she stepped down she would step into the level part of the road. She therefore stepped down in the dark. She had several packages on her left arm, but her right hand was at liberty, and with that she took hold of the iron rod by the side of the steps. Instead of being over the level road as she supposed, the end of the car was over a depression at the side of the road, and when her foot left the step she went down so far that her hold of the iron was broken and she fell to the ground. Her foot slipped on the wet ground and turned under, and her leg was broken. She lay helpless until assistance could be procured. It was not until after the train had left that she was taken up and carried into the station, and medical assistance obtained. During all the time of the stop no one connected with the train or employed by the defendant was giving assistance to the plaintiff or her husband, or looking after passengers at the rear end of the car they had occupied.

It is contended on the part of the defense that the plaintiff was negligent in leaving the car where she did; that the only proper place for leaving was where there was light, and where assistance was provided, and that if needful, she should have passed through the car in front of the way car from which, if not from the way car, she might have alighted upon the platform. It is further said that it is not expected passengers will leave the car at the rear end; their duty is to pass to the front end and leave the other to passengers taking the car, who otherwise will be incommoded in getting aboard. And it is insisted the railroad company is under no obligation to station assistants at each end of every car to help passengers on and off; the burden would be an

unreasonable one and passengers have no right to demand or expect it.

It would, no doubt, be better that travelers should always leave a car by the front end, and it might be competent for a railroad company to make and enforce a rule requiring it. But it is not shown that this defendant has any such rule, and it is certain that there is no general custom now observed by the public to that effect. Passengers not only do leave the cars at the rear and front indifferently, but they are suffered to do so without objection, and probably a very large portion of them all are not aware that it is desired they should do otherwise. Under such circumstances it cannot be said that it is negligence per se for a passenger to leave the car at the rear. If there was negligence in this case it must arise from the fact of the darkness, the known fact that the rear of the car was not at the landing, and the uncertainty in respect to the ground where it stood.

If the front end of the car had been at the platform, there would have been more reason for insisting that the plaintiff should have gone in that direction. But we think a woman is excusable for not desiring to pass through the smoking car, and she has a right to assume it is not expected of her. We also think that passengers, where not notified to the contrary, may rightfully assume that it is safe to alight from the car wherever it is stopped for passengers to leave it. And if no light is given them to leave the car by, they are not to be charged with fault for leaving in the darkness.

A review of the record satisfies us that the agents and servants of the defendant were not as careful and vigilant as they should have been in providing for the safety of the passengers in leaving the train. If a car in which there were passengers was not standing where it would be safe for them to alight without assistance, it was the duty of the company to provide assistance or give warning, or to move the car to a more suitable place. This was decided in *Cockle v. London & S. E. Ry. Co.* L. R. 7 C. P. 321, a case

on its facts very similar to this, and the same principle has often been laid down in other cases. *Nicholson v. Lancashire &c. R. Co.* 3 H. & C. 534; *Foy v. London &c. R. Co.* 18 C. B. (N. S.) 225; *Brassell v. N. Y. Cent. &c. R. R. Co.* 84 N. Y. 241; s. c. 3 Am. & Eng. R. R. Cas. 380; *Penn. R. R. Co. v. White* 88 Penn. St. 327; and *Balt. & O. R. R. Co. v. State* 60 Md. 449: 12 Am. & Eng. R. R. Cas. 149, are among those so holding. There was therefore evidence to go to the jury on the question of negligence in the defendant. And the peculiarity of the case is such that the same facts which tend to show negligence in the railroad company tend in the same degree to show that the plaintiff was without fault. If she had a right to assume that the landing place was safe, she was not negligent in stepping down as she did. It must be conceded that she did not exhibit a very high degree of caution, but we cannot say that it was not as much as the average passenger would have shown under like circumstances. It was very proper, we think, for the circuit judge to submit the whole case to the jury.

The judgment must be affirmed.

The other Justices concurred.

JOHN NEWBURN v. THOMAS T. WOODS.

Attachment—Fraud upon creditors.

One who has bought property under an arrangement which would be fraudulent as against the creditors of the vendor, or by an unratified sale in which the vendor's agent has exceeded his authority, obtains no title which he can protect from attachments sued out by the vendor's creditors.

Error to Newaygo. (Fuller, J.) Jan. 23.—Feb. 8.

REPLEVIN. Plaintiff brings error. Affirmed.

Fletcher & Wanty for appellant. The fraud of which creditors can complain is one which is aimed at them, not one which is practiced on the debtor: Bump Fraud. Conv. ch. 3; *Pettus v. Smith* 4 Rich. Eq. 197; *Garretson v. Kane* 27 N. J. 208; *Eaton v. Perry* 29 Mo. 96; *Hovey v. Holcomb* 11 Ill. 660; *Prosser v. Edmonds* 1 Y. & C. Exch. Eq. 481; *Graham v. Railroad Co.* 102 U. S. 148; *McAlpine v. Sweetser* 76 Ind. 78.

Turner & Carroll for appellee.

CAMPBELL, J. Newburn sued defendant in replevin to recover certain goods held by defendant as sheriff upon attachment levies against Mary E. Pierson, on which judgments had been rendered to something over $1100. Newburn claimed to have bought the goods from Mrs. Pierson for the price of $1500, of which he had paid $300, the rest being put on short time. The testimony of Mr. and Mrs. Pierson agreed that the price was $1500, but that Mrs. Pierson had not authorized her husband, who made the sale, to sell except for that amount in cash. Pierson testified that Newburn knew this, and that they together deceived Mrs. Pierson into supposing he had paid in full, and that she did not know of the fraud until after this attachment.

The court in substance instructed the jury that if the facts were as above stated the sale was void as to Mrs. Pierson and title never passed to Newburn, and she could not by subsequent ratification cut off the attachment. They were further instructed that if Mrs. Pierson sold the goods to Newburn for $300 cash and the rest on time, with intent to defraud her creditors, the plaintiff could not recover.

It is certainly questionable whether there was any evidence of her consent to such an arrangement or of any fraudulent intent. But if there was not, then the sale was, upon all the testimony, made without any authority at all and passed no title without further ratification. We can see no reason why in such a case Newburn can set up any rights against her creditors which he could not set up

against herself. They assert her title, and he is not entitled on such a transaction to prevail against her title. He took her property without right, and it did not cease to be hers. If she sold on the other terms, such a sale might, with the surrounding circumstances, justify a jury in considering the question of fraud. In either case we think Newburn was liable to the consequences which the court below applied, and the rulings were not erroneous.

The judgment must be affirmed with costs.

SHERWOOD and CHAMPLIN, JJ. concurred.

COOLEY, C. J. I have not been able to see how the creditors were at liberty to raise the question of the validity of the sale to the plaintiff under the facts of this case. The defect in the sale, if there was one, was an excess of authority in the agent in selling; and this the owner might or might not insist upon as she pleased. Nobody else could make the election for her; and there is strong evidence of election in this case to affirm.

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EDWIN BYLES v. TOWNSHIP OF GOLDEN.

Question of fact—Mandamus—Town taxes.

1. A question of fact is not to be submitted to a jury if there is no evidence bearing on it.
2. Mandamus is not the proper remedy for compelling a township to refund the amount of a tax unlawfully levied if there is any issue involved which should go to the jury.
3. The township treasurer, in Michigan, is an officer and agent of the township in collecting such taxes as would be retained in the township treasury after paying to the county treasurer the State and county taxes; and the township is liable to one who has been wrongfully taxed for the amount received from him even though it has been paid out from the township treasury on orders from the proper school and highway authorities.
4. Township orders received in the township treasury as money are equivalent to money, and must be accounted for in the same way.

Error to Oceana. (Russell, J.) Jan. 23.—Feb. 8.

Assumpsit. Plaintiff brings error. Reversed

Fletcher & Wanty for appellant

L. G. Rutherford for appellee. Quasi municipal corporations are not responsible for the acts of officers who, for the State's convenience, are chosen within its geographical limits: *People v. VanKeuren* 74 N. Y. 310; *Highway Comr's v. Martin* 4 Mich. 557; *Leoni v. Taylor* 20 Mich. 152; *Hart v. Oceana County* 44 Mich. 417; *Waltham v. Kemper* 55 Ill. 346.

Cooley, C. J. Plaintiff sues the township to recover the amount received by its treasurer on a sale of his property to satisfy a tax assessed against him, and for which he insists he was not liable. He was not a resident of the township, but had property within it, for which, under certain circumstances, he might be there taxable. The circuit judge in submitting the case to the jury told them there was no evidence tending to show that the plaintiff was liable to taxation in the township. Nevertheless he seems to have submitted the question of his liability to them as one of fact, and they found for the defendant. This was error, and requires a reversal of the judgment.

The point is made for the defense that, if plaintiff was not liable to taxation, mandamus is his proper remedy; the amount of the liability being determined by the law itself when the question of fact is determined. But the question of fact is not one which can be conveniently tried on mandamus. It will usually involve disputed questions of residence and business, which would render an issue for a jury necessary, and it is therefore more proper that the party should take his controversy immediately to the court of original jurisdiction instead of bringing it first to this Court that we may send it there. Besides, the duty of the defendant to satisfy the plaintiff's demand does not arise upon contract, but from the seizure and sale of his prop-

erty, and the case differs radically in that particular from *Dayton v. Rounds* 27 Mich. 82, and the cases following it, upon which the argument for defendant is based.

The principal questions are, whether the township is liable at all, and if so, for what taxes. It is contended for the defendant that the township treasurer in collecting and paying over taxes is not the agent of the township, but is only an officer whom the electors of the township are required by State law to elect for the performance of certain duties, in some of which the township is concerned, while others concern the State, the county or other municipalities. This seems to be the view held under the statutes of New York, where it is said the town as such has no treasury, and the tax collector, after paying over specified sums of money collected to the supervisor, commissioners of highways, superintendent of schools and overseers of the poor, pays the residue to the county treasurer. *Lorillard v. Monroe* 11 N. Y. 392. But the township system in this State is considerably different. We have a township treasury, *People v. Bringard* 39 Mich. 22, and the township treasurer, after collecting the taxes, retains in it all except the State and county taxes until orders are presented upon which he may lawfully pay them out. [How. St. § 1038.] The State and county taxes he pays over to the county treasurer. Ibid. The New York cases have therefore no application.

It was not claimed in this case that the township was liable for the amount of the State and county taxes received by the treasurer, but it is insisted that for all moneys which were to be retained in the township treasury it was liable. This would include school and highway taxes, which the treasurer pays out on orders from the proper school and highway authorities, and which, it appears in this case, he had paid out before the suit was instituted. There is an apparent hardship in holding the township liable for moneys thus paid over; but on the other hand when the plaintiff traces his moneys to the treasury of the township it would seem plain that a right had accrued in his favor

which could not be discharged by subsequent action of the township authorities to which he was in no sense a party. The defendant has received his money and must account to him for it; not to any one else.

It appeared in the case that a portion of the treasurer's collections was made in township orders; but that was of no importance. The orders were received at the township treasury as money and were the equivalent of money to the township.

The judgment must be reversed and a new trial ordered.

The other Justices concurred.

JOHN S. ASH v. JOSEPH MATHES.

Ownership of personalty—Theory of action.

Where a man brings replevin in his own name and as owner, for a pony sold by his minor daughter, and does not sue in her behalf as guardian or next friend, it is error to treat the case, in charging the jury, as one of a sale by an infant, conveying no title.

Error to Wayne. (Jennison, J.) Jan. 24.—Feb. 8.

REPLEVIN. Defendant brings error. Reversed.

Conely, Maybury & Lucking for appellant.

Geo. S. Hosmer (*Dickinson, Thurber & Hosmer*) for appellee.

CAMPBELL, J. Ash, in his own name and as owner, replevied a pony from defendant, and recovered in a justice's court and on appeal. Defendant brings the case up on error, alleging that the charge of the court was erroneous.

There appears in the record some testimony tending to show that defendant bought the horse, supposing he was buying of a daughter of plaintiff, as owner. The court, at

any rate, gave a charge to the jury to the effect that if the daughter was under age and living with her father, and sold the horse, she conveyed no title and plaintiff must recover. We cannot but think the record is imperfect in some respects, but as it stands this clearly indicates that the title of the daughter and sale by her must have been considered by the jury. It does not appear how this issue could have been properly dealt with in the way shown by the return. The suit was not brought on behalf of the daughter. Not only is it in the father's name as sole plaintiff, but he presented his case by the evidence on the theory that he owned the horse himself. After this showing we do not see how the suit could proceed on the theory that he was suing on her behalf, as her guardian or next friend. The charge can only be explained on that idea, unless something occurred which, if inserted, would have explained it differently. On this record we are not called upon to discuss the rights of infants, and shall not attempt to do so.

There must be a reversal and new trial.

The other Justices concurred.

The People v. James Curtis.

Homicide—Threats—Evidence of disposition—Calibre of weapon—Interference to protect another—Insults.

1. In a prosecution for homicide committed in a riotous affray among neighbors and apparently in defense of a brother, all facts leading thereto and connected with it should be admitted, including the conduct of other participants besides respondent, and especially of those who provoked the assault. The dangerous character of the deceased and his disposition when drunk are also material; and so would be the fact that the person in whose behalf respondent interposed was afraid deceased would cut him as he had others.

2. If, upon a prosecution for a homicide done in an affray, declarations of malignant purpose are shown that were made by respondent before the killing, his remarks accompanying them should also be received in order to determine whether the threats were not mere brag.

3. Where, in a case of killing by pistol shot, it had been shown on post mortem examination that the shot was too large for the pistol respondent claimed to have, it was also necessary to show that the fatal shot came from respondent's pistol; and when it had been shown that two shots were fired, it was important, independently of any claim that respondent fired both shots, to know who else had pistols.

4. A man has a right, in a riotous affray, to interfere for the protection of a brother who is in personal danger whether the brother was blameless or not. And the use of a deadly weapon in such interference does not of itself show malice where neither began the affray and there had been no space for cooling time nor opportunity to withdraw safely.

5. A dangerous felony may be forcibly prevented by any one who is not himself in the wrong directly or by complicity.

6. Coolness and deliberation cannot be required of those who are concerned in a riotous and exciting affray involving a considerable number of persons; and the absence of these qualities cannot fairly be treated as aggravating the acts of persons not originally in the wrong.

7. It is not good law to hold that though insulting language will not justify a dangerous assault, yet if it has provoked one it precludes the person who used it from resisting the assault and deprives others of the right to interfere for his protection.

Error to Cass. (A. J. Smith, J.) Jan. 29.—Feb. 8.

INFORMATION for murder. Respondent brings error. Reversed.

Spafford Tryon and *Harsen D. Smith* for respondent appellant. Where evidence of threats is given the context must be shown: *Ben v. State* 37 Ala. 103; *Stokes v. People* 53 N. Y. 164; *Bearss v. Copley* 10 N. Y. 93; *Rouse v. Whited* 25 N. Y. 170; *Platner v. Platner* 78 N. Y. 103; one who commits homicide in resisting an attack may show the character of the deceased for violence: *Brownell v. People* 38 Mich. 735; *Hurd v. People* 25 Mich. 419; *Pritchett v. State* 22 Ala. 39; *Franklin v. State* 29 Ala. 14; *State v. Hicks* 27 Mo. 588; *Dukes v. State* 11 Ind. 557; *State v. Turpin* 24 Am. 456; *State v. Keene* 50 Mo. 357; *State v. Dumphey* 4 Minn. 438; Hor. & Thomp. Cases on Self Defense 695; *Fields v. State* 47 Ala. 603; inten-

tional homicide is not necessarily malicious: *Maher v. People* 10 Mich. 225; *Pond v. People* 8 Mich. 150; *People v. Lilly* 38 Mich. 270; as to the duty to avoid violence, see *Sharp v. State* 19 Ohio 388; *Stoffer v. State* 15 Ohio St. 47; 1 Hale P. C. 480; *State v. Ingold* 4 Jones N. C. L. 216; *Hodges v. State* 15 Ga. 117; *Long v. State* 52 Miss. 35; *Patten v. People* 18 Mich. 333; *Erwin v. State* 29 Ohio St. 186; *Campbell v. People* 16 Ill. 17; *Ross v. State* 38 Am. 795; *Judge v. State* 29 Am. 707; *Runyan v. State* 57 Ind. 80: 36 Am. 52.

Attorney General *Jacob J. Van Riper* for the People. Testimony as to the violent character of a person killed in a fight is inadmissible in a prosecution for his murder if the person killing him did not know his character: *People v. Lamb* 2 Keyes 360; *State v. Hicks* 27 Mo. 588; *Reynolds v. People* 17 Abb. 413; Wharton on Hom. 229; *State v. Field* 14 Me. 244; Wharton's Crim. Law § 641; *People v. Garbutt* 17 Mich. 9; and the accused must have done everything in his power to avoid doing harm: *Schnier v. People* 23 Ill. 17.

CAMPBELL, J. Curtis was tried in the Cass county circuit court and convicted of murder in the second degree. Errors are assigned on rulings during the trial and in instructions to the jury. Macom Wilson was the person killed.

The facts bearing on the case are these. On the 15th day of August, 1883, the respondent with many others attended a colored people's celebration at a place called Osborn's Grove, in Calvin township. Clay Wilson, a brother of deceased, had a temporary grocery on these premises near the south end, east of the north and south highway. Levi Wilson, another brother, was in the company, as well as Ami Curtis, a brother of respondent. After the celebration was ended, and just in the edge of the evening, Levi Wilson and Ami Curtis got into an altercation. Levi had a knife which according to some of the witnesses he used

in a threatening manner towards Ami. He also had stones which he threw at the latter. There is some doubt just how this fight began, but they were chasing each other round a wagon that stood there, when Macom Wilson came up and threw a stone at Ami Curtis and as some witnesses swore was threatening him further with another stone, when he was shot by some one claimed to have been respondent. It is agreed that respondent fired a revolver, and that deceased was killed by a ball of 32-caliber, while respondent claims his revolver was much smaller. Several witnesses testify to another shot about the same time, which was not fired by respondent.

The controversy was—*First*, whether respondent shot deceased at all; and *second*, if he did, whether the act was murder, manslaughter or innocent homicide. The bearing of most of the questions presented is towards the degree of blame, if any. Some questions bear on the entire absence of complicity in the shooting.

A number of objections apply to the admission or exclusion of testimony as to sayings and doings of respondent and others during the earlier part of the afternoon. The testimony indicated that the crowd consisted of neighbors and persons acquainted, and it appears that during the final quarrel there was a crowd at the place of the fight, and some noise and excitement.

The first question discussed arises out of the reception by the court of declarations made by respondent at 2 o'clock in the afternoon on the grounds. On objection made to the question whether respondent made threats, the court remarked: "Suppose he said he meant to kill the first person he met, and then did it,—the witness may answer." The witness then swore—"I heard the defendant say he was going to knock down three men and kill one, before he left the ground." Defendant's counsel moved to strike out this as not referring to deceased. The court struck out what was said about knocking down, and left what was said about killing; and this threat, as the court treated it, was made prominent in the subsequent charge of the court as to malice.

Whether this declaration was admissible or not, it was in our opinion wrong to strike out the part relating to knocking down three men. Taken all together it was open to the natural construction that it was no more than braggadocio, while standing alone it might have a more serious meaning. The whole statement should have been let in or all ruled out.

The court allowed other evidence of defendant's talk of a similar character to be shown, but refused to allow testimony that Levi Wilson was stropping his knife on his boot and trying to cut people and made threats, and that other persons made similar threats.

This difficulty was thus allowed to be shown to have had some connection with the previous gathering and yet evidence was only allowed as to defendant's conduct, while that of others was shut out. In our view all of the transactions of the afternoon were proper and should have been received. There is a great deal of testimony indicating more or less commotion and disturbance in the afternoon, and it is impossible not to see that many things might have been made much more intelligible, if this testimony had been let in fully instead of partially and only as it bore against the respondent. All of the Wilsons as well as some others were mixed up in the disturbance, and defendant's conduct must be viewed in the light of all the surroundings. This is especially true as to Levi and Macom Wilson, whose conduct was the apparent provocation to defendant's assault, if he committed one, and must necessarily have a close relation to his excusability. It was as much defendant's right to inquire into their conduct and appearance, as if he had himself been the person assaulted instead of his brother.

It appeared on the post mortem examination that the bullet was larger than would fit the pistol which defendant claimed to have been in his possession. When the prosecution gave evidence that defendant had fired a revolver, and another of their witnesses testified he heard a revolver go off and saw Macom Wilson shot, but did not know who shot him, but that he saw defendant have a revolver, the

prosecuting attorney asked what was the size of defendant's revolver. The court interrupted him and said: "Mr. Carr, you have shown that this bullet was found in the body of Macom, that this bullet killed him, and defendant fired, and that is enough, and the size of the revolver has nothing to do with the case, and you need not go into the size of the revolver at all at this stage of the trial." This was not only a statement of fact made in such a way as to tell the jury a case had been made out, which the court has no right under such circumstances to do, but it prevented the prosecutor from doing his duty to the prisoner, by giving all of his testimony fairly in the opening. It was an essential part of the prosecutor's case to show that the ball came from defendant's pistol, and it was his duty to do this by making —as he seemed disposed—a full showing.

James Byrd testified that he saw defendant at the time of the affray and that his revolver was a small one of 22 calibre, and that there were two shots fired. He testified on cross-examination that there were several persons having revolvers out, and that these were of different sizes, but he was not allowed on re-examination by defendant to tell what persons he saw with such revolvers, the court saying it was immaterial if they were not the persons engaged in this affray. As there was no claim that defendant fired two shots, and as it was certain that such a revolver, as he was shown by witness to have had, could not have been the weapon that killed the deceased, this testimony was of obvious importance. And it was error to shut out any of the immediate surroundings of the affray. If defendant did not do the killing it is evident some one else took a most important part in this affray, and it was important to know who it was.

Ami Curtis, the brother of respondent, gave a very full account of the difficulty, and of the conduct of the two Wilsons and the attack on himself, and among other things said he backed up from Levi Wilson when he came at witness with his knife, because witness was afraid he would cut him, as he had cut several men, and witness was afraid

he would do so to him. The court struck this out, and also refused to allow witness to testify as to Levi's character as to peaceableness when in liquor. The materiality of this testimony cannot be doubted. Respondent was witness's brother and claims to have acted in his defense, and the danger to Ami was the occasion for it. It is manifest that a violent and quarrelsome man, armed and aggressive, would make any sensible person apprehensive of mischief and justify him in seeking protection. Moreover in this case, in his charge, the court very strongly urged the fault of Ami Curtis in this affray as chargeable not only to himself but to respondent. Other testimony of violent conduct of Levi was also shut out, as well as evidence of his quarrelsome character. The testimony showed that all of the persons concerned were neighbors, and this character could not have been properly ignored in any such controversy and quarrel. There was much other very direct testimony of his actual violence that day ruled out. All this was against the right of the prisoner, and actually tended to his prejudice.

The charge is objected to on several grounds most of which relate to what was said concerning the duties and liabilities of persons in such affrays. Much of the charge is based on assumptions of duty which may arise in cases where there are but two persons engaged, and there are no exciting surroundings, but which are not appropriate when there is such a riotous affray as appeared here. It is not in our judgment admissible to require of persons involved in such a tumultuous scene the possession of coolness and deliberation. It is unavoidable in such scenes for the participants to lose their self-control to some extent, and coolness would often be the strongest evidence of malice in one who commits violence under such circumstances.

The respondent was entitled and bound to take an interest in the life and safety of his brother. There was no difference in the testimony as to his being in danger, and all the instructions which confined the right of respondent to helping him only when he was entirely without fault were

unwarranted. The court refused to charge that a brother might interpose against a felonious or serious bodily harm, unless the assailed party was entirely blameless, and this was contrary to the well-settled principle that a dangerous felony may be prevented by one who is not himself in the wrong, directly or by complicity.

It was not, we think, proper to charge as a matter of law that the use of a deadly weapon by respondent was a strong circumstance tending to show malice. On the contrary we have had great doubt whether it was proper in this case to leave the question of malice to the jury at all. The case was one of those fights in which usually there could be no guilt worse than manslaughter in any one who acted on provocation. Neither respondent nor his brother began the affray, and we have discovered no testimony authorizing the inference that there was space for cooling time, or opportunity for withdrawal by Ami without danger. It is unreasonable to regard their reciprocal advances and retreats as creating each time new rights and duties.

The court charged repeatedly that if Ami was in fault at all, respondent could not be justified, and the court told the jury that if Ami had made an insulting remark in Levi's presence, although not sufficient to justify an assault it was so far liable to provoke as to put Ami in fault and deprive him of his rights, and put respondent in fault for defending him. This is not supported by any authority and is a dangerous doctrine. It is equivalent legally to saying that while words will not justify a dangerous assault they will preclude a person from resisting it, and in that respect the charge was altogether inconsistent. To hold, as was here intimated, that it put a man in the wrong so as to deprive him of all defensive rights in an affray begun by the other party is entirely unwarranted.

We do not think it desirable to go at length into the charge, which appears to us to be throughout open to the criticism that it bore very heavily against respondent and subjected him to such restrictions and presumptions as would make it almost impossible for any one to interpose

to save his relatives from brutality and danger. We have indicated sufficiently the character of the errors relied on, and we abstain from multiplying remarks on similar questions which would require the same criticism.

The judgment must be reversed and a new trial ordered. The prisoner must be remanded to the custody of the sheriff of Cass county, and must be allowed bail if he desires it, in a moderate amount.

The other Justices concurred.

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THE PEOPLE v. BURTON HUSTED AND FRANK PARISH.

Liquor-selling—Time for closing bar.

A complaint under How. St. § 2274 for not closing a saloon "at the hour of nine o'clock" on a specified day, and for keeping it open "until twenty minutes past eleven o'clock in the afternoon of said day," is not bad for failing to show that nine o'clock at night was meant and for using the word "afternoon."

Exceptions before judgment from Clare. (Hart, J.) Jan. 30.—Feb. 8.

Complaint for keeping saloon open after nine o'clock at night. Conviction affirmed.

Attorney General *Jacob J. Van Riper* for the People.

C. W. Perry for respondent. Twenty minutes past eleven in the afternoon is an impossible time: 1 Bish. Cr. Prac. §§ 611, 612; *State v. Gove* 34 N. H. 510; *State v. Hickman* 8 N. J. L. 299; *State v. O'Bannon* 1 Bailey 144; *Updegraff v. Com.* 6 S. & R. 5; *Tully v. People* 67 N. Y. 15; *State v. Robbins* 66 Me. 324.

CHAMPLIN, J. Complaint was made against the defendants and one Charles Peters before a justice of the peace of

the township of Grant, Clare county, for a violation of the Act of 1881 relative to the sale of spirituous liquors. The complaint was as follows:

"On the 22d day of July, A. D. 1882, at the village of Clare, in the county aforesaid, (the said 22d day of July, A. D. 1882, being a week day,) Burton Husted, Charles Peters and Frank Parish, (he, the said Burton Husted, not being a person whose business it is and was at that time to deal in drugs and medicines), did not close at the hour of nine o'clock on said 22d day of July, A. D. 1882, a certain saloon in the village of Clare, in said county, which said saloon he, the said Burton Husted, was then and there the proprietor and keeper, the said saloon being then and there a place in said village where malt, spirituous, and intoxicating liquors were sold at retail. But that the said Burton Husted kept the said saloon open on the said 22nd day of July, A. D. 1882, until twenty minutes past eleven o'clock in the afternoon of said day, contrary and in violation of Act 259 of the Session Laws of 1881.

"And the said Charles Peters and Frank Parish being then and there clerks, servants and agents of the said Burton Husted, and they as such clerks, servants and agents of said Burton Husted, not being persons whose principal business it is and was at that time to deal in drugs and medicines, either for themselves or for their principal, Burton Husted, did not close at the hour of nine o'clock on the 22d day of July, A. D. 1882, a certain saloon in the village of Clare, in said county, which said saloon one Burton Husted was then and there the proprietor and keeper, the said saloon being then and there a place in said village where malt, spirituous, and intoxicating liquors were sold at retail. But that the said Charles Peters and Frank Parish kept the said saloon open on the said 22d day of July, A. D. 1882, until twenty minutes past eleven o'clock in the afternoon of said day, contrary and in violation of Act No. 259 of the Session Laws of 1881.

On the trial before the justice, Husted and Parish were convicted, and appealed to the circuit court where they were again tried before a jury and found guilty.

The defendants then moved in arrest of judgment upon the ground that "the complaint made in said cause, and upon which the defendants were tried, does not charge any offense under the law."

The statute under which complaint was made reads as follows:

"All saloons, restaurants, bars, in taverns or elsewhere, and all other places where any of the liquors mentioned in sections one and two of this act are or may be sold, or kept for sale, either at wholesale or retail, shall be closed on the first day of the week, commonly called Sunday, on all election days, on all legal holidays, and until seven o'clock of the following morning, and on each week-day night from and after the hour of nine o'clock until seven o'clock of the morning of the succeeding day." [How. St. § 2274.]

The particular defect claimed to exist in the complaint consists in failing to charge that the saloon was not closed from and after nine o'clock at night, but uses the term "afternoon," the word "night" not appearing in the complaint. It is a well-settled rule of criminal pleading that a complaint or information upon a statute must state all the facts and circumstances which constitute the statutory offense; but, except in cases where the statute enumerates several elements as combining to create a crime, it is not necessary that the words of the statute should be precisely followed; and words of equivalent import or more extensive signification which necessarily include the words used in the statute, may be substituted. The complaint is clearly within the rule. It alleges that on the 22d day of July, 1882, being a week day, defendants did not close their saloon at the hour of nine o'clock, but kept it open until twenty minutes past eleven o'clock in the afternoon of said day. This is equivalent to saying that the defendants did not keep their saloon closed on that particular "week-day night from and after the hour of nine o'clock until seven o'clock of the morning of the succeeding day."

Counsel for defendant insists that the complaint names an impossible time, and he cites Webster's and Worcester's unabridged dictionaries to prove that the word "afternoon" signifies from "noon" until "evening," and that "night" is the time from sunset until sunrise. Accurately and properly speaking the definitions are correct. But we think the distinction as applied to the complaint in this case

is too critical. The pleader was not referring to the period of time between "noon" and "evening," but to the hours that had elapsed since the hour of noon, and when that is stated to be until twenty minutes past eleven o'clock it is pretty certain that in this latitude it was after the hour of nine o'clock at night.

The circuit court is advised to proceed to judgment.

The other Justices concurred.

The People v. James McMillan.

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Forgery—Criminal procedure.

Forgery and uttering a forgery are two distinct offences; and a person cannot be convicted under an information for forgery when the complaint on which he was examined only charged him with uttering the forgery.

Error to Schoolcraft. (Steere, J.) Jan. 30.—Feb. 8.

Information for forgery. Respondent brings error. Reversed.

Geo. K. Newcombe for respondent appellant.

Attorney General *Jacob J. Van Riper* for the People.

Campbell, J. Respondent was complained of and examined on a charge of uttering a forged check of Van Winkle & Montague on the Caro Exchange Bank for $97.65. The information contained counts for forgery and for the offense of uttering and publishing. On the trial the testimony indicated that he had passed the forged paper on one Epstine. The court when requested refused to charge that he could not under the original complaint on which he was examined and under which the information was supposed to be authorized, be convicted of the crime

of forgery. He was found guilty generally, and was sentenced for the specific crime of forgery.

As under our statutes these two offenses are distinct and separate crimes, and as under our criminal practice, as fixed by law, a prisoner cannot be lawfully prosecuted by information for a crime on which he has not been examined, or waived examination, there was error in refusing this request, and in dealing with him for forgery.

There are some other points in the case, but as they are not likely to arise hereafter without such oversight as we are not disposed to anticipate, we make no reference to them.

The judgment must be reversed and a new trial ordered.

The other Justices concurred.

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The People v. John Minnock.

Complaint for unlawful liquor-selling—Certainty in allegations.

A complaint which merely charges that on a particular day the defendant sold liquor without having given a bond, will not support a conviction under How. St. § 2270 if it does not allege a sale to any person or persons or identify some act or acts as illegal.

Error to Oakland. (Stickney J.) Jan. 30.—Feb. 8.

Complaint for selling liquor without giving bond. Respondent brings error. Reversed, and prisoner discharged.

Aug. C. Baldwin for respondent appellant. A complaint for unlawful sale of liquor must identify the purchaser; but see *Enders v. People* 20 Mich. 240; *People v. Adams* 17 Wend. 475; *State v. Bielby* 21 Wis. 205; *State v. Gummer* 22 Wis. 441; *Cannady v. People* 17 Ill. 158; *Green v. People* 21 Ill. 125; *State v. Jackson* 4 Blackf. 49; *Com. v. Blood* 4 Gray 31; 2 East. P. C. 651-681; *Rex v.*

Walker 3 Camp. 263; *State v. Angel* 7 Ired. 27; *State v. Stucky* 2 Blackf. 289; *Blodget v. State* 3 Ind. 403; *State v. Burgess* 4 Ind. 606; *Com. v. Dean* 21 Pick. 334; *Com. v. Thurlow* 24 Pick. 374; *Com. v. Wallace* 14 Gray 382; *State v. Steedman* 8 Rich. (S. C.) 312; *State v. Carter* 7 Humph. 158; *Alexander v. State* 29 Tex. 495; *State v. Allen* 32 Ia. 491; *Wreidt v. State* 48 Ind. 579; *Wilson v. Com.* 14 Bush 160; *State v. Schmail* 25 Minn. 368; Bish. Stat. Crimes § 1037; *McLaughlin v. State* 45 Ind. 338; *State v. Doyle* 11 R. I. 574.

Attorney General *Jacob J. Van Riper* for the People.

CAMPBELL, J. The record in this case shows that defendant was prosecuted under a complaint which merely charged that on a day named he did "sell, furnish to, give and deliver spirituous liquors, malt liquors, brewed liquors, fermented liquors and vinous liquors" without having given bond as required by the Laws of 1881, p. 350.[1] The complaint alleged no sale or other delivery to any person or persons, and did not identify any act or acts as illegal. This defect is alleged as ground for setting aside the conviction. There is nothing in the record except the complaint to identify the charge.

We think the objection is well taken. The elementary principles of criminal law require every charge to be made with proper averments of time, place and person or circumstance. The respondent cannot without such averments know what he is to meet. The section under which the charge is made does not attempt to punish as a single offense the setting up of a contraband business as a business, and the punishment for such extensive action would hardly

[1] § 2270. SECTION 1. The People of the State of Michigan enact, That it shall not be lawful for any person except druggists to sell, furnish to, or give any spirituous, malt, brewed, fermented, or vinous liquors, or any beverage, liquor or liquids, containing any spirituous, malt, brewed, fermented, or vinous liquors, without first having executed and delivered to the county treasurer of the county in which such business is proposed to be prosecuted or carried on, the bond required by section nine of this Act. [Howell's Statutes.]

be confined to the small penalties of section 6 [How. St. § 2275], which are undoubtedly designed to reach single offenses. The complaint does not allege the establishment of such a business as a business. It is merely an imperfect charge of what was intended to include some single transgression. As such it is invalid for the uncertainty.

The judgment must be reversed and the prisoner discharged without day.

The other Justices concurred.

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ABRAHAM CONKLING, GUARDIAN, ET AL. v. MARY TUTTLE.

Lease—Novation—Action for use and occupation—Recoupment.

1. A tenant who has refused to pay rent until repairs are made, and is accordingly notified to quit, has a right to regard the lease as ended, and if the landlord then agrees to make the repairs provided the tenant will stay, the lease is a new one.

2. In an action upon the common counts for use and occupation the tenant can, under the general issue, set up a new agreement: and by way of recoupment can, on giving notice, show damage to goods on the premises.

3. Use and occupation may be sued for generally or specially without reference to the form of the lease under which they are enjoyed.

Error to Washtenaw. (Joslyn, J.) Feb. 1.—Feb. 6.

ASSUMPSIT. Defendant brings error. Reversed.

Sawyer & Knowlton for appellant. A tenant to whom notice to quit is given can rely on it and it cannot be withdrawn without mutual consent, and if consent is given a new tenancy is created: Wood's L. & T. § 48; *Doe v. Milward* 3 M. & W. 328; *Tayleur v. Wildin* 3 Exch. 303; and the acceptance of the new lease is a surrender of the old one; Wood's L. & T. § 492; *Donkersley v. Levy* 38 Mich. 59; *Livingston v. Potts* 16 Johns. 28; a lease by deed is surrendered by a valid parol lease: *Logan v. Anderson*

2 Doug. (Mich.) 101; 1 Washb. R. P. 476; rent cannot be exacted after notice to quit and abandonment: *Curtiss v. Miller* 17 Barb. 477; *Bates v. Phinney* 45 Mich. 388; *Home Ins. Co. v. Sherman* 46 N. Y. 370; a promise made in consideration of the fulfilment of a contract which the other party had not performed, is binding: *Moore v. Locomotive Works* 14 Mich. 272; *Munroe v. Perkins* 9 Pick. 305; *Lattimore v. Harsen* 14 Johns. 330; *Sanford v. Huxford* 32 Mich. 319; *Keeney v. Mason* 49 Barb. 254; the right in an action for rent to recoup damages for failure to repair exists where a valid promise to repair is made out: *Whitbeck v. Skinner* 7 Hill 53; *Dorwin v. Potter* 5 Den. 306; *Mayor v. Mabie* 13 N. Y. 151.

Hewett & Freeman for appellee. Performing one's agreement can furnish no consideration for a new promise to do the same thing: 1 Addison on Cont. 13; 1 Pars. Cont. (5th ed.) 437; *Goodale v. Holridge* 2 Johns. 193; *Russell v. Buck* 11 Vt. 176; *Reynolds v. Nugent* 25 Ind. 328; *Smith v. Bartholomew* 1 Met. 276.

CAMPBELL, J. Plaintiffs, as lessors of a building, sued defendant on the common counts for use and occupation. The claim they set up on trial was for rent under the covenants of a written lease.

Defendant based her defense on the substitution of a new verbal agreement whereby plaintiffs undertook to repair the building, and she sets up by way of recoupment, damages to her goods in the building.

The agreement which she sought to establish but which the circuit court held insufficient, was that the property was out of repair and she omitted to pay a part of the rent. Plaintiffs gave her notice to quit, and she accepting the notice, at once made arrangements to go into another building, but was induced to remain on the landlord's agreement to put the premises in order.

As the court took the case from the jury, and as the whole controversy essentially turns on the legal sufficiency of such an arrangement as defendant sets up, there is no

need of touching the minor questions, except possibly as to the form of the pleadings. It seems to have been claimed below that the declaration was really a declaration on the covenants of the lease, and the defendant's notice attached to her plea not sufficient to reach it. We do not think the declaration can be regarded as based on the written lease, in terms or in effect. Use and occupation may be sued for generally or specially, without reference to the form of the lease, and where the common counts are used such a defense as defendant relies on is proper under the general issue without any notice, except perhaps for a judgment for damages by way of recoupment, which the present notice is broad enough to cover, as we think it is also sufficient under plaintiff's own theory. The question therefore recurs upon the defense itself.

The main reasons set up against it are that it changes a written instrument, and is without consideration because a promise to pay the same rent already covenanted to be paid is only a promise to do a duty and forms no consideration for promises by the landlord.

It is agreed on both sides that the original lease did not require the landlord to repair. But defendant offered to show that he had given her notice to quit, and she had accepted it by proposing to act upon it by seeking other premises. This clearly justified her in treating the term as ended. The new agreement, while it adopted the annual rental of the old one, was a distinct and independent lease, valid although verbal, because for less than a year, and fixed the rights and duties of both parties. The change in terms negatives entirely the idea that it can be regarded as a continuance of the old lease. There is no rule of law forbidding the relinquishment of existing contracts and the substitution of new ones in their stead, and that is what was done here.

It was error, therefore, to refuse to allow legal force to the claims of defendant, and the judgment must be reversed, and a new trial granted accordingly.

The other Justices concurred.

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OSCAR TALCOTT v. JOHN Q. CRIPPEN.

Mortgagee's good faith—apparent ownership—Damages.

1. If a bill of sale of a shingle-mill is taken as security for its owner's debts but the mill is left in his possession a copy of the bill must be filed at once or the property cannot be protected by it against other creditors of the owner (How. St. § 6193) whose good faith alone will not protect the unrecorded transfer.
2. Where replevin against an officer who had taken the property under an attachment was brought by a person to whom a bill of sale had been given as security but not put on file, it was *held* proper for defendant to show that part of the debts on which the attachment issued accrued after the bill was given and in reliance upon the vendor's continued possession and apparent ownership.
3. Where malice is in no way an element in a litigation over the right to personal property the rule of damages is the same whether the action is of contract or of tort.
4. Evidence as to prospective profits is inadmissible to fix the measure of damages in a case where the loss of such profits is involved if it appears that they could not be made except under the most favorable circumstances, that the chances against them were numerous and that it was doubtful if the business was profitable at all as conducted.

Error to Montcalm. (V. H. Smith, J.) Feb. 1.—Feb. 8.

REPLEVIN. Defendant brings error. Reversed.

T. F. Shields and *Webster, Steere & Miller* for appellant.

Lemuel Clute for appellee.

COOLEY, C. J. Plaintiff replevied of defendant a shingle-mill. On the trial plaintiff deduced title under a bill of sale from Spaulding S. Ackles, bearing date April 6, 1882, and purporting to make an absolute transfer of the title. Ackles at the time was in possession and was operating the mill. He was indebted to the plaintiff, according to his testimony, in a considerable amount, and, as he testifies for

the plaintiff, he transferred the mill to the plaintiff as security for the debt. In immediate connection with this he says he considered it a genuine sale. Plaintiff on his own behalf testified that Ackles, after the bill of sale was given, was left to operate the mill till he had performed an outstanding contract, and whatever profits would accrue from it he was to pay to plaintiff on his indebtedness. Plaintiff himself took possession about July 1, 1882. The bill of sale was filed in the office of the township clerk, August 10, 1882. Plaintiff says that he filed it because, in a casual conversation with a lawyer, he was advised that it would be safer to do so. The defendant is sheriff of the county and he seized the mill on attachments against Ackles on August 11, 1882. The demands for which the attachments issued were created between February 9, 1882, and August 3, 1882.

In submitting the case to the jury the circuit judge failed to bring out the distinction between transfers of chattels by absolute sale and those by way of security, and he charged the jury at the plaintiff's request, that if they found he took the mill from Ackles for the purpose of paying him for money that Ackles owed him, and to indemnify him for liabilities which he agreed to pay for Ackles, and without any intent to hinder, delay or defraud the creditors of Ackles, their verdict should be for the plaintiff. This could only be true if the sale was absolute; for the statute provides that "every mortgage, or conveyance intended to operate as a mortgage, of goods and chattels, which shall hereafter be made, which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers or mortgagees in good faith, unless the mortgage, or a true copy thereof" shall be duly filed. How. St. § 6193. Good faith in the mortgagee does not protect the unrecorded transfer which comes under this statute. *Haynes v. Leppig* 40 Mich. 607; *Fearey v. Cummings* 41 Mich. 383; *Cooper v. Brock* 41 Mich. 491; *Sut-*

ton v. Rowley 44 Mich. 113; *Anderson v. Brenneman* 44 Mich. 198; *Wallen v. Rossman* 45 Mich. 333. There was abundant if not conclusive evidence to go to the jury on the theory that this bill of sale was nothing but a mortgage, and this seems to have been the theory of the plaintiff himself when he began his proofs.

The defense offered evidence to show that a portion of the demands for which the attachments were sued out was contracted after the giving of the bill of sale, and in reliance upon the possession and apparent ownership of Ackles. This was not received, but we think it should have been. The use of any such credit as the apparent ownership of Ackles would give him, ought to have been anticipated by the plaintiff as a possible occurrence, and it might well be argued to the jury that plaintiff should have given some degree of notoriety to the transfer. The fact that persons continued to trust Ackles without knowledge of any transfer, when they would have refused if they had known of it, is a circumstance bearing strongly upon the plaintiff's good faith.

The plaintiff delayed the replevy of the mill for three months, and he claimed on the trial to recover as damages the profits he might have made in the interval. The defense objected to the proofs offered, and referred to the decisions in *Allis v. McLean* 48 Mich. 428 and *McKinnon v. McEwan* 48 Mich. 106, as authority against them. These cases are said not to be applicable, because they were suits upon contract, while the present is a suit sounding in tort. A distinction is undoubtedly to be taken between actions upon contract and actions of tort, in all cases where malice, express or implied, is an element; but where parties are in good faith litigating disputed rights, and there is a choice of remedies, the rule of damages ought not to depend upon the form of remedy the party has selected. This plaintiff elected to retake the property in an action sounding in tort; he might have waited until a sale and sued in assumpsit for the proceeds; but in either case the facts in controversy would have been the same, and the

measure of damages ought to be by the same rule. The real question is, by what rule shall we with most certainty arrive at a knowledge of what they actually were. It was shown in the two cases just referred to that estimates of profits are generally so unreliable as to be worthless as a means of ariving at the actual damages; and in *Allis v. McLean* it is said (p. 432) that "the profits of running a saw-mill are proverbially uncertain, indefinite and contingent. They depend on many circumstances, among which are capital, skill, supply of logs, supply and steadiness of labor; and one man may fail while another prospers, and the same man may fail at one time and prosper at another, though the prospective outlook seems equally favorable at both times. Estimates of profits seldom take all contingencies into the account, and are therefore seldom realized; and if damages for breach of contract were to be determined on estimates of probable profits, no man could know in advance the extent of his responsibility. It is therefore very properly held in cases like the present that the party complaining of a breach of contract must point out elements of damage more certain and more directly traceable to the injury than prospective profits can be."

It was said, however, that this language is not applicable to the present case, because Ackles when he sold to the plaintiff had an unfulfilled contract for cutting shingles, upon which it was possible to estimate the profits with reasonable certainty. This contract was transferred to the plaintiff, [and] he was allowed to show, by the testimony of Ackles and others, that the profits in filling it would be ten dollars a day. He was also permitted to give similar testimony without regard to that contract. We have looked through the evidence, and are of opinion that no better case could be taken for an illustration of the worthlessness of this standard for the estimation of damages. It conclusively appears from it that the estimated profits could only be made under the most favorable circumstances; that the contingencies which stopped operations or rendered them unprofitable were numerous; and finally that it was

very doubtful whether the business in the hands of Ackles had been profitable at all. And it is a significant [fact] that the plaintiff, after delaying so long to retake the property, had not in the following May, when the suit was tried, got it into operation again. He had then, as he says, arranged with a party to put it in condition for use and pay five dollars a day for the use of it, but with allowance of lost time for stoppages, which appear when Ackles run it, to have been frequent.

We think the estimates of profits were not proper evidence.

The judgment must be reversed and a new trial ordered.

The other Justices concurred.

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126 292

WILLIAM SMITH v. JONATHAN B. SHERMAN, ELIZABETH O. SHERMAN, DARWIN O. WHITE AND ABRAM S. HALL.

Equity practice—Amendment of bill at the hearing.

1. A judgment creditor's bill to set aside a deed as in fraud of his rights under the execution did not aver that the sheriff had levied on the land before the bill was filed. The bill was not demurred to, however, and testimony was taken on the whole issues. *Held* proper to allow the bill to be amended on the hearing.

2. Costs of the Supreme Court, on affirmance of a decree, are allowed only against the actual appellant, if parties jointly interested with him do not join in the appeal.

Appeal from Oakland. (Stickney, J.) Feb. 1.—Feb. 8.

CREDITOR'S BILL. Defendant Hall appeals. Affirmed.

J. W. Robbins and *Aug. C. Baldwin* for complainant.

J. Ten Eyck for defendant appellant.

CAMPBELL, J. Complainant, who is a judgment creditor of Jonathan Sherman, brought his bill to have a deed made

by Sherman to Hall, his son-in-law, declared fraudulent and void as against his execution rights. It appeared on the hearing that the sheriff levied on the land before bill filed. The bill as originally drawn omitted this averment, but it was not demurred to, and the testimony was taken on the whole issues. On the hearing the bill was allowed to be amended so as to include this charge, and we think that as the case stood it was proper.

The sale was made while complainant was urging his demand, and appears, as we think, to have been in contemplation of the judgment. The consideration alleged was $4000, of which $3000 was paid down in cash and a mortgage assumed for most of the remainder and paid.

The testimony consisted largely of facts bearing on the lack of means of Hall to purchase, and of the failure of Sherman to show what had become of the alleged payment. There is a conflict of testimony on the leading facts. The land has remained as before under the management and possession of Sherman, who claims that this is only because his wife has become lessee, which she has, unquestionably, by a written lease, which complainant claims is one of the fraudulent contrivances.

It would not be profitable to discuss all the facts at large. The circuit judge became satisfied that the fraud had been perpetrated, and set aside the conveyance as to complainant's rights. We are of opinion that this conclusion is justified by the peculiar testimony of Sherman quite as much as by the facts sworn to by others. In such a conflict, where the testimony cannot all be harmonized, we must use our best judgment in comparing it.

We see no reason for disturbing the decree, which must be affirmed. As only Hall appealed, costs must go against him alone in this Court.

The other Justices concurred.

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107 11
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147 201

RILEY A. AXTELL v. JAMES O. GIBBS.

Garnishment—Alias summons.

1. An alias summons can be taken out against the principal defendant in a garnishment proceeding even though the return of the first summons was informal; the return may be amended.
2. An alias summons may be treated as a new writ for a new suit if the first suit has gone down; it is not void merely because the return to the original summons did not furnish a proper basis for it.

Error to Kalamazoo. (Mills, J.) Feb. 1.—Feb. 8.

ASSUMPSIT. Plaintiff brings error. Reversed.

Hawes & Shakespeare for appellant.

Breese & Stearns for appellee.

COOLEY, C. J. The plaintiff, on October 25, 1882, took out summons against the defendant, from the circuit court for the county of Kalamazoo, and also at the same time caused William A. Gibbs to be summoned as garnishee of the defendant. The defendant at the time was understood to be out of the State, and he was proceeded against as a non-resident. The statute in such case permits of the service upon the defendant abroad, or of a substituted service within the State; allowing sixty days for the purpose. How. St. §§ 8087, 8088. No service whatever was made in the principal suit within the time. For some unexplained reason two writs appear to have been taken out against the defendant at the same time, one of which was filed without action, and the other was returned by the sheriff some time after the return-day, with a return thereon that he was unable to serve it upon the defendant. A further summons, purporting to be an alias, was taken out February 8, 1883, which was duly served on the defendant. Subsequently, motions were made to dismiss both the original suit and the garnishment, and the motions were granted.

In dismissing the principal suit the circuit judge is understood to have proceeded on the idea that a suit under the statute to reach moneys and effects of a non-resident by garnishment, was a proceeding in rem, and if service failed to be made in some form within the statutory time it could not be kept alive by successive writs. We do not think this the proper view to take of the proceeding. If the defendant should come to the State so that service could be had, we have no doubt of the right of the plaintiff to take out an alias for that purpose. Indeed, the principal suit should proceed as in other cases whenever that is practicable; the exceptional service being only provided for cases in which the ordinary and more proper service cannot be made.

The judge was also of opinion that the alias writ was improperly sued out because the return on the prior writ was not in due form of law. The return was certainly informal, but the officer should have been directed to amend it if anything depended upon its regularity in form. But if the last writ had no proper basis as an alias, it was not for that reason void. If the first suit had gone down, this should have been treated as a new writ for a new suit, and sustained accordingly.

The judgment must be reversed and the proceedings remanded.

The other Justices concurred.

52 640
109 613

RILEY A. AXTELL v. WILLIAM A. GIBBS, GARNISHEE.

Garnishment—Dismissal of garnishee.

1. Garnishment proceedings must be dismissed if service upon the defendant in the principal case has not been obtained within the statutory period, whatever steps have been taken to keep the principal suit alive for the recovery of a personal judgment.

2. A garnishee's action is restrained only for the time provided by statute for such service on the principal debtor as is necessary to reach the credits and effects in the garnishee's hands.

Error to Kalamazoo. (Mills, J.) Feb. 1.—Feb. 8.

GARNISHMENT proceeding. Plaintiff brings error. Affirmed.

Hawes & Shakespeare for appellant.

Breese & Stearns for appellee.

COOLEY, C. J. The defendant was proceeded against as garnishee of James O. Gibbs. The proceedings in the case are given in the preceding opinion. The circuit judge was quite right in dismissing the garnishee proceeding when the plaintiff had failed to secure service upon the principal defendant within the statutory period. *Noble v. Bourke*, 44 Mich. 194. Whatever the plaintiff might do to keep the suit against the principal defendant alive for the purposes of a personal judgment, did not concern the garnishee; the proceeding against him was purely statutory, and his hands were tied and his action restrained for the time only that the statute provided for such service on the principal debtor as was necessary to enable the plaintiff to reach the credits and effects in the hands of the garnishee. The two proceedings are by no means indissolubly associated.

The judgment must be affirmed.

The other Justices concurred.

JOHN WILKIE v. THE CIRCUIT JUDGE FOR INGHAM COUNTY.

Mandamus vacating order to set aside execution sale.

1. Notice of proceedings to set aside an execution sale should be given to the purchaser.

2. Mandamus to vacate an order setting aside a sale on an execution that had been levied without waiting for the enrollment of the decree was *denied*, even though no notice of the proceedings to set aside the sale had been given to the purchaser, where (1) the date of the decree, as shown in the execution, was notice of the fact that the exe-

cution was prematurely issued; and (2) where the motion to set aside was not made until the time to redeem had expired.

Mandamus. Submitted Feb. 6. Denied Feb. 8.

J. C. Shields for relator.

Huntington & Henderson for respondent.

COOLEY, C. J On July 22, 1882, a decree in chancery was entered in the Ingham circuit court, in the case of Andrew J. Carr v. J. Deville Dennis, whereby costs were awarded to the complainant. On the next day the costs were taxed; and without waiting thirty days for the enrollment of the decree as the statute requires—How. St. §§ 6649, 6653—the complainant took execution immediately. This was directed to the sheriff of the county of Tuscola. July 24, 1882, the decree was enrolled. September 12, 1882, the defendant made an affidavit as a basis for a motion to recall the execution, and gave notice to complainant's solicitor of such a motion. The motion was not brought to a hearing until February, 1883. Meantime the sheriff of Tuscola county had levied upon lands of defendant and sold the same, and the relator had become the purchaser, without, as he claims, any notice of irregularities. At the February term of the Ingham circuit court, 1883, the circuit court granted the defendant's motion.

The relator now moves for a mandamus to require the circuit judge to vacate the order setting aside the sale. He shows that he had no notice of defendant's motion; and this, and the fact that he was a purchaser in good faith, are the grounds of his application.

The circuit judge was irregular in vacating the sale without notice to the relator. But before setting aside his action we must see what justice requires; and we are satisfied that justice does not require that relator should be allowed the benefit of his sale. The execution is not returned, but it is to be assumed that it shows the date of the decree, so that the fact that it issued prematurely appears upon it.

But passing that point, we cannot overlook another fact that is of much importance. The motion to set aside the order vacating the sale was not made until the time to redeem from the sale had expired, and the effect of granting it would be to cut off the statutory right of redemption. It is not very clearly shown that relator did not know of the proceedings which were taking place in time to move more promptly; but if not, confirming his sale now is more likely to do injustice than leaving the order already made to stand. We think it proper, therefore, to leave the case in the hands of the circuit judge, who will no doubt protect the equities of all parties as completely as shall be found possible under the circumstances.

The other Justices concurred.

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3 The respondent in a prosecution for adultery is entitled to a specification of the times and places of the acts relied on for conviction in any case in which he might otherwise be misled in preparing for defense. *Id.*
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2 The Supreme Court cannot review the decision of a lower tribunal upon the testimony submitted on an application to dissolve an attachment, unless there is entire absence of proof on some material point. But it will review its decision upon questions of law, if properly presented, and upon the exclusion of testimony. *Genesee County Sav. Bank v. Mich. Barge Co.*, 164.
3 The issue upon presentation of a claim before probate commissioners continues the same on appeal to the circuit court and is governed by such evidences of the claim as were filed with the commissioners. *Hathaway's Appeal*, 112.
4. An appeal from the allowance by probate commissioners of claims against an estate is a matter of right to those who are interested, and such person may take it if the administrator declines to; and if the probate judge allows an appeal to some one else he thereby passes upon the fact of the administrator's refusal. *Crouch v. Wayne Circ. Judge*, 596.
5 How. St. § 7020 in providing that no appeal from a justice shall be dismissed on the ground of a defective affidavit if the appellant makes a proper one, means affidavits that are fatally defective; any other would be sufficient. *Hamilton v. Wayne Circ. Judge*, 409.
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2 Use and occupation may be sued for generally or specially without reference to the form of the lease under which they are enjoyed. *Conkling v. Tuttle,* 630.
3 A man belonged to a mutual aid society to which he paid certain moneys which, according to the scheme of the society, were to be paid out again to the various members. Thinking that he had received no consideration for these payments he afterwards brought an action as for money had and received, and sued two of the members jointly with the society. *Held* that the joint action would not lie; and as the money had been disposed of with plaintiff's consent the form of action seems inappropriate. *Murphy v. Bidwell,* 487.
4 A delaration in justice's court set forth that by false warranty of a horse defendant had obtained plaintiff's note for it, and that on discovery of the fraud plaintiff had rescinded the sale, tendered back the horse and demanded the note, but the defendant had refused to surrender it, to plaintiff's damage, its amount. *Held* that this may be sustained as a declaration in assumpsit. *Thomas v. Schram,* 213.
5 In suing for the price of a quantity of timber shipped to defendants at a distance, and received subject to inspection, it is proper for plaintiff to show, as an element in the case, how much was loaded for shipment, if it appears that some of it was taken by defendants before inspection and that they used some which did not pass. *McLennan v. McDermid,* 468.
6 A borrower went to a loan agent of an insurance company for money but afterwards negotiated the loan himself, dealing with the company personally and by letter. The money went to him through the hands of the loan agent, who insisted on retaining part of it for his services, and compelled the borrower to give a receipt showing a settlement in full. *Held,* that in a suit by the borrower against the loan agent for the amount withheld, it was proper to introduce the letters and to show what passed between the parties when the receipt was extorted *McAllister v. Engle,* 56.
7 In an action by a borrower to recover from a loan agent the amount of commissions which the latter had withheld on delivering the money, the plaintiff is entitled to show how defendant obtained the receipt which he gave for the money, and that he gave it under protest. *Id.*

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1 Attachment proceedings before a justice of the peace are special and statutory, and will not support a lien unless all the provisions of the statute as to the levy and execution of the writ are strictly observed. *Fairbanks v. Bennett,* 61.
2 One who has bought property under an arrangement which would be fraudulent as against the creditors of the vendor, or by an unratified sale in which the vendor's agent has exceeded his authority, obtains no title which he can protect from attachments sued out by the vendor's creditors. *Newburn v. Woods,* 610.
3 Proceedings to dissolve an attachment are special and not according to the course of the common law; they are interlocutory and do not affect the merits of the main action. *Genesee County Sav. Bank v. Mich. Barge Co.,* 164.
4 An application for dissolution of an attachment is in the nature of a motion and can be disposed of at chambers. But there must be a hearing and a trial of the questions of fact involved before a judge or circuit court commissioner, and he is to adjudicate questions of both law and fact and may apply the rules that govern the trial of such issues. *Id.*

5 When the facts set up in the affidavit for an attachment are denied upon a motion to dissolve it, the plaintiff in attachment has the burden of protecting his lien by proofs outside of the affidavit. *Id.*
6 On an application to dissolve an attachment granted on the ground that defendants had disposed of their property with intent to defraud creditors, it was proper to question a witness who testified that he held a mortgage on some of defendant's property, as to what the particular property was and whether he had ever paid defendants anything for the mortgage. *Id.*
7 After trespass has been brought for the seizure of goods under an attachment which was not properly served, the defect in service cannot be cured, for the purposes of the action in trespass, by taking out a new attachment. *Fairbanks v. Bennett*, 61.
8 The purchaser of goods exempt from execution obtains a title which overrides the lien of any subsequent attachment levy, and indeed of any previous levy, unless it be for unpaid purchase money; and the title cannot be destroyed by subsequent admissions or acts of the debtor. *Buckley v. Wheeler*, 1.
of property based on judgment in another State, 52 (1).
replevin for goods taken by attachment, 633 (2).
effect of attachment on subsequent action of replevin, 423 (2).
judgment in replevin for attached property, 529 (1).
Attendance—of sheriff upon court; fees, 340 (2).
ATTORNEY AND COUNSEL.
1 Where counsel has been assigned to a person on trial and has acted without objection from his client, the latter's conviction cannot be set aside on the ground that counsel was not of respondent's choice. *People v. Murray*, 289.
2 Communications made to a prosecuting attorney by the complaining witness in a criminal case are not privileged, so far as the witness is concerned, for he is not the prosecutor's client and cannot control the use of the communications, which are made for purposes of public justice. Whether the State cannot sometimes claim the privilege—Q. *People v. Davis*, 570.
attorney can consent to judgment in garnishment, 394 (3).
conduct of counsel in presenting case; review, 215 (9).
relationship to judge not ground for rehearing, 215 (12).
Averment—in jugment creditor's bill, of levy by sheriff, 637 (1).

BAIL.
1 The files and record in a case are admissible in a suit upon recognizance of special bail taken therein. *Heymes v. Champlin*. 26.
2 In an action upon a recognizance of special bail, the omission to allege in the declaration that a *fi. fa.* has been issued and returned unsatisfied, will not, *it seems*, defeat a judgment if the objection has not been seasonably interposed. *Id.*
BAILMENT.
1 Where the owner of a team, after hiring it out and binding himself to furnish a driver, makes a temporary arrangement with the other party whereby the latter takes the team into his own charge and promises to furnish a driver himself if he has occasion to use it, the transaction, being for the benefit of both parties, amounts to a bailment for hire, and the party in possession of the team is bound to take such ordinary care of it as a prudent owner would take. And the driver whom he furnishes is his servant and not that of the owner of the team. *Hofer v. Hodge*, 372.
2 The fact that a business firm not organized for banking purposes was in the habit of receiving an individual's money and allowing him interest on it does not tend to show that it was his depositary of securities. *Hathaway's Appeal*, 113.

delivery to bailee of assignment of contract, 76 (1).
replevin by bailee on paying consignee's debt, 423 (2).
bailment of goods held by receiver, 484 (1).

BANKRUPTCY.

A composition of creditors is not effective, under the Bankrupt Act, to discharge any portion of a debt unless the creditor's name and address and the amount of his claim were set forth in the statement made by the debtor at the meeting of creditors at which the resolution of composition was adopted, nor unless such resolution was recorded by order of the court which confirmed the composition. *Shaw v. Vaughan*, 405.

BANKS AND BANKING.

1 A shareholder in a bank is, as regards creditors, not only a surety for the bank but as one of the associates therein, he is held to have undertaken, by the terms of association, to be bound for the debts which it contracts. How. St., § 3174. And the liability of the shareholders is commensurate with that of the corporation and extends to costs and interest on judgments. *Warren v. Grand Rapids Sav. Bank*, 557.

2. The estate of a non-resident stockholder in a bank may be held ratably liable for debts of the bank that matured before the passage of Act 141 of 1877, and to such debts the limitations imposed by that Act as to service within the jurisdiction, cannot apply. And a judgment against the corporation is prima facie evidence of the liability; and the entries on the stock-ledger are admissible to show that decedent was a stockholder. *Id.*

3 A statute giving the creditors of a banking corporation a new remedy against stockholders cannot affect those who took shares in the corporation before its passage; nor can it, so far as existing claims are concerned, supersede the remedies in force when they arose and in reliance upon which they were contracted. *Id.*

special deposits with non-banking firms, 112 (1, 3, 4), 113 (5).
Bar—of chancery proceeding to action at law, 390 (1).
Benefit association—action against for money paid, 487.
Bill—of costs; affidavit attached thereto, 474 (3).
——review on appeal from taxation, 474 (4).
of particulars; in prosecution for adultery, 569 (1).
of sale; construction and binding nature, 491 (1).
——when taken as security, must be filed, 633 (1-2).
in chancery does not lie for less than $100, 159 (2).
case alleged by bill must be established by proofs, 318.
bill for accounting lies wherever fiduciary relations exist, 157.
for accounting by trustee; evidence as to management, 174 (2-3).
bill for divorce, not amendable to annul marriage, 429 (2).
to enforce contribution from representatives of co-surety, 7 (1), 8 (3).
bill by judgment creditor to set aside deed, 637 (1).
to cancel judgment entered in another court, 258 (2).
to set aside judgment for fraud, 52 (1).
bill of interpleader based on township drain proceedings, 159 (1).
bill of review after foreclosure, 489 (1-3-4).

BILLS AND NOTES.

1 An instrument promising to pay a stated sum, with interest, "on or before two years after date," but providing that if it be paid within one year no interest shall be paid, is not a promissory note, as it lacks certainty in time and amount. And as it is not negotiable it can only be transferred by assignment, and though the payee may perhaps assign it by indorsing it he does not thereby make himself liable for the amount to be paid. *Story v. Lamb*, 525.

2 B and F were litigating in equity the ownership of certain logs, and

B filed a separate bill to restrain F from interfering with them. In this latter proceeding a receiver was appointed by consent of the parties, and he, being authorized to sell the logs, delivered them to F and took his notes therefor, upon which he afterwards brought suit. The bill in the last mentioned suit was dismissed and the receiver thus became a mere bailee for the party actually entitled to the logs. *Held* that in the suit by the receiver on the notes F had a right to show that it was understood when they were given that they were to be paid only if the logs should be adjudged not to belong to him, and that as the logs were in fact his, the notes were without consideration. *Maltz v. Fletcher*, 484.

3 Failure of consideration may always be shown in a suit on a contract; and in an action on negotiable paper proof may be made of the purpose for which it was given, or that the purpose does not require the enforcement of payment. *Id.*

4 The presumption that a note which specifies no place of payment is to be paid at the residence of the person liable upon it, is one that applies to indorsers. *McIntire v. Mich. State Ins. Co.*, 188.

denial of execution of corporate note, 438 (2).
payment of premium note, 188 (1).
presumption of payment of demand note, 415 (4).

Board—of supervisors; claims for sheriff's fees, 340 (1-3-4).
—— cannot delegate auditing duty, 340 (5).
—— mandamus to pay county obligations, 16 (1).
—— application to divide town, 517 (1-3).
township board; meetings with notice, 528.
highway money taxes levied by town board, 509 (1), 510 (3).

Bona fide—holder; of forged mortgage, 375 (2-3).
of negotiable paper of corporation, 438 (2-3).
purchaser; rights conflicting with vendor's lien, 77 (2).

Bond—of administrator; action on in justice's court, 387 (1).
of assignee for benefit of creditors, 272 (3).
of executor, necessary to authority. 451 (2).
of guardian for making sale; approval, 304 (9).
on chancery appeal; liability to pay costs, 153 (1).
selling liquor without giving bond, 582, 628.
bill for contribution from representatives of co-surety, 7 (1), 8 (3).
action of covenant on bond in justice's court, 497.

Bonds—deposited with a non-banking firm, 112 (1-3-4), 113 (5).

Boom companies—obstruction of navigable streams, 203.

Boundaries—to be set forth in petition for division of town, 517 (2).

Breach—of conditions of bond; jurisdiction, 387 (1-2).
of condition, by municipality accepting dedication, 320 (1).
of covenant against incumbrances, 587.
of promise; action for; evidence, 336 (1), 337 (2-4).
of warranty; right of action for, 602 (5).

Bribery—irrelevant to charge of indecent assault, 426 (3).

BRIDGES.

A township can hardly be held liable for injuries caused by latent defects in a bridge over a mill-race where they do not affect the traveled part of the way and where the miller has apparently not been negligent in performing his statutory duty of looking after the condition of the bridge. *Abernethy* v. *Van Buren Township*, 383.

liability for security of township bridges, 146 (1), 147 (2, 7).

Burden of proof—of fraud is on complainant, 267 (3).
of payment of a debt, 415 (6).
that a note has not been paid, 415 (5).
is on complainant to establish allegations of bill, 318.
in sustaining lien of attachment, 164 (3).

Cancellation—of judgment of co-ordinate court, 258 (2-4).
Capias—affidavit for, in action for crim. con, 570 (7).
amendment of sheriff's return in collateral action, 26 (5).
Caption—of demurrer; variance as to name of court, 324 (1).
CARRIERS.
Where a railroad train pulls up at a platform so that nothing but the forward end of the smoking car is at the platform, passengers in the rear cars, especially ladies, are not bound to go through the smoker to alight; and if, in consequence of the position of the train, they are injured in getting off from the car in which they have been riding, it is the fault of the company. *Cartwright v. Chic. & G. T. R. Co.*, 606.
Cause—order to show; statement of record issues, 16 (3).
Cause of action—arising after dissolution of partnership, 14.
for services in breaking jams, 70.
Certainty—in time and amount necessary to note, 525.
Certificate of amount due school district, 344.
of notary, not conclusive, 375 (1).
of sheriff's attendance on court, 340 (2).
of tax purchase to be assigned on foreclosure, 22 (2).
CERTIORARI.
1 Certiorari may be resorted to for the review of drain proceedings in cases where the drain commissioner has acted without jurisdiction. *Null v. Zierle*, 540.
2 Certiorari does not lie for the review of merely technical defects in the proceedings of a justice, unless they go to the foundation of the action; the proper remedy is by appeal, when the case can be re-tried and determined on its merits. *Galloway v. Corbitt*, 460.
3 A justice's return to a writ of certiorari must be taken as true. *Id.*
certiorari to review proceedings to enforce mechanic's lien, 370.
Challenge—of talesmen disqualified by age, 584 (2).
Character—of persons engaged in affray, 289 (6-8), 616 (1).
Charter—provision for lien for city taxes, 272 (5).
Circuit—courts are of general jurisdiction, 523 (5).
——courts can allow advancements under a will, 542 (1).
Circuit Court Commissioner—tries questions of fact on motion to dissolve attachment, 164 (2).
Circuity of action—in obtaining contribution from co-surety's representatives, 8 (3).
Claim against estate on a demand note, 415 (5), 416 (7).
for money lent, against estate; evidence, 545 (1).
for widow's allowances, by grass-widow, 592 (1-2).
against estate; appeal from allowance, 596.
against mortgager; mortgagee not authorized to buy, 124 (2).
based on covenant against incumbrances, 587.
for personalty not accounted for by guardian, 432 (1-3)
for commissions in negotiating sale, 480.
disposition of, by board of supervisors, 340 (3, 5).
Clerk of court; appeal from his taxation of costs, 474 (4).
of township; to certify amount due school district, 344.
Cohabitation—establishing fact of marriage, 464 (1-3).
Collateral—action; impeachment of decree of divorce, 94 (6-7).
proceedings; conclusiveness of return of service, 260.
attack on recitals in decree for partition, 304 (1).
attack, on judgment enforcing mechanic's lien, 370.
Collection—agent for, is not a joint garnishee, 476 (1).
of highway taxes, 510 (4).
of tax by town treasurer does not make him liable in tort, 504
of State and county taxes by town treasurer, 612 (3).

of taxes; where injunction is granted to restrain, 28 (3).
of unpaid taxes by action, 458.
Commissioners—drain commissioner's jurisdiction; petition, 540 (1, 2).
in probate; appeal from allowance by, 596.
in probate; inquiry into solvency of decedents co-suretie's, 7 (1).
Commissions—on negotiating sale. 480.
paid to loan agent; action to recover back, 56 (2, 4).
Common counts—recovery upon contract on common counts, 435 (2).
for use and occupation; evidence under general issue, 630 (2).
Communications—to prosecuting attorney; whether privileged, 570 (3,5).
Compensation—to trustees for services connected with trust, 174 (6).
Competency— to make a will, 346 (1-5), 347 (6).
Complaint—for selling liquor without giving bond, 628.
for selling liquor on legal holiday, 584 (1).
for not closing saloon at specified time, 624.
for one thing and warrant for another, 597 (2).
Composition—of creditors in bankruptcy, 405.
Compromise—with one person does not prove liability to another, 147 (3).
Conclusiveness—of decree where cross-bill is not essential, 91.
Conditions—of acceptance of goods sold, 602 (1, 2).
as to payment of interest, 525.
as to payment of premium note, not to be waived, 188 (3).
of warranty; non-fulfillment thereof, 602 (3).
to supplying consumers with gas, 499, (1, 2).
breach of, by municipality accepting dedication, 320 (1).
to granting leave to plead to merits, 523 (6).
Conduct—of engaged persons; evidence as to, 336 (1), 337 (2).
Conflict of Laws—jurisdiction of foreign court in divorce suit, 94 (6).
setting aside judgment sued on in another state 52, (1).
Confusion—of securities by a lien-holder, 552 (4).
Consideration—for assignment by debtor to preferred creditor, 174 (1).
for deed from parents in return for support, 7 (2).
for money paid to benefit associations, 487.
failure of consideration, evidence, 484 (1-2).
rescission for mistake as to consideration, 100.
of contracts, affecting separate liens for payment, 77 (5).
CONSTITUTIONAL LAW.
1 The right of property to governmental protection does not depend upon whether its owner is a natural or artificial person: nor upon his social advantages, nor on the form of the property, provided it be lawful. And the violation of the duty to protect it is not merely a political non-feasance, but an assault on the owner's right and a breach of that trust which the institution of government implies. *People v. Lake Shore &c. R. Co.*, 278.
2 The judicial proceedings to which full faith and credit must be given in every State besides that in which they are taken are those only in which the court was competent to act; and a prima facie showing of their regularity does not save them from impeachment by proper evidence. *Reed v. Reed*, 117.
3 A conviction cannot be set aside for the admission of a deposition in pursuance of a voluntary stipulation by the parties or their counsel even if the respondent is represented only by counsel assigned to him; in making such a stipulation the respondent waives his constitutional right to be confronted by the witness. *People v. Murray* 288.
Construction—of agreement not to practice within specified region, 34.
of contingent power of sale in lease, 37 (1).
of contract from correspondence, 409, (1).
of devise to wife and posthumous child, 18 (1).
of devise providing for accumulations, 542 (1).
of fire insurance policy, 446.

of general expression in declaration 195 (1).
of oral authority, a question for a jury, 365 (3).
of phrase "with the rest of my heirs," 398.
of report of guardian's sale as to mode of sale, 304 (10).
of railway crossing and of the statute thereon, 277 (1).
Constructive—notice of corporate acts, 87 (4).
CONTRACTS.
1 A man who got some supplies from a merchant said they were for a certain lumberman, who, as the merchant knew, had been the man's employer and had cashed his orders. The merchant wrote to the lumberman's bookkeeper notifying him of the purchase and asking him to send an order to give the man supplies "if O. K." The bookkeeper wrote back "I think it will be O. K. for about one hundred dollars at present." *Held* that this correspondence could not establish a contract on the part of the lumberman to pay for the supplies; and that even if he said it was all right on hearing of the correspondence, he would not be bound, as this would amount at most to a parol promise to pay the debt of another. *Ruppe v. Edwards* 411.
2 One who purchases under a warranty deed containing covenants of seizin and quiet possession, cannot rescind the bargain on the ground of a mistake as to the vendor's title if the mistake does not go to the entire consideration; as where he supposed the vendor had title in fee-simple, instead of a mere life estate. *Leal v. Terbush* 100.
3 A contract to clear an innavigable stream and to run logs through it cannot be assumed to be void as against public policy on the ground that it involves trespassing on the lands of third persons, unless it also appears that the riparian owners object or that an invasion of their rights is intended. *Fuller v. Rice* 435.
4 An agreement between physicians that one would not practice in a specified city *and vicinity* was *construed* as excluding him from all territory within ten miles from the city limits. *Timmerman v. Dever* 34.
5 One of several stockholders cannot back out of an agreement which all have entered into to contribute a number of shares each to be sold for the benefit of the corporation, after the rest, in reliance upon the agreement, have contributed their proportion. And if his shares have been taken and used accordingly, he cannot bring trover for them. *Conrad v. LaRue* 83.
for labor; power of superintendent of corporation, 45 (1, 2).
of officers of association; liability of members, 106.
for sale of chattels; security. 602 (1-5).
to pay, implied from consumption, 499 (2).
obligation to pay rent, after entry; implied contract therefor, 141.
right of action for breach of warranty, 602 (5).
contract sustains recovery on common counts, 435 (2).
consolidation of contracts affects separate liens for payment, 77 (5).
failure of consideration may be shown in action on contract, 484 (2).
rescission in part and partial affirmance 491 (2).
contract, in fraud of creditors, to support parents, 7 (2).
contract void under Statute of Frauds, 455 (1).
measure of damages same as in cases of tort 633 (3).
Contribution—from co-indorsers of note, 143.
from representatives of co-surety on bond, 7 (1), 8 (3).
right to withdraw from agreement for, 83.
Contributory—negligence; in using dangerous highway, 108 (2).
negligence and reckless driving, 383 (2).
Conversation—about loan; evidence in proving claim, 545 (1).
as to private dealings with decedents, 545 (3).
Conversion—by person in peaceable possession of realty, 94 (5).

may be alleged in declaring in trespass qu. cl., 94 (1).
Conviction—for assault not possible on information for murder, 24 (1).
for assault and battery set aside on evidence, 105.
forgery cannot rest on charge of uttering, 627.
for selling liquor without giving bond, 628.
of less offense than charged in information, 24 (3).
sufficiency of evidence to support conviction, 563 (1).
setting aside conviction for irregularities, 288 (1), 289 (3).
Copy—by photography, of existing documents, 214 (2).
of bill of sale, taken as security, must be filed, 633 (1, 2).
of written representations; when admissible, 165 (7).
service on absent defendant by copy, 394 (2).

CORPORATION.

1 A corporator is not charged with constructive notice of corporate acts and may deal with the corporation as a stranger may, if his personal connection with corporate action is not such as to notify him of reasons to the contrary. *Rice v. Peninsular Club* 87.

2 One who assumes to deal with a corporation, through one of its members, and though himself a member, must satisfy himself at his peril that the member through whom he deals has authority to act as agent for the corporation and is acting within the scope of his authority. *Id.*

3 The ordinary management of a corporation is under the control of its directors. *Genesee County Sav. Bank v. Mich. Barge Co.*, 438.

4 The liability of a corporation for the acts of one who, with its assent, has controlled and sold its paper for his own benefit, is no less than that of an individual would be. *Id.*

5 A corporation was *held* bound by representations as to its solvency, made for the purpose of floating its paper by a member of a firm that was both payee and indorser and owned nearly all the stock and controlled the corporate operations. *Id.*

6 Negotiable paper of a corporation is valid in the hands of a bona fide holder if it appears, on its face, to have been duly issued by the corporation in conformity to the provisions of its charter. If the corporation has power under any circumstances to issue such paper, a bona fide holder has the right to presume that it was issued under the circumstances which gave authority. *Id.*

7 The directors of a corporation in which every stockholder was a director adopted a rule allowing any stockholder to have its note at any time for the par value of a quarter of his stock. Such a note was duly executed by the treasurer, at the instance of a director, and was made payable to a firm consisting of this director and one other, who together owned nearly all the stock. The note was negotiated and came into the hands of a bona fide holder. *Held* that the corporation on being sued by the holder, could not deny its execution or escape liability upon it. *Id.*

8 The directors of a boom company passed a resolution that the laboring men signing contracts to remain through the season have a bonus of fifteen per cent. at the end of it. *Held* that this did not restrict the power of the president and superintendent of the company to hire other persons than the class of laborers referred to, on the same terms, especially if the persons hired knew nothing of the resolution. *Hardy v. Tittabawassee Boom Co.*, 45.

9 A letter from the superintendent of a boom company to its president, stating the terms upon which he had hired an employee, is admissible in evidence for the latter in a suit by him against the company for his wages, even though it was obtained by the defendant for its own information. *Id.*

Corporation—for banking; evidence of stockholder's liability, 557 (1-3).

stockholder's right to withdraw from agreement, 83.
words of inheritance not required in lease to corporation, 314 (1).
Cost—of redeeming from foreclosure of prior mortgage, 552 (1).

COSTS.

1 An appellant's right to costs is fixed by the entry of a judgment for reversal with costs, if his adversary discontinues without taking a new trial. *Sherman v. Washtenaw Circ. Judge*, 474.

2 Costs were not allowed on mandamus where the occasion for its issue was the error of relator's counsel. *Frederick v. Circ. Judge*, 529.

3 The statute permitting a circuit judge to award the costs, on an appeal from a justice, to either party (How. St. § 7026), does not apply where the plaintiff has discontinued after the case has been sent back to the circuit for a new trial upon a reversal in defendant's favor; in such cases defendant is entitled to costs as a matter of right. *Sherman v. Washtenaw Circ. Judge*, 474.

4 Costs were denied upon the affirmance of a decree on the merits where appellant showed that he had received injury which excused though it did not justify his own action. *Port Huron v. Chadwick*, 320.

5 Costs of the Supreme Court, on affirmance of a decree, are allowed only against the actual appellant, if parties jointly interested with him do not join in the appeal. *Smith v. Sherman*, 637.

6 A decree dismissing a bill is affirmed if the appellate court is equally divided as to reversing it; but the affirmance may be without costs. *Dutch Reformed Church Cases*, 329.

7 Costs of the issue on an immaterial plea to the jurisdiction and of the Supreme Court on error were exacted upon granting leave to plead to the merits. *Thompson v. Mich. Mut. Benefit Ass'n*, 523.

8 The sureties on a chancery appeal bond must pay all costs, including those of the Supreme Court in case of affirmance, but they are not liable upon the bond for any portion of a deficiency left on sale of the appellant's property to satisfy the decree. *Kennedy v. Nims*, 153.

9 Witness fees must be taxed as costs in accordance with the showing made by the statutory affidavit attached to the bill of costs, unless there is a counter showing. *Sherman v. Washtenaw Circuit Judge*, 474.

10 When an appeal from the taxation of costs by the county clerk is taken to the circuit judge, the party appealing should specially except in writing to the allowances or disallowances complained of; and the bill of costs should then go upon those exceptions alone and on the same showing as was made to the clerk. *Id.*

costs of sale of property distrained for rent, 549 (1).
shareholder's liability for costs, 557 (2).

COUNTIES.

1 Local equities between newly organized townships set off from the same county should be speedily adjusted and with due respect to the deliberate settlements of the various local authorities. *Higgins v. Supervisors*, 16.

2 A board of supervisors cannot delegate the auditing of accounts to the county treasurer. *Vincent v. Mecosta Supervisors*, 340.

3 A board of supervisors cannot be restrained in its method of business in the disposition of claims if the claimant has not been deprived thereby of an opportunity to be heard. *Id.*

payment of balances in settlement with township, 16 (1-3).
Counts—change of election between, 468 (1).

COURTS.

1 The circuit courts of Michigan are courts of general jurisdiction and can take cognizance of suits on contracts, irrespective of the locality of their origin, provided the parties, by service of process or otherwise, are before them. *Thompson v. Mich. Mut. Benefit Ass'n*, 523.

2 Defects in jurisdiction of subject matter can not be waived, even

where the nature of the action is local or any element of locality is necessary to the jurisdiction *Id.*

3 Defendant's objection that the court has no authority in the particular case must be specifically and seasonably taken if the court is one of general jurisdiction; and it is properly taken by a plea to the jurisdiction. But if a general demurrer has already been filed this objection is waived and the plea presents an immaterial issue and should be struck from the files. *Id.*

4 When a court of competent jurisdiction has become possessed of a case, its authority continues, subject only to the appellate authority, until the matter is finally and completely disposed of; and meanwhile no court of co-ordinate authority is at liberty to interfere with its action. *Maclean v. Wayne Circ. Judge*, 257.

credit to be given to judicial proceedings, 117 (1).
local courts of general jurisdiction; process, 523 (4).
courts may exclude incompetents from jury, 506 (2).
courts can award issue in equity on conflicting testimony, 552 (1).
power to advance money from accumulation fund, 542 (1), 543 (2).
abuse of discretion in allowing change of election, 468 (1).
courts cannot set aside stipulations when lawful, 289 (4).
mutual interference of co-ordinate courts, 258 (2-4).
performance of judicial duty as to confirming sales, 304 (10).
variance in caption of demurrer as to name of court, 324 (1).
courts of probate are of general jurisdiction, 451 (1).
rulings are necessary to right to review, 289 (3).
review of evidence in criminal cases, 563 (1).
review of proceedings to dissolve attachment 164 (4).
Supreme Court will not review denial of new trial, 575 (1).
power of Supreme Court to review on error, 215 (8).
costs of Supreme Court on error, 523 (6); and appeal, 153 (1); 637 (2).
equal division of Supreme Court affirms decree; costs, 329.

COVENANT.

An action of covenant lies in justice's court on a money bond given to secure the payment of $150 or less (How. St. § 6820); and on other bonds if the penalty stated therein and the amount involved by breach thereof do not exceed the sum for which suit may be brought before a justice. *Gray v. Stafford*, 497.

how covenants in a deed limit right of rescission, 100.
covenant against incumbrances; claim based upon, 587.
covenants of a lease; action against partners thereon, 388.

Creditor's bill—to enforce contributions from representatives of co-surety, 8 (3).
to set aside a deed, 637 (1).
to set aside a judgment for fraud, 52 (1).

Criminal conversation—affidavit for capias in civil action for, 570 (7).

CRIMINAL LAW.

1 An information in a criminal case is presumed to have been framed with reference to the facts disclosed on the preliminary examination; and the date of the offence as given therein is supposed to correspond fairly with the facts then stated. *People v. Davis*, 570.

2 A request, in a criminal case, for an instruction that there is no evidence whatever on some essential part of the case, presents a question of law that is a proper subject of exception. *People v. Moore*, 563.

3 There can be no conviction of a lighter offense than is charged in the information unless it is one that is included in that which is charged. *People v. Adams*, 24.

4 The Supreme Court will not, on exceptions before sentence, review

the evidence to determine whether it was sufficient to justify conviction, as that is a question for the jury. *People v. Moore*, 563.
5 New trial need not be granted on the ground that the jury were not kept in a private place until they rendered their verdict if in fact they agreed upon it before leaving their room. *People v. Francis*, 575.
prosecution for adultery. See ADULTERY.
complaint for adultery by husband of guilty party, 570 (2).
bill of particulars in prosecution for adultery, 569 (1).
criminal assault causing death is murder or manslaughter, 24 (2).
evidence in trial for homicide by assault, 289 (6-8).
conviction for assault on information for murder, 24 (1).
forgery differs from uttering forgery, 627.
duty to call witnesses named on information, 564 (1).
review of verdict on exceptions before judgment, 565 (2).
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DAMAGES.
1 A claim for money had and received cannot be classed as unliquidated damages, as the amount of such a claim is always ascertainable. *Powell v. Powell*, 432.
2 Evidence as to prospective profits is inadmissible to fix the measure of damages in a case where the loss of such profits is involved if it appears that they could not be made except under the most favorable circumstances, that the chances against them were numerous and that it was doubtful if the business was profitable at all as conducted. *Talcott v. Crippen*, 633.
3 One who, under a contract, has done valuable service of which the other party thereto has had the advantage, is entitled to recover therefor at the contract rate less any damages the other party may have suffered from incomplete performance. *Fuller v. Rice*, 435.
4 The measure of damages for lumber sold under a contract, subject to inspection, is the contract price for such as passed inspection, and the market value for such as did not but was taken by defendant. *McLennan v. McDermid*, 469.
5 Damages cannot be recovered, whatever the proof or the ad damnum clause, in a greater amount than the aggregate of the items of injury specifically alleged, unless other causes of injury are stated in the declaration. *Abernethy v. Van Buren Township*, 383.
6 Where malice is in no way an element in a litigation over the right to personal property the rule of damages is the same whether the action is of contract or of tort. *Talcott v. Crippen*, 633.
7 Damages as for positive malfeasance charged in the declaration cannot be recovered upon evidence of non-feasance only; and defendant is not required to meet such a showing. *Macumber v. White River Log, &c., Co.*, 195.
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declaration of person prosecuted for murder, showing malice, 616 (2).
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Dedication—for street; breach of conditions by authorities, 320 (1).
DEED.
1 Delivery of an assignment of a land contract into the custody of one of the partners in a firm to which it is assigned can hardly be considered a delivery in escrow, to operate until the assignee shall execute a mortgage back, in a case where both the assignment and the contract have first to be delivered to the other party to the contract in order to obtain from him a deed on which to base the mortgage. If such a delivery be accompanied by a parol agreement as to the terms of the transfer, it cannot, under the Statute of Frauds, be regarded as a trust, but is rather a bailment or agency. *Ortmann v. Plummer*, 76.
2 A notarial certificate is prima facie but not conclusive evidence of the authority of the instrument to which it is attached; and its force may be rebutted by the testimony of the person who appears to have executed the instrument. *Camp v. Carpenter*, 375.
3 A claim against an estate cannot be based upon a covenant against present incumbrances in a deed from decedent to claimant's grantor, if the latter has not assigned to claimant the right of action for the breach but has only conveyed the land. *Davenport v. Davenport's Estate*, 587.

4 A description in a deed may be sustained if, with the aid of the usual local inquiries, there would be no difficulty in locating the land. *Persinger v. Jubb*, 304.
from debtor to creditor, with declaration of trust, 174 (8).
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Depositary—of securities; evidence as to identity, 113 (5).
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Depositions to which valid objection has been made in a chancery suit will not be considered on appeal even though a motion to suppress them was not acted on. *Edson v. Cummings*, 52.
in criminal case; admission of stipulation, 288 (1).
DESCENT AND DISTRIBUTION.
Heirs are not, as such, held responsible for the delinquencies of their ancestors, in the probate system of Michigan. *Rynearson v. Turner*, 8.
absolute devise of entire estate, 18 (1).
Description—in a deed; cured by aid of local inquiries, 304 (5).
of articles in bill of sale, 491 (1, 2).
of petitioner in proceedings for partition, 304 (2).
of proposed drain in petition therefor, 540 (1).
Detroit—charter provision for lien for city taxes, 272 (5).
DEVISE AND LEGACY.
1 A bequest to the children of a specified person, or to their survivors, to be placed at interest by the executor and equally divided when they become of age, and providing that if any of them die under age, leaving children, the children shall take their shares, provides for an accumulation to be distributed at the times specified; and the probate court has no power to require the executor to advance money from the fund. But such advances, if necessary

to the support of the beneficiaries, may be made by the circuit court in chancery on a proper original application. *Knorr v. Millard*, 542.

2 A child unborn at its parent's death is a competent legatee under the parent's will, and its interest under the will vests at the testator's death, possession only being postponed. How. St. §§ 5529, 5546. *Chambers v. Shaw*, 18.

3 A will giving to the testator's wife all his real estate, lands, tenements, etc., together with all his chattels, personal moneys, credits, etc., that shall remain after discharging his legal debts; to have and hold the same in sole possession and to enjoy the sole use and benefit thereof during the term of the legatee's natural life; provided, that any heir afterwards born shall receive out of such property or out of its proceeds or annual income all needful and proper support, maintenance and education during minority, and shall at age receive half the property, or the whole, if the legatee named be dead, is *held*, (1) to dispose of the entire estate, real and personal, without leaving any portion to be dealt with under the Statute of Descents or of Distribution; (2) to bestow it absolutely upon the wife and expected children. *Id.*

4 A man after deeding some land to one of his sons in consideration of the latter's relinquishing all claims of inheritance, made a will in which his wife and another son were the only legatees specifically named. He provided that his wife should have the use of $7000 until this son became of age, when the son was to have $2000 of it. When the mother died the remaining $5000 was to revert to the estate and the son was to share in it "*with the rest of my heirs.*" *Held* that this clause practically revoked the former arrangement by which the other son was excluded from any right of the inheritance, and entitled him not only to a share in the $5000 but in any surplus for distribution. *Turner's Appeal*, 398.

Directors—control management of corporation, 438 (1).
Discharge—of debt, by composition of creditors, 405.
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of mortgage; forgery thereof; good faith, 535.
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in garnishment; when insufficient, 476 (3).
Discontinuance—affecting costs on appeal, 474 (1, 2).
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in denying new trial, 575 (1).
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held by trustees jointly cannot be exercised severally, 174 (5).
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of partnership; effect on subsequent causes of action, 14.
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of townships; notice of application for, 517 (1, 3).
Divorce—residence acquired for divorce purposes, 117 (2).
amendment of divorce bill, 429 (2).
impeachment of decree in collateral suit, 94 (6, 7).
Documents—evidence by letters in suit for breach of promise, 337 (3, 4).

DOWER.

1 A man and woman lived together, as if they were husband and wife, for twenty years and had thirteen children. Then they sepa-

rated and during the man's life the woman was formally married to another man who lived with her nearly three years and then married another woman while the first was still living. *Held* that the first couple were husband and wife, and the following marriage therefore void, so that the last marriage was valid and the woman entitled to claim a widow's share of her husband's estate upon his death. *Peet v. Peet*, 464.

2 A woman who by mutual agreement with the man with whom she was living had parted from and released all claims upon him and left the State and married another man, cannot maintain a claim for widow's allowances against the estate of her original companion, as against a woman who in good faith lawfully married him, without, at least, showing very clearly that she, the claimant, had been his lawful wife. *Young's Appeal*, 592.

3 A proceeding to obtain widow's allowances is not binding upon a woman who had in good faith married decedent after the claimant had left him and was living with him as his wife at the time of his death, but was not made a party to the proceeding brought by her predecessor. *Id.*

dower interest entitles administratrix to petition for partition, 304 (2).
partition before expiration of dower interest, 304 (4).

DRAINS AND SEWERS.

A petition to lay out a drain does not give the drain commissioner jurisdiction to act if the description of the proposed drain is so indefinite as to leave it to him to determine the direction it shall take. *Null v. Zierle*, 540.

drain proceedings reviewed on certiorari, 540 (2).
drain taxes, interpleader for amounts paid in, 159 (1).
taxes on specific parcels constitute separate funds, 159 (3).

EJECTMENT.

Where a person, against whom an action is pending, transfers his real estate, the plaintiff, on recovering judgment, cannot maintain ejectment against the purchaser of the real estate on the ground that it was fraudulently transferred, without showing that the purchaser participated in the fraudulent purpose, or had notice of it. *Brown v. Dean*, 267.

Election—between counts; change of, 468 (1).
Encroachments—on highway; when trespass does not lie therefor, 50 (1).
Enforcement—of lien where prices are blended in mortgage, 77 (3).
Enrollment—of decree as affecting execution sale, 641 (2).
Entry—of judgment in replevin; amendment, 529 (1, 2).
of judgment, fixes right to costs, 474 (2).
on stock ledger as evidence of shareholding, 557 (1).
on premises, creates obligation to pay rent, 141.

EQUITY,

1 A court of chancery may sometimes award issues or other modes of inquiry, in order to satisfy its own conscience, where the testimony on well-defined issues is conflicting. *Wendell v. Highstone*, 552.

2 A bill for an accounting will lie wherever there are fiduciary relations between the parties under which the duty to keep and render accounts exists; and one who files such a bill for an accounting for his share of the proceeds of a business carried on upon joint account, is not confined to his remedy at law, whether a partner or not. *Clarke v. Pierce*, 157.

3 Where a surety on a bond has had to pay the whole of a judgment recovered thereon, his position as a judgment creditor of the other defendants is as perfectly defined as if he had taken a new judgment for the amount they owe him in contribution; and a creditors' bill

filed by him against the representatives of a deceased co-surety should not be dismissed for that reason where no other creditors have sought to prove claims and all the facts have been investigated in a proceeding to which the co-surety's administrator is a party. It would be circuity of action to require the co-surety's administrator to file the bill in behalf of creditors. *Rynearson v. Turner*, 8.

4 A bill of interpleader is not the proper proceeding to enable a township treasurer to determine the right to the amount of specific drain taxes assessed against particular pieces of property and paid under protest, where the several property owners, on the one hand, claim that the taxes are illegal and should be refunded, and, on the other, those individuals who have received township orders against the specific sums so paid, but whose interests are not themselves conflicting, present their orders to the township treasurer to be cashed. *Wallace v. Sorter*, 159.

5 A bill in equity for contribution from the representatives of a surety on a bond will lie in the circuit court if the case involves an inquiry into the liability and solvency of the other sureties that cannot be settled before the probate court or commissioners. *Rynearson v. Turner*, 7.

6 Where one of several indorsers has been held for the full amount of the note, he is entitled to contribution from the rest; and if any of the others have become insolvent or are beyond the reach of process, he is entitled, in equity, to recover from the remainder the proportion they would have to pay of the whole amount if insolvents and non-residents were excluded. *Stewart v. Goulden*, 143.

7 A bill in chancery will not lie where the amount in controversy is less than $100; nor will it where the entire amount is more than that, but has to be disposed of under separate issues no one of which involves so much. *Wallace v. Sorter*, 159.

8 If one who is in privity with a complainant, and has precisely the same rights, does not join as complainant, it is proper to implead him as defendant; and if the case is one in which all rights can be adjudicated without a cross-bill, he is concluded by the decree, and cannot begin another suit in his own behalf. *Waldo v. Waldo*, 91.

9 A bill of review to set aside a foreclosure sale was dismissed where complainant took no steps to facilitate inquiry into the facts or to obviate delays, and did not make any offers. *Thomas v. Burt*, 489.

10 *It seems* that a bill of review filed after foreclosure sale and after the time for appealing has expired, and allowed on the ground that the property has been sold at a great sacrifice to a purchaser who really represents the complainant, should be accompanied by adequate security and contain an offer to redeem or procure a higher bidder. *Id.*

11 Where a sworn plea to a bill of review is regular in form and positive in substance and consists of a denial of the main issue presented, a demurrer to it, if permitted by practice, would be so frivolous as to entitle the pleader to final judgment. And setting the plea down for hearing would be equivalent to a demurrer. If it leaves any issue to be disputed, it should be replied to and the facts investigated. *Id.*

12 A judgment creditor's bill to set aside a deed as in fraud of his rights under the execution did not aver that the sheriff had levied on the land before the bill was filed. The bill was not demurred to, however, and testimony was taken on the whole issues. *Held* proper to allow the bill to be amended on the hearing. *Smith v. Sherman*, 637.

13 After the proofs in a chancery cause have been taken, especially if they have been taken in open court, it is not proper upon the hearing to open the case generally for the reception of further proofs, nor to open it at all without special reasons, and then usually for the

admission only of formal or documentary evidence, or of testimony that has been overlooked by excusable inadvertence. *Wendell v Highstone*, 552.
14 Where a case remains in court upon equities reserved and for future supervision, orders subsequent to the decree can be made as circumstances require. *Loud v. Winchester*, 174.
affirmance of decree dismissing bill; costs, 329.
allegations of bill must be proven as set forth, 318.
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chancery suit in bar of action at law, 390 (1).
costs payable by sureties on appeal bond, 153 (1).
power to make advances from accumulation fund, 542 (1).
equity protecting bona fide holder of forged mortgage, 375 (2, 3).
precedence of adjudications in partition, 304 (1).

ERROR.

1 The power of the Supreme Court to review the action in a circuit court on the trial is derived entirely from the statute and common law practice on bills of exceptions; and if the action of the circuit court has not been excepted to the Supreme Court cannot review it. *Maclean v. Scripps*, 215.
2 Where the course of counsel in addressing the jury has not been excepted to and ruled on, the Supreme Court can not review it even though recited in the bill of exceptions. *Id.*
3 An appellate court has nothing to review in a case at law if the trial court has made no ruling. *People v. Murray*, 289.
4 The writ of error lies to bring up proceedings according to the course of the common law; and it is not appropriate for the review of an order of the circuit court setting aside the appointment of an administrator. *Brinsmade's Appeal*, 537.
5 The refusal of the circuit court to affirm a probate order to an executor to advance money from an accumulation fund to the beneficiaries under a will, does not present a common law issue, and cannot be brought up on writ of error. *Knorr v. Millard*, 543.
6 Error does not lie on the refusal to strike out impeaching testimony that does not infringe the rules of evidence. Its force is for the jury under proper instructions. *Dovey v. Lane*, 49.
7 A verdict cannot be disturbed where the issue is purely of fact and is submitted upon the theory of each party in a proper charge. *Buttrick v. U. S. Fish Freezing Co.*, 172.
8 In a trial for murder by assault, the admission of the question "You pride yourself on your muscle, don't you?" could not be prejudicial error if the answer was No. *People v Murray*, 289..
9 Error cannot be presumed; but on the other hand it may be presumed that an appellant's record is as favorable to him as he is entitled to have it as to facts that are so essential that they cannot be overlooked. *Hamilton v. Langley*, 549.
10 The exclusion of a question cannot be treated as error if the information sought is afterwards admitted by the introduction of record evidence. *Waldo v. Waldo*, 94.
11 A general exception "to the charge of the court as given and to each and every part thereof" is not definite enough; the errors objected to must be specifically brought to the attention of the trial judge before the verdict is rendered so that he can have an opportunity to correct them. *McAllister v. Engle*, 56.
12 The objection that testimony is "inadmissible under the pleadings" is too indefinite to aid an appellate court; the reasons for it should be clearly stated and the attention of the trial judge particularly directed thereto. *Heymes v. Champlin*, 26.
costs of Supreme Court on error, 523 (6).

error cured by sympathy of jury, 425 (2).
error of permitting change of election, 468 (1).
Escrow—delivery in escrow of assignment of contract, 76 (1).
Estate—conveyed by lease in perpetuity to school district, 314 (1).
estate of deceased partner; liability on firm debts, 112 (1, 4).

ESTOPPEL.

1 Technical regularity is required in a pleader who objects to a mere technical irregularity. *Comstock v. McEvoy*, 324.

2 One cannot maintain assumpsit to recover back the amount paid by him in satisfaction of a tax which, as a member of the board of supervisors, he voted to impose without presenting objections to its levy that he knew of at the time. *Wood v. Norwood*, 32.

estoppel binding persons in privity with complainant, 91.
estoppel from asserting undue influence on testator, 347 (6).
estoppel from objecting to sufficiency of proof of loss, 131 (4).
estoppel from resisting an assault, 617 (7).

EVIDENCE.

1 A copy of written representations may be put in evidence where the original has been returned to the person making them, and he has failed to produce it on being notified to do so. *Genesee County Savings Bank v. Michigan Barge Co.*, 165.

2 The error of excluding competent testimony may sometimes be cured by treating it as if it were in evidence. *Smith's Appeal*, 415.

3 Testimony that on a certain occasion a person had not denied guilt is properly excluded if evidence is admitted of all that was said and done, and the inferences are left to the jury. *Maclean v. Scripps*, 214.

4 Where a woman in disordered health charges people with assaulting her it is entirely proper to show that persons so afflicted are subject to hallucinations, even though there has been no showing that she herself is; a good deal of latitude is allowable in drawing out the facts upon the trial of such cases. It is also proper to ask her if she has not made similar charges against others, and if, shortly after the assault alleged, she had not told a friend of a previous one, without mentioning this; and to show the facts if she denies them. *Derwin v. Parsons*, 425.

5 A circus performer went to a dance and was pitched upon by some of the participating citizens. He shrieked "Hey, Rube!" and at this signal a lot of other circus men rushed in and a fight followed in which the town marshal was killed by one of the circus men, as was supposed. *Held*, that on the latter's trial it was proper to exclude as hearsay and immaterial what one of the witnesses had heard of the citizens being drunk and of their having trouble with the marshal. *People v. Murray*, 289.

6 Statements made by persons who have been partners but after the firm has dissolved and its debts have been assumed by another member are immaterial in seeking to show the liability of a non-consenting partner for bonds specially deposited, the firm not having been organized to receive such deposits and getting no profit from them. *Hathaway's Appeal*, 112.

7 Photographic copies of handwriting are inadmissible as evidence of existing documents if the originals can be had. *Maclean v. Scripps*, 214.

admissions of debtor not affecting title, 1 (2).
admission of evidence curing exclusion of questions, 94 (4).
as to assurances of insurance agent about payment, 188 (4).
as to capacity to make a will, 346 (1-3, 5).
as to claim against estate for money lent, 545 (1).
as to claim on a note against an estate, 416 (7).
as to conversion by party in peaceable possession, 94 (5).

as to identity of special deposit, 112 (4).
as to management of trusts, on accounting, 174 (2, 3).
as to private dealings with decedent, 545 (3).
as to prospective profits in showing damages, 633 (4).
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bearing on destruction of former will, 65 (2, 3).
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comflicting evidence; award of issues in equity, 552 (1).
depositions, properly objected to, not considered on appeal, 52 (2).
evidence in action for breach of promise, 336 (1); 337 (2-4).
in action for injury for defective bridge, 147 (4).
in action for libelous charge of illicit intercourse, 214 (1).
in action for wages, as to terms of contract, 45 (2).
in criminal case; exceptions, 565 (2).
in proceedings to establish a will, 65 (2-4).
in prosecution for adultery, 570 (5-8).
in replevin for attached goods, 633 (2).
in suit for price of goods shipped, 468 (2).
exclusion of facts known equally to decedent, 3 (3); 415 (1).
force of notarial certificate 375 (1).
must support request to charge, 456 (3).
necessary for submission of question of fact, 612 (1).
necessary to support a finding of facts, 61 (2).
objections to evidence must be explicit, 60 (5).
of agreement void under Statute of Frauds, 435 (1).
of amount secured by mortgage, 124 (5).
of assault snd battery, 105.
of assignee's title to debt secured by mortgage, 124 (3).
of failure of consideration, 484 (1, 2).
of files and record in action on special bail, 26 (4).
of marriage, by cohabitation and reputation, 464 (1-3).
of motive, in action for newspaper libel, 214 (4).
of one's representations as to his solvency, 164 (6).
of payment of debt; burden of proof on foreclosure, 124 (4)
of record issues in return to order to show cause, 16 (3).
of stockholder's liability by judgment, 557 (1).
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on appeal of claim against estate, 112 (2).
on application to dissolve attachment, 164 (4); 165 (9).
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on prosecution for homicide, 289 (6-8); 616 (1, 2); 617 (3).
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refusal to strike out impeaching testimony, 49.
review of evidence in criminal cases, 563 (1).
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to support ejectment brought by judgment creditor, 267 (1).
under general issue in action for use, 630 (2).
use of impeaching testimony, 267 (2).
Examination—for criminal offence; information, 570 (8).

EXCEPTIONS.

1 The conclusions of a jury in a criminal case cannot be disturbed upon exceptions before judgment, if there was any evidence tending to prove the fact agreed on. *People v. Henshaw*, 565.

2 The verdict of a jury in a criminal case cannot be disturbed on exceptions if the evidence had any tendency to support it and the case was prorerly presented to the jury on the law. *People v. Francis*, 575.

3 The discretion of the circuit court in denying a new trial is not reviewable by the Supreme Court. *Id.*

necessary to enable appellate court to review, 215 (8, 9); 563 (1).
on ruling as to existence of evidence, 563 (1, 2).
exceptions to charge; when too indefinite, 56 (1).
to support appeal from taxation of costs, 474 (4).
Exclusion—of competent testimony; how cured, 415 (2).
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of evidence known equally to decedent, 3 (3), 415 (1).
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of evidence that a person has not denied guilt 214 (3).
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of questions, cured by admission of records, 94 (4).
of testimony as to understanding of statement, 188 (4).
of testimony, in attachment proceedings, reviewable, 164 (4).
EXECUTION.
1 A debtor can do what he pleases with any of his property that is exempt from execution, and his disposition of it cannot subject it to execution or affect the exemption. *Buckley v. Wheeler*, 1.
2 Notice of proceedings to set aside an execution sale should be given to the purchaser. *Wilkie v. Ingham Circ. Judge*, 641.
3 Mandamus to vacate an order setting aside a sale on an execution that had been levied without waiting for the enrollment of the decree was *denied*, even though no notice of the proceedings to set aside the sale had been given to the purchaser, where (1) the date of the decree, as shown in the execution, was notice of the fact that the execution was prematurely issued; and (2) where the motion to set aside was not made until the time to redeem had expired. *Id.*
fraudulent agreement to screen property from execution, 7 (2).
fraudulent settlement to protect property, 3 (1).
in void garnishment proceedings; replevin, 394 (6).
execution of attachment issued by a justice, 61 (1).
execution of corporate note; denial of liability, 438 (2).
purchaser of exempt goods has good title, 1 (2).
execution sale; notice of proceedings to set aside, 641 (1, 2).
setting aside deed as in fraud of execution, 637 (1).
EXECUTORS AND ADMINISTRATORS.
1 The probate courts of Michigan are courts of general jurisdiction in probate matters; and where foreclosure proceedings were taken by foreign executors to whom letters testamentary had been issued in Michigan, and the proceedings were taken under a stipulation by the parties to the suit that the executors were duly appointed and acted as such, and the probate records showed nothing to the contrary, it was *assumed* that the appointment referred to in the stipulation meant the appointment in Michigan, and that such a showing was made to the court, by sworn petition or by oral proof, that the estate had such property interests in the county as would warrant the issue of the letters. *Alexander v. Rice*, 451.
2 A foreclosure by executors is not invalidated by the fact that only two out of three executors acted, if these two acted under proper authority and there is no showing that the third ever gave an official bond or qualified. *Id.*
3 An administrator has no power as such to invade at pleasure the premises of a person in peaceable possession of the property of the estate and take it therefrom without process. *Waldo v. Waldo*, 94.
4 Where a claim against an estate is for a special deposit of a quantity of government and state bonds with a firm of which decedent was a member, testimony is fatally defective, which, while tending to show the deposit of bonds, does not identify their character. *Hathaway's Appeal*, 112.
5 In a proceeding against an estate to recover the face of a note given

by decedent it was shown that the maker had directed the cashier of a bank to pay the claimant a certain sum, and had himself given the cashier a cheque to serve as a voucher. *Held*, that after the payment of the amount had been shown the cheque was properly excluded as evidence, at least as against the claimant. *Smith's Appeal*, 416.

6 A decree compelling a release by executors was sustained by a divided court where one of two joint owners, acting with the other's verbal authority, had made a contract of sale the terms of which, after various transfers, had been fulfilled, but where the executors and legal representatives of the other joint owner, who had died meanwhile, claimed to retain their decedent's original interest. *Gardner v. Warren*, 309.

7 In prosecuting a claim against an estate for moneys lent to the decedent by claimant, but not in connection with his business, general testimony from his book-keeper that he, the book-keeper, found no such item debited on the cash account, would be irrelevant and could not be admitted in defense to the claim, especially if it did not appear that he would know what amounts were received by his employer; it would also be improper to show by him or others that he or they had been present when claimant and decedent had talked about other claims and had never heard this one mentioned. Nor would the decedent's widow be allowed to testify that she did not know of her husband's borrowing from claimant. *Chadwick v. Chadwick*, 545.

8 An action by the probate judge upon an administrator's bond cannot be brought in a justice's court when the penalty of the bond exceeds the jurisdictional limit of such court, and when judgment for the whole is sought so that the writ of scire facias may be resorted to on further breaches. How. St. § 6003. *Probate Judge v. Dean*, 387.

appeal from allowance by probate commissioners, 596.
executor cannot advance from accumulation fund, 542 (1); 543 (2).
evidence in suit brought by administrator, 3 (3).
review of order setting aside appointment of executor, 537.
claim against estate on a demand note, 415 (5).
claim based on covenant against incumbrances, 587.
claim for widow's allowances, 592 (1, 2).
impleading co-surety; administrator in bill for contribution, 8 (3).
issue on appeal of claim against estate, 112 (2).
liability of estate of deceased partner, 112 (1, 4)
petition by administratrix for partition, 304 (2).

Exemptions—debtors can dispose of exempt property, 1 (1, 2).
exemption from levy to satisfy personal taxes, 272 (3, 5).
exemption from process; waiver of, by non-resident, 523 (4).
exemption of goods from execution; wife's rights, 538 (1).

Failure—of consideration; evidence, 484 (1, 2).

FALSE PRETENCES.

Representations made by a person in business to a commercial agency are presumed to have been made for the purpose of obtaining credit, and if others, in giving it, rely on them as coming from him, they are admissible in evidence where such credit is in question. *Genesee County Sav. Bank v. Mich. Barge Co.*, 164.

False—warranty; note obtained by, 213.
Fee—base-fee conveyed by lease in perpetuity to corporation, 314 (1).
fee simple; title in; mistake as to consideration, 100.
Fees—of witnesses; taxation as costs, 474 (3).
of sheriff; allowance by supervisors, 340 (1-5).
Fences—obstructing ways; notice of removal, 50 (1).

Fiduciary debts—arising out of trust relation, 174 (8).
Fieri facias—allegation of issue, in declaring on special bail, 26 (3).
Files—striking plea to jurisdiction therefrom, 522 (3).
Finding—on undisputed testimony, 456 (2).
of facts; evidence and instructions, 61 (2).
Foreclosure—by foreign executors, 451 (1, 2).
cost of redemption from; security for, 552 (1).
decree on foreclosure covering cost of tax-title, 22 (2).
foreclosure, forgery of discharge of prior mortgage, 535.
Foreign—jurisdiction; suit on domestic insurance policy, 189 (5).
FORGERY.
Forgery and uttering a forgery are two distinct offences; and a person cannot be convicted under an information for forgery when the complaint on which he was examined only charged him with uttering the forgery. *People v. McMillan*, 627.
of discharge of mortgage, good faith, 535.
forgery of mortgage affects bona fide holder, 375 (2, 3).
Form—of action as affecting measure of damages, 633 (3).
form of action fixed by subject of pleadings, 331 (1).
of action for money paid to benefit association, 487.
of lease does not affect form of action on it, 630 (3).
Forum—of action on contracts, not fixed by locality, 523 (5).
FRAUD AND FRAUDULENT CONVEYANCES.
1 Fraud cannot be presumed, but must be proved: and the burden of proof is on the party complaining of it. *Brown v. Dean*, 267.
2 An agreement to support one's parents is not, as against creditors, a valid consideration for a deed from the parents if made with the purpose of putting the property beyond the reach of execution; such an agreement is for the direct benefit of the grantors. *Rynearson v. Turner*, 7.
attachment against property fraudulently sold, 610.
bill to set aside judgment for fraud, 52 (1).
creditors' bill to set aside deed, 637 (1).
evidence on motion to dissolve attachment, 165 (9).
parties to settlements cannot avoid them for their own fraud, 3 (1).
transfer of realty by defendant in pending suit, 267 (1).
FRAUDS, STATUTE OF.
1 A. let B. take a yoke of oxen to use in clearing land for A.'s wife, and with the understanding that B. should own the oxen when he had done $100 worth of clearing. *Held*, that this arrangement was not void under the Statute of Frauds. *Sutherland v. Carter*, 151.
2 A promise to pay another's debt is void under the Statute of Frauds unless in writing and signed by the person promising or by his duly authorized agent. *Ruppe v. Edwards*, 411.
3 The Statute of Frauds declares that a contract for the sale of goods for more than fifty dollars shall not be valid unless the purchaser shall accept and receive part of the goods, or shall give something to bind the bargain, or unless some memorandum of the bargain shall be signed by the party to be charged. How. St. § 6186. *Held* that this does not cover a tailor's contract to make a customer a sixty dollar overcoat that has actually been sent to the customer when finished and has been returned by him for alterations after which it has been held subject to his order. *Rasch v. Bissell*, 455.
4 If a bill of sale of a shingle-mill is taken as security for its owner's debts but the mill is left in his possession a copy of the bill must be filed at once or the property cannot be protected by it against other creditors of the owner (How. St. § 6193) whose good faith alone will not protect the unrecorded transfer. *Tulcott v. Crippen*, 633.
5 A parol agreement that would be void under the Statute of Frauds

may nevertheless be put in evidence in an action on it, to the extent to which the parties have carried it out, since they have so far agreed to be governed by its terms. *Fuller v. Rice*, 435.
agreement for year's lease to begin in future, 462 (2).
oral promise to pay another's debt, 411, (1, 3).
sale valid by consent of parties, 365 (1).
parol agreement accompanying delivery, 76 (1).

GARNISHMENT.
1 Persons cannot be held as garnishees upon a disclosure which admits neither an indebtedness nor the possession of property belonging to the principal defendant. *Ball v. Young*, 476.
2 Several persons cannot be held as joint garnishees unless the principal defendant is indebted to them jointly; and this is so whether the garnishment proceeding is based upon a debt or upon the possession of property. *Id.*
3 Where an agent for the collection of a debt that is secured by mortgage takes possession of the mortgaged property, he cannot be held with the creditor as a joint garnishee in a proceeding in which the debtor is principal defendant. *Id.*
4 Garnishment proceedings are special and statutory, give a harsh and peculiar remedy and ought not to be resorted to when redress can be had at common law. But when taken, the statutory requirements are to be strictly followed. *Iron Cliffs Co. v. Lahais*, 394.
5 A garnishee's action is restrained only for the time provided by statute for such service on the principal debtor as is necessary to reach the credits and effects in the garnishee's hands. *Axtell v. Gibbs*, 640.
6 Garnishment proceedings must be dismissed if service upon the defendant in the principal case has not been obtained within the statutory period, whatever steps have been taken to keep the principal suit alive for the recovery of a personal judgment. *Id.*
7 Garnishment proceedings are ancillary to the principal case, and if that is defective, go down with it. *Iron Cliffs Co. v. Lahais*, 394.
8 A disclosure in garnishment before jurisdiction of the principal case has been obtained, is of no force, and the subsequent appearance of the principal defendant does not cure it. *Id.*
9 Judgment cannot be rendered against a garnishee until he has been summoned to show cause to the contrary, or has consented in person or by attorney. *Id.*
alias summons in garnishment, 639 (1, 2).
executor in void garnishment proceedings; replevin, 394 (6).

GAS COMPANIES.
1 A gas company is of a public nature if it exercises its rights by virtue of a state law and local ordinances; and wherever, within its assigned limits, it has connected its mains and service pipes with the pipes and fixtures of individuals it is bound to supply them with gas, on reasonable conditions, when they ask for it. *Williams v. Mut. Gas Co.*, 499.
2 A gas company can require those who wish for gas to give security for the payment therefor, or to deposit a fair sum in advance, as a reasonable condition to supplying them. So *held* where the consumer used about sixty dollars worth a week, and the company required him to keep one hundred dollars on deposit with them. But the requirement that the consumer should also make a special contract with them would be unnecessary as the law would imply whatever contract was needed. *Id.*
General—count for use and occupation, 630 (3).
demurrer, waives objections to jurisdiction, 522 (1, 3).

exceptions to charge to jury, 56 (1).
expression in pleading; construction, 195 (1).
issue; notice attached to plea, 94 (2).
issue to common counts for use and occupation, 630 (2).
jurisdiction; circuit courts have, 523 (5).
objections to evidence insufficient, 66 (5).
verdict; corresponding to special verdict, 215 (6, 11).
Good faith—of marriage to person formerly married, 592 (1, 2).
of possession of goods held as security, 633 (1).
of second mortgage, 535.
Goods—sold; claim of set-off, 432 (1).
GUARDIAN AND WARD.
1 Sufficient publication of notice of a guardian's sale may be shown by other evidence than the affidavit thereof, which is for the purpose of a permanent record. *Persinger v. Jubb*, 304.
2 Want of an affidavit of the posting of notice of a guardian's sale is not fatal if the fact is shown in the sworn report of the sale and is recited in the order confirming it. *Id.*
3 A guardian's report of the sale, for a round sum, of two parcels of land, one belonging to each of two wards, is not necessarily to be construed as showing that both were sold together for one sum or to impeach the judge's performance of his duty in satisfying himself as to the facts before confirming the sale. *Id.*
4 A receipt by a ward for property held by his guardian is no more conclusive than any other receipt, and while it justifies the guardian's discharge neither the receipt nor the discharge precludes the ward from showing that under a mutual arrangement the guardian has not actually accounted for part of the property. *Powell v. Powell*, 432.
5 Undue haste in the settlement of a guardian's account is not favored. *Id.*
6 The probate judge's approval of the bond given by a guardian before selling his ward's real estate sufficiently appears by the recital of the fact in the order confirming the sale. *Persinger v. Jubb*, 304.
claim for personalty not accounted for by guardian, 432 (1).
entitling of guardian's oath, 304 (6).
guardian for minor heirs can petition for administration, 304 (2)
replevin for article sold by minor child 615.

Handwriting—evidence by photographic copies, 214 (2).
Hearing—on motion to dissolve attachment, 164 (2).
Hearsay—as to circumstances on trial for murder, 289 (6).
evidence of statements made after the fact, 188 (4).
impeachment of hearsay testimony, 267 (2).
Heirs—not answerable for ancestors' delinquencies, 8 (4).
Hiring—team; driver as the bailees' servant, 372.
Holiday—complaint for liquor selling on legal holiday, 584 (1).
HOMICIDE.
1 A criminal assault resulting in death is either murder or manslaughter in Michigan. *People v. Adams*, 24.
2 A statutory information for murder will not sustain a conviction for a mere assault, especially if it does not set out a murder by assault. *Id.*
3 Where, in a case of killing by pistol shot, it has been shown on post mortem examination that the shot was too large for the pistol respondent claimed to have, it was also necessary to show that the fatal shot came from respondent's pistol; and when it had been shown that two shots were fired, it was important, independently of any claim that respondent fired both shots, to know who else had pistols. *People v. Curtis*, 617.

4 Coolness and deliberation cannot be required of those who are concerned in a riotous and exciting affray involving a considerable number of persons; and the absence of these qualities cannot fairly be treated as aggravating the acts of persons not originally in the wrong. *Id.*

5 It is not good law to hold that though insulting language will not justify a dangerous assault, yet if it has provoked one it precludes the person who used it from resisting the assault and deprives others of the right to interfere for his protection. *Id.*

6 If, upon a prosecution for a homicide done in an affray, declarations of malignant purpose are shone that were made by respondent before the killing, his remarks accompanying them should also be received in order to determine whether the threats were not mere brag. *Id.*

7 In a prosecution for homicide committed in a riotous affray among neighbors and apparently in defense of a brother, all facts leading thereto and connected with it should be admitted, including the conduct of other participants beside respondent, and especially of those who provoked the assault. The dangerous character of the deceased and his disposition when drunk are also material; and so would be the fact that the person in whose behalf respondent interposed was afraid deceased would cut him as he had others. *Id.*

8 A dangerous felony may be forcibly prevented by any one who is not himself in the wrong directly or by complicity. *Id.*

9 A man has a right, in a riotous affray, to interfere for the protection of a brother who is in personal danger whether the brother was blameless or not. And the use of a deadly weapon in such interference does not of itself show malice where neither began the affray and there had been no space for cooling time nor opportunity to withdraw safely. *Id.*

homicide by assault; evidence, 289 (6-8).

HUSBAND AND WIFE.

1 Continued cohabitation as husband and wife establishes the relation without any actual marriage ceremony if the parties are competent to marry and consent to take each other as husband and wife. *Peet v. Peet*, 464.

2 Reputation is important as evidence to establish the fact of a marriage, but it cannot disprove an actual marriage. And where there is doubt, the presumption should favor a lawful marriage rather than notorious immorality. *Id.*

3 It is not clearly error to permit a father to testify in a breach of promise suit brought by his daughter that after he had given his consent to defendant upon the latter's telling him that the lady had consented to marry him, the pair conducted themselves towards each other as though they were engaged. This is not to show the mutual promise, but to show that defendant trifled with plaintiff's affections. *Vanderpool v. Richardson*, 337.

4 Surmises and conclusions of witnesses, based on what they have observed of mutual behavior, are not sufficient to prove a promise of marriage; the facts observed should be shown. *Id.*

5 Where plaintiff in a breach of promise suit has put her letters to defendant in evidence, defendant may put in evidence the replies. *Id.*

6 In a suit brought by a woman for breach of promise, the plaintiff may show that she had no independent means, and may put in evidence the letters written by her to defendant before he broke the engagement. And the jury may consider the length of the engagement, and give damages for injury to her feelings or reputation, or any circumstances of indignity. *Id.*

7 A Michigan wife has special statutory rights in such household goods,

as would be exempt from execution ; and if her husband leaves her he cannot get possession of them by writ of replevin, even if they consist of books, a shot gun and a revolver. *Smith v. Smith*, 538.
8 In a collateral proceeding depending upon a divorce procured in another state, the court which granted it must be presumed to have had jurisdiction, and to have proceeded on the merits in accordance with the local laws. *Waldo v. Waldo*, 94.
9 An Indiana divorce cannot be impeached in a purely collateral civil action in Michigan by seeking to show that the residence of the complainant in the divorce suit was not such as to give the Indiana court jurisdiction. *Id.*
10 One who leaves Michigan temporarily to avoid legal process and stays in Indiana a year for the purpose of getting a divorce meanwhile, does not thereby acquire a residence which will give the Indiana court jurisdiction of his divorce proceedings. And notice of such proceedings, served on the wife in Michigan, need not be heeded. *Reed v. Reed*, 117.
11 A divorce bill cannot be amended by substituting a prayer that the marriage be annulled. *Schafberg v. Schafberg*, 429.
12 How. St. § 6622 in requiring the issue raised upon a bill to annul a marriage to be tried by jury is not mandatory but secures to either party the right to a jury, unless it is waived. And it will be considered waived if after replication a motion is not made by one party on notice to the other, for a feigned issue. *Id.*
13 Eighteen years' delay in suing a husband for support where the wife is living apart from him is fatal to the suit, even if the wife originally left him for cause. *Reed v. Reed*, 117.
clandestine execution of mortgage by wife, 375 (3).
partnership dissolved by marriage of parties, 3 (2).

Identification—by terms of complaint, of illegal act complained of, 628.
of estate by title of proceedings for partition, 304 (6).
of keeper of saloon, 566 (1); 584 (3, 4).
of special deposit in claiming amount from an estate, 112 (4).
Identity—of jury's answers to special questions, 215 (6, 7).
Impeachment—of divorce granted by foreign court, 94 (6).
of judicial proceedings taken in another state, 117 (1).
of notarial certificate, 375 (1).
of party testifying in case of indecent assault, 425 (1); 426 (3).
of receipt given by borrower to loan agent, 56 (2).
of witness in criminal case, 570 (4, 7).
of witness; purpose of inpeaching testimony, 267 (2).
refusal to strike out impeaching testimony, 49.
Implied—contract to pay for what is used, 499 (2).
Incompetency—of juror entitles court to exclude him voluntarily, 506 (2).
to make will ; evidence as to capacity, 346 (1-5); 347 (6); 478.
Incumbrances—on insured property; statement of insured, 131 (1).
Indiana—divorce: constructive residence, 117 (2), impeachment of, 94 (6).
Indorsement—contribution by co-indorsers, 143.
indorsement necessary to presumption of payment, 416 (8).
indorsement of witness' name on information, 564 (1).
transferring non-negotiable paper by indorsement, 525.
presumption as to place of payment, 188 (2).
INFANTS.
Where a man brings replevin in his own name and as owner, for a pony sold by his minor daughter, and does not sue in her behalf as guardian or next friend, it is error to treat the case, in charging the jury, as one of a sale by an infant, conveying no title. *Ash v. Mathes*, 615.

Information—covering lighter offense than is charged, 24 (3).
for murder, not sustaining conviction for assault, 24 (1).
for uttering will not support conviction for forgery, 627.
presumed to be framed according to facts, 570 (8).
witnesses whose names are indorsed, 564 (1).
Inheritance—exclusion from rights; revoking clause, 398.
words of inheritance, not required in lease to corporation, 314 (1).
Injunction—demand and violation of will not sustain replevin, 538 (2).
to restrain collection of taxes; when allowed, 28 (3).
Injury—allegations govern recovery of damages, 383 (3).
injury done by servant; trespass for, 402 (2).
injury from defective bridge; township, 383 (1).
injury to goods by landlord in removing them, 331 (3).
injury to passengers alighting from cars, 606 (1).
INSOLVENCY.
effect on co-indorser's obligation to contribute 143.
effect upon levy of personal tax, 272 (4).
Instructions to jury—as to finding facts, 61 (2).
must be objected to seasonably 215 (11).
refusal of request to charge not based on testimony, 456 (3).
requests to charge to be based on evidence, 415 (3).
that there is no evidence, 563 (2).
when exception thereto is too indefinite, 56 (1).
when the instructions are proper, verdict is not reviewable, 172.
INSURANCE.
1 The stipulation in an insurance policy that any application, survey, plan or description of the property referred to therein shall be considered part of the policy, does not apply where the application &c. is not in writing. *O'Brien v. Ohio Ins. Co.*, 131.
2 A mutual insurance company organized under How. St. ch. 132 is allowed to insure "live stock, wagons carriages, harness," etc., "being upon farms as farm property." The by laws of a certain company did not allow it to insure village property that was within one hundred feet of other buildings, and provided for canceling the policy if the situation of insured property was so changed as to increase the risk. *Held*, that the company would not be liable for a horse, harness, cushion and blanket insured as "personal farm property in buildings and on farm," but destroyed by fire while in the barn of a village hotel that stood within one hundred feet of other buildings. *Wildey v. Farm. Mut. F. Ins. Co.*, 446.
3 Where an insurance agent himself fills out a policy upon a mere oral application for insurance, and the applicant is not asked the amount of incumbrances, and does not know that it should be stated, his omission to state it is no defense to the payment of a loss, unless in cases involving unusual risk not likely to be contemplated by the insurer. *O'Brien v. Ohio Ins. Co.*, 131.
4 The conditions prescribed by an insurance policy as to the payment of a premium note cannot be waived by an insurance agent if the policy expressly stipulates that they shall not be. *McIntyre v. Mich. State Ins. Co.*, 186.
5 The restrictions in policies of insurance upon the power of agents to deviate from their express terms generally apply only to those parts of the transaction which relate to the formation and continuance of the contract, and not to those which prescribe the condition of suit on the policy, such as notice, delivery of proofs or submission to examination. *O'Brien v. Ohio Ins. Co.*, 131.
6 An insured person who is notified by an agent of the insurance company that the company absolutely refuse to pay a loss, is excused from furnishing proof of the loss or demanding payment before

bringing suit on the policy; especially if an agent of the company has made investigation. *Id.*

7 An insurer who has absolutely denied liability for a loss is estopped from objecting to the want or sufficiency of the preliminary proof thereof; and a court will not presume reasons to support his refusal to receive such proof if seasonably offered. *Id.*

8 Where an insured person gives a premium note in payment of his policy he is bound to attend to its payment himself at maturity and is not excused by the non-presentation of the note, especially if it specified no place of payment. *McIntyre v. Mich. State Ins. Co.*, 188.

9 A provision in the policy of a domestic insurance company that omission to sue for twelve months after a loss should be conclusive against the validity of the claim is not suspended for the period occupied in attempting to sue in foreign jurisdictions. *Id.*

10 In an action on an insurance policy plaintiff sought to meet the defence that the premium note had never been paid by showing that the agent of the insurance company had told him the company had given him, the agent, credit for the note. The plaintiff's further offer to show that he understood this to mean that the agent had paid the note was properly excluded as mere inference; and the agent's statement to that effect, if made after the fact, would have been mere hearsay. *Id.*

Intent—in allowing saloon to be kept open, 566 (2).
of person selling liquor in single instance, 582.
Interest—allowing interest on special deposits, 113 (5).
conditions as to payment of interest, 525.
of posthumous child in devised estate, 18 (2).
on judgment against bank; shareholder's liability, 557 (2).
Interference—by one court with another's action, 257 (1); 258 (2–4).
Interlocutory—proceedings; to dissolve attachment, 164 (1).
Interpleader—based on proceedings to run township drain, 159 (1).
Intervention—by bona fide purchaser against vendor's lien, 77 (2).

INTOXICATING LIQUORS.

1 Selling a pint of liquor in a single instance without having given the bond required of liquor sellers is a violation of How. St. § 2270, whatever be the intent of the offender as to going into the business of liquor selling. *People v. Kropp*, 582.

2 A complaint which merely charges that on a particular day the defendant sold liquor without having given a bond, will not support a conviction under How. St. § 2270 if it does not allege a sale to any person or persons or identify some act or acts as illegal. *People v. Minnock*, 628.

3 How. St. § 2274 requires all saloons to be closed on Sunday, and any person who violates this requirement is liable to punishment as for a misdemeanor. Id. § 2275. *Held* that under these sections a saloon-keeper was properly convicted whose clerk, without his knowledge or consent, but while he was on the premises, had opened the saloon on Sunday morning to have it cleaned out and had meanwhile sold a drink to a casual customer who insisted on having it. *People v. Roby*, 577

4 Where a saloon-keeper is prosecuted for violating the law which requires all saloons to be closed on Sunday, the respondent's intent in allowing his saloon to be open is immaterial, even if the opening was the act of his bar-tender and without his knowledge or express authority. *People v. Blake*, 566.

5 In a prosecution for keeping a saloon open on Sunday, testimony that respondent kept the saloon in question, and that the witness knew him tends to identify the respondent as the proprietor of the saloon. *Id.*

6 A complaint and warrant for selling liquor on a legal holiday were *held* sufficient where they set forth that on the date specified the respondent, "being then and there a keeper of a saloon in said village and the same being a place where spirituous and malt liquors are sold at retail, and the said 4th of July, A. D. 1882, being a legal holiday, did not keep the said saloon closed, and did then and there on the said 4th day of July, A. D. 1882, a legal holiday, keep the said saloon open for the purpose of selling spirituous and malt liquors at retail therein, the said [respondent] not being then and there a druggist nor a person whose business consists in whole or in part of the sale of drugs and medicines," etc. *People v. Baumann*, 584

7 In identifying the proprietor of a saloon it was *held* proper to ask a witness as to the contents of a license card which he testified he had seen in the saloon. *Id.*

8 Upon a prosecution for keeping a saloon open testimony that the saloon was open on a certain day and identifying respondent as keeper of the saloon and as keeping liquor and being about the building though the bar-tender was in charge, is enough to go to the jury upon the main charge. *Id.*

9 A complaint under How. St. § 2274 for not closing a saloon "at the hour of nine o'clock" on a specified day, and for keeping it open "until twenty minutes past eleven o'clock in the afternoon of said day," is not bad for failing to show that nine o'clock at night was meant and for using the word "afternoon." *People v. Husted*, 624.

Issue—as to competency or volition of testator, 347 (6); 478.
as to validity of stipulation, 595.
awarded by court of chancery, 552 (2).
appealing claim against estate. 112 (2).
on bill to annul a marriage, 429 (1).
issue of execution; time for, 641 (2).

Joinder—of interested parties in appeal; costs, 637 (2).
Joint—action for money paid to mutual benefit association, 487.
joint garnishee; agent for collection is not, 476 (1).
joint garnishee; what necessary to constitute, 476 (2).
joint defendants; enforcement of mechanic's lien, 370.
joint discretion cannot be exercised separately, 174 (5).
joint judgment in replevin where possession is joint, 423 (1).
joint owners, making contract of sale with verbal authority, 309.
joint wrong-doer in conversion of timber, 380.

JOINT TENANTS AND TENANTS IN COMMON.

One who has leased a farm upon the tenant's agreement to deliver in payment half the produce is a tenant-in-common in respect to such produce and can maintain replevin for it after it is in condition to deliver. *Sutherland v. Carter*, 471.

Judge—tries questions of fact on motion to dissolve attachment, 164 (2).

JUDGMENT.

1 A joint judgment in replevin is proper where the possession of the defendants was joint and they were connected in all the transactions on which it was based. *West Mich. Sav. Bank v. Howard*, 423.

2 A judgment, the entry of which was corrected by mandamus, was ordered to take effect from the date of the correction, so that full opportunity to ask for a review thereof might be saved. *Frederick v. Mecosta v. Circuit Judge*, 529.

3 A bill will lie to set aside a judgment for having been obtained by fraud between the judgment debtor and defendant, even though it has already been made the foundation in another state, of a suit in which defendant has attached the judgment debtor's property there.

And complainant need not himself have obtained a judgment against the debtor as a foundation for the suit to set the judgment aside. *Edson v. Cumings*, 52.
4 A bill will not lie in one court to cancel a judgment entered in a court of co-ordinate jurisdiction if the latter court was competent to dispose of the case. *Maclean v. Wayne Circuit Judge*, 258.
5 A judgment will not generally be disturbed for technical defects in a declaration that is sufficient to sustain it and has not been demurred to. *Heymes v. Champlin*, 25.
judgment against garnishee; summons to show cause, 394 (3).
judgment by justice of peace to enforce mechanic's lien, 370.
judgment creditor; bill to set aside a deed, 637 (1).
judgment entry; mandamus to change, 529 (1, 2).
entry of judgment fixes right to costs, 474 (2).
exceptions before judgment; verdict in criminal cases, 565 (2).
judgment in action on special bail; defects in declaration, 26 (3).
judgment in evidence of stockholder's liability, 557 (1).
judgment on bond paid by only one surety, 8 (3).
judgment in replevin for goods under attachment, 529 (1).
judgment on demurrer to plea to bill of review, 489 (2).
personal judgment in garnishment; service, 640 (1).
Judicial—proceedings to which credit must be given elsewhere, 117 (1).
Jurisdiction—continues when once acquired, 257 (1), 258 (2-4).
costs of immaterial issue, 523 (6).
jurisdiction in chancery based on amount in controversy, 159 (2).
jurisdiction of action involving land title, 50 (2).
jurisdiction of circuit courts is general, 523 (5).
jurisdiction of divorce proceedings on constructive residence, 117 (2).
jurisdiction of foreign court in divorce proceedings, 94 (6, 7).
jurisdiction of justice over action of covenant on money bond, 497.
jurisdiction of justice over actions on bonds, 387 (1, 2).
jurisdiction of justice to try mechanic's lien proceedings, 370.
jurisdiction of main case must precede disclosure, 394 (4).
jurisdiction of personal action against absent defendant, 394 (2).
jurisdiction of probate courts is general, 451 (1).
jurisdiction of subject matter; no waiver, 522 (2).
service within jurisdiction; stockholder's liability, 557 (1).
suit on insurance policy in foreign jurisdiction, 189 (5).
jurisdiction to lay out drain; the petition therefor, 540 (1, 2).
waiver of objections to jurisdiction by demurrer, 522 (1, 3).
JURY.
1 Courts should protect the rights of parties in selecting jurors and may properly exclude any incompetent or drunken person, even against objection. *Torrent v. Yager*, 506.
2 The presence upon jury of talesmen over sixty years old is not ground for challenge to the array, but will sustain a challenge for cause, as the only persons qualified for talesmen are those who are not exempt from jury duty. How. St. § 7555. *People v. Baumann*, 574.
3 A question of fact is not to be submitted to a jury if there is no evidence bearing on it. *Byles v. Golden Township*, 612.
4 A jury must find for the plaintiff if his claim is supported by undisputed testimony which they believe. *Rasch v. Bissell*, 456.
5 It is for a jury to decide whether an oral authority has been correctly construed. *Spalding v. Archibald*, 365.
address of counsel to jury; exceptions, 215 (9).
jury cannot be visited by a justice, 460 (3).
jury decides whether an act is willful or careless, 402 (2).
finding of facts; evidence and instructions, 61 (2).

force of impeaching testimony a question of fact, 49.
general and special verdicts, 215 (6, 7, 11).
indefinite exceptions to charge, 56 (1).
irregularities as to place of custody, 575 (2).
questions of fact as to partnership settlement, 590.
right to take documents to jury room, 545 (2).
sympathy of jury to cure improper questions, 425 (2).
to decide whether a cheque has been paid, 416 (8).
to determine sufficiency of evidence, 563 (1).
trial of issues on bill to annul marriage, 429 (1).
JUSTICES OF THE PEACE.
1 A justice of the peace has no jurisdiction of an action involving the title to land. *Highway Com'r v. Withey*, 50.
2 Where a mechanic, suing for his wages, makes the owner of a building on which he works a joint defendant with the contractor who hired him, and sues them in an appropriate form of action before a justice of the peace, the justice has jurisdiction to try the issue; and though he cannot enforce a mechanic's lien, an error in rendering judgment therefor, or in holding the owner personally liable, will not destroy his jurisdiction or make his judgment void and open to attack in a collateral action; and unless reversed on appeal or certiorari, it must stand. *Smith v. Pearce*, 370.
acknowledgments by incompetent grantors, 346 (4).
action in justice's court on administrator's bond, 387 (1).
action of covenant on money bond, 497.
assumpsit on ordinary money bond, 387 (2).
attachment proceedings before justices, 61 (1).
cannot visit jury room without consent, 460 (3),
certiorari to justice to review defects, 460 (1).
costs on discontinuance after remand, 474 (1, 2).
declaration in justice's court, in assumpsit, 213.
dismissal of appeal for defects, 409 (2).
mistake in filling out complaint, 597 (2).
return to certiorari presumed true, 460 (2).
unsigned affidavit for appeal not fatally defective, 409 (1).
Justification—of dangerous assault by insulting language, 617 (7).

Labor—contracts of hiring by corporate officer, 45 (1, 2).
labor rate in highway taxes levied by town board, 509 (1), 510 (2).
LACHES.
1 After the lapse of a dozen years it is too late to disturb the title to a school-house site by mere questions of regularity in the proceedings to designate it. *School District No. 5 of Delhi v. Everett*, 314.
2 Two months' delay in tendering back an unsatisfactory machine that had been sold with a warranty and did not fulfil its terms was not unreasonable where the vendor was allowed for the greater part of that time, to continue his efforts to make it work. *Felt v. Reynolds Rotary Fruit Evaporating Co.*, 602.
in asserting rights in land dedicated for a street, 320 (1).
in enforcing payment of secured debt, 124 (4).
in suing husband for maintenance, 117 (3).
LANDLORD AND TENANT.
1 One who enters upon the use of another's property with full knowledge of the rent demanded therefor is under contract obligation to pay such rent, even though he has originally refused to or has said that he would only pay under protest. *Thompson v. Sanborn*, 141.
2 One who is entitled to the possession of premises can remove the property left there by a previous tenant, if he exercises such care in doing so as the nature of the property demands; and if he leaves it

in such a condition that the owner, by reasonable diligence, can take it uninjured, he is not bound to house it or otherwise protect it until the owner sees fit to take possession. *U. S. Mfg. Co. v. Stevens*, 331.

3 An agreement for a lease may be a different thing from the lease. *Whiting v Ohlert*, 442.

4 A parol agreement for a year's lease to begin in the future is valid, and not within the Statute of Frauds as an oral contract for more than a year's lease. *Id.*

5 A lease to a school district, to hold the property "during the time it is used for school purposes," is a lease in perpetuity at the will of the lessee; and as the lessee is a corporation, and words of inheritance are not required, the lease, if a present consideration is paid, really operates as a bargain and sale, and conveys a base or determinable fee. This is sufficient to satisfy the provisions of the school law, which requires a title in fee or a lease for ninety-nine years where land is to be secured for erecting a stone or brick school-house. *School District No. 5 of Delhi v. Everett*, 314.

6 A clause in a lease providing that anything placed on the premises shall be liable for the rent, and that the lease shall constitute a mortgage to secure it, and that on default the lessor may seize and sell the property on certain notice and may retain from the proceeds the rent and the "costs of such sale," does not justify the detention of property so seized if the rent is paid without sale and there is no showing of actual costs or of information thereof to the lessee, or of any notice of proceedings to be taken. *Hamilton v. Langley*, 549.

7 A lessee holding over after the termination of his lease is a tenant at sufferance. *Abeel v. Hubbell*, 37.

8 The statutory proceeding to recover possession of land from a tenant cannot be maintained by one of two independent grantees of the lessor under the provision in the lease that the lessor is to have the right of selling the land on certain conditions. *Id.*

action against partners on covenants of lease, 388.
action against a partner on his lease to the firm; set-off, 389 (1).
declaration on lease may be general or special, 630 (3).
evidence under general issue; recoupment against landlord, 630 (2).
lease on shares makes tenant in common, 471.
novation of lease after notice to quit, 630 (1).
relation of, material to action of trespass, 331 (2).
tenant's rights not affected by adjournment of arbitration, 37 (3).

Language—insulting, as provocation for assault, 617 (7).

Lease—action against partners on covenants of, 388.
by a partner to his firm; action by lessees; set-off, 389 (1).
construction of contingent power of sale in lease, 37 (1).
lease differs from agreement therefor, 462 (1).
form of lease does not affect counts on it, 630 (3).
novation of lease after notice to quit, 630 (1).
lease on shares; replevin by tenant in common, 471.
lease operating as mortgage, 549 (1).
lease to school district in perpetuity, 314 (1).
lease unaffected by adjournment of arbitration, 37 (3).

Legitimacy—as affecting right to share in partition, 304 (1).

Letters—testamentary, to foreign executors, 451 (1).

Levy—by sheriff; covenant of, in creditor's bill, 637 (1).
levy of attachment issued by a justice, 61 (1).
levy of highway taxes, 509 (1), 510 (2-4).

LIBEL.

1 A false and injurious publication made in a public journal "for sensation and increase of circulation" is, in a legal sense, malicious. *Maclean v. Scripps*, 215.

2 The willful publication of injurious statements involves the design to produce whatever injury must necessarily follow; and when done purposely, knowingly and for no good purpose or justifiable end, it is malicious in the sight of the law even if done without any actual personal ill-will. *Id.*

3 A physician accused of illicit intercourse with a patient sued his defamer for libel. *Held*, that he could show the patient's physical condition as bearing on the probability of the charge. But in contradicting the patient's testimony that she was weak and sick at home, the defence were properly confined to that issue, and it was not error to exclude their testimony as to her mode of employment there and her visiting elsewhere. *Id.*

4 In an action for newspaper libel, the motive of a subordinate in publishing the article complained of is irrelevant if not communicated to his principal, the defendant, and if a showing has been made of everything that passed between principal and subordinate before publication. And where the defendant besides testifying that he had no ill-will toward plaintiff and did not know him, and that he had put implicit confidence in his subordinate, had also been allowed to show all that took place before the publication, and the information on which he acted, there was no material error in excluding a question as to whether he had any purpose to injure plaintiff in assenting to the publication, especially where it was put by his own counsel in cross-examining him when called by the plaintiff to show his control of the paper. *Id.*

LICENSE.

1 An oral sale of the stumpage on cedar land, though void under the Statute of Frauds, is valid as a license to cut the timber, until it is revoked; and when the timber is cut the title to it passes because the right thereto has become a chattel interest. *Spalding v. Archibald*, 365.

2 A licensor's actual knowledge that his consent has been acted on is not necessary to the protection of the licensee; he is bound to assume that it has. *Id.*

license revoked by death of licensor, 3 (2).

LIEN.

1 Whether a lien may not continue, if so agreed, where other collaterals are taken—*Q. Ortmann v. Plummer*, 77.

2 O. had 2000 acres of pine land, and held a contract from a railroad company for about 5000 more. A certain firm which had contracted for the smaller parcel agreed also to take the contract for the larger, subject to certain sums thereafter to fall due. O. was to give the firm a deed of the smaller parcel, and have a lien on the larger for what they owed him on both. The firm were to get a deed of the larger parcel from the railroad company, and mortgage it, first to the company for what was left unpaid, and next to O. to secure their debt to him. This arrangement was oral. The company, however, refused to give a deed until the larger parcel was all paid for, and this refusal prevented the fulfillment of the arrangement in its terms. The firm changed, and its successor, after paying the company a sum which the latter insisted on applying in part upon other contracts, became bankrupt, and P., having obtained so much of its assets as concerned the property in the railroad lands, asked the company for a new contract for the larger parcel. The company refused, but agreed to consolidate all contracts in one, which P. took, and under which he made large sales. Everybody had notice of O.'s rights. *Held*, that as the company had denied O.'s lien and tried to destroy it, and by compelling the consolidation of the contracts had made it impossible to separate the payments, and

by such consolidation had obtained for the larger parcel enough more than the contract price to render it liable for the money due to O., it must pay him that amount. *Id.*

3 One who seeks to enforce a mechanic's lien for material furnished is required by statute to file an affidavit of the amount due within thirty days after furnishing the material, and also proof of service of notice of the lien. If he does not, it is provided that the lien shall cease as to all persons except the owner of the premises. It is further provided that the lien shall not continue more than sixty days *after the filing of the affidavit* of amount due, unless proceedings to enforce the lien have been begun. *Held*, that if no affidavit is filed at all, the lien will be lost after ninety days have passed since the material was supplied. *Comstock v. McElroy*, 324

lien based on attachment proceedings before a justice, 61 (1).
lien cannot attach to exempt goods in purchaser's hands, 1 (2).
lien for city taxes provided for by charter, 272 (5).
lien of attachment; burden of proof to sustain, 164 (3).
lien of sheriff on attached goods; replevin, 529 (1).
lien of vendor extends to equitable titles, 77 (2).
lien of vendor of land where prices are lumped, 77 (3).
subrogation to additional security, 552 (4).

Life—estate; as affecting consideration, 100.

Limitations, Statute of—as to conversion by joint defendant, 380.
not barred as to personal debt by mortgage, 124 (1).
not suspending provision in insurance policy, 189 (5).
presumption of payment of demand note, 415 (4).

LIS PENDENS.

A pending and undetermined chancery proceeding is in itself no bar to an action at law whatever effect a final decree may have. *Kinney v. Robison*, 389.

Loan—agent; deductions of commissions, 56 (2, 4).

Local—actions; defects in jurisdiction, 522 (2), 523 (4, 5).

Locality—of origin of contracts does not affect jurisdiction, 523 (5).

Logs—taxation of, in town where sawed, 506 (1).
obstruction of navigable streams by boom companies, 203.
action for services in breaking jams, 70.

Maintenance—of highway crossings of railways, 277 (1).
suit against husband for support, 117 (3).

Majority—of trustees, cannot authorize discretionary action, 174 (5).

Malice—in litigation over personal property; damages, 633 (3).
in publication of newspaper libel, 214 (4, 5), 215 (6, 10).
malice in use of deadly weapon, 617 (4).

MALICIOUS PROSECUTION.

1 A justice's mistake in filling out a complaint as one for assault and battery, when the actual complaint, on which the warrant was issued, was for an assault only, cannot in an action for malicious prosecution prejudice the person making the complaint. *Carter v. Sutherland*, 597.

2 B. took the whiffletrees from C.'s wagon, and C., who had a wagon stake in his hand, threatened to break his head. S. thereupon had C. arrested for assault and C. sued him for malicious prosecution. The judge charged that while a man had a right to protect his property he would only be justified in using just force enough to do so; and that while C. might have been justified in taking away the whiffletrees from B. and using only enough force for that purpose he would not be justified in striking him on the head with a stick, as that would be inflicting punishment. *Held* that this was correct and was not objectionable as taking from the jury the question

whether C. was chargeable with using more force than was necessary. And it was proper to instruct the jury that they might make allowance for excitement on the part of S. as bearing on the question whether he acted maliciously in having C. prosecuted. *Id.*

MANDAMUS.

1 Mandamus lies to vacate an order made in one court to restrain competent proceedings in a court of co ordinate jurisdiction. *Maclean v. Wayne Circ. Judge*, 258.

2 Mandamus was granted to compel a board of supervisors to provide for the payment of a balance credited upon the books of the county to a certain township which belonged, with another, to a county set off from the first, the credit having been made in pursuance of a mutual arrangement between the townships and the county indebted. *Higgins v. Supervisors*, 16.

3 Mandamus is not the proper remedy for compelling a township to refund the amount of tax unlawfully levied if there is any issue involved which should go to the jury. *Byles v. Golden Township*, 612.

4 Record issues should be set forth as they stand, in showing cause in cases involving a settlement of public accounts between townships and counties. *Higgins v. Supervisors*, 16.

to change journal entry of judgment, 529 (1, 2).
to compel certificate of school district funds, 344.
to enforce a stipulation, 595.
to vacate order setting aside executor's sale, 641 (2).
costs on mandamus where relator was in default, 529 (3).

Manslaughter—where criminal assault causes death, 24 (2).

Map—attached to petition for division of township, 517 (2).

Marriage—established by co-habitation, 464 (1, 3).
marriage in good faith to person previously married, 592 (1, 2).
proceedings to annul a marriage, 429 (1, 2).

Married woman—mortgage by, clandestinely given, 375 (3).
right to widow's allowances, 464 (3).

MASTER AND SERVANT.

1 Whoever hires out for any service takes the risks of it. *Piquegno v. Chic. & G. T. R. R.*, 40.

2 In trespass against an employer for an injury caused by the act of his servant, it is for the jury to decide whether the act was wilful or careless; if wilful, the employer would not be answerable. *Wood v. Detroit Street Ry. Co*, 402.

driver of hired team servant of bailee, 372.
injury to subordinate servant from negligence of superior, 40 (1, 2).
power of superintendent as to labor contracts, 45 (1).
violation of Sunday liquor law by employee, 566 (2), 577.

Measure of damages—by prospective profits, 633 (4).
See DAMAGES.

Mechanic's lien—affidavit for; time for filing it, 324 (4).
justice's jurisdiction to try issue on mechanics' lien, 370.

Meetings—of township board without notice, 528.

Mileage—allowance to sheriff by supervisors, 340 (1).

Minor—heirs; their guardian can petition for partition, 304 (2).

Misconduct—of trustees; evidence thereof upon accounting, 174 (3).

Mistake—as to character of goods described in bill of sale, 491 (1).
as to consideration; rescission of bargain, 100.
in filling out complaint before a justice, 597 (2).

Money—had and received; action against mutual benefit association, 487.
claim of set-off, 432 (1).
not classed as unliquidated damages, 432 (2).

MORTGAGE.

1 A mortgage will not keep alive the personal obligation to pay a debt

after the time when it would otherwise be outlawed *Lashbrooks v. Hatheway*, 124.

2 An unwitnessed mortgage is good as between the parties to it. *Baker v. Clark*, 22.

3 A forged mortgage cannot be valid even in the hands of a bona fide holder, unless, indeed, the latter came into possession of it under circumstances which establish an equity in his favor against the party apparently liable upon it. *Camp v. Carpenter*, 375.

4 One who takes a mortgage signed only by a married woman, with knowledge that it does not relate to her separate property, and that its execution is clandestine, can hardly claim any equities against her if the mortgage should turn out to be forged. *Id.*

5 A mortgage which is so drawn as to cover any demands which the mortgagee may hold against the mortgager cannot authorize the mortgagee to buy up claims against the mortgager and enforce them unless the provision that he may do so is very clearly expressed. The provision can ordinarily cover only such demands as arise directly out of the dealings between the mortgager and mortgagee. *Lashbrooks v. Hatheway*, 124.

6 A printed omnibus clause in a mortgage extending it to debts not covered by the amount specifically stated *seems* to be to some extent counterbalanced by the presumption arising from the fact that the stamp on the mortgage corresponds to the specified sum. *Id.*

7 Where a purchaser under a second mortgage seeks relief against one who holds under a first mortgage, on the ground that the first was not filed and recorded until after the second, he must establish the case made by his bill or he cannot have relief. *Hoffman v. McMorran*, 318.

8 The good faith of a second mortgagee in taking his mortgage on the strength of a forged discharge of the former one, is no defence to the foreclosure of the earlier mortgage if the holder had nothing to do with deceiving the later mortgagee. And as the foreclosure is an original equity proceeding which covers all questions as to the validity and amount of the security, the question of forgery is for the court to decide and not for a jury. *Keller v. Hannah*, 535.

9 The cost to which the assignee of a second mortgage is put to redeem from the foreclosure of the first is a necessary outlay in aid of the assigned security, and the assignee is entitled to hold the assignment as security for it, but not to make it a personal charge against the assignor. *Wendell v. Highstone*, 552.

10 One who has secured another's debt is entitled to the benefit of any further security which the lien-holder obtains from the debtor; and if the latter security consists of a chattel mortgage and the lien-holder disposes of the property which it covers, for his own benefit and without the consent of the person giving the first security, the latter is released, to the extent, at least, of the property so disposed of. And its proceeds must be first applied to the satisfaction of the oldest mortgage if the securities have been so confused by the lien-holder as to make it impossible to distinguish between them. *Id.*

11 Where one seeks, as assignee, to foreclose a mortgage securing a non-negotiable note, but gives no evidence of title to the debt beyond the mere possession of the note and of an assignment of certain interests which are not shown to include the debt secured, his bill must be dismissed. *Lashbrooks v. Hatheway*, 124.

12 Where a mortgagee has taken a tax-title for the purpose of protecting the mortgage, it is proper, in decreeing payment on foreclosure, to provide that on payment of the cost of the tax-title with suitable interest, the certificate of the tax-purchaser shall be assigned to defendant. *Baker v. Clark*, 22.

13 A foreclosure sale ought not to be set aside on merely disposing of the plea to the bill of review filed to set it aside. *Thomas v. Burt*, 489.
14 The rule that on foreclosure the defendant has the burden of showing that the debt has been paid ought not to be stringently enforced where the debtor has confided in the creditor and placed himself in his hands, and for ten years neither debtor nor creditor has taken any notice of the debt, and the evidence relating to it has become uncertain and conflicting. *Lashbrooks v. Hatheway*, 124.
blending prices of several parcels in one mortgage, 77 (3).
construction of pledge as a trust, 174 (8).
foreclosure by foreign executors, 451 (1, 2).
garnishment for possession of mortgaged property, 476 (1).
lease operating as mortgage, 549 (1).
Motion—does not lie to try validity of stipulation, 595.
motion for dissolution of attachment, 164 (2).
for feigned issue in proceedings to annul marriage, 429 (1)
motion to set aside execution sale, 641 (2).
to strike from files a defective demurrer, 324 (3).
to suppress depositions when unnecessary, 52 (2).
Motive—for publication of newspaper libel, 214 (4, 5), 215 (6, 10)
MUNICIPAL CORPORATIONS.
1 "Notice in writing" must be posted of any application to a board of supervisors to detach territory from one township and add it to another. How. St. § 487. *Held* that such notice may not only be printed, but the names thereto attached, if properly authenticated, may also be printed. *Pelton v. Ottawa Supervisors.*, 517.
2 The map which petitioners for a change in township boundaries are required by How. St. § 486 to furnish to the board of supervisors need not show the full topography of all the townships to be affected; it is enough to give the boundaries and sections or parts of sections for each, together with the place and course of any natural boundaries, if any, that are to be established as limits. *Id.*
3 Where notices of the hearing of an application to alter township boundaries are shown to have been seasonably given, it is immaterial that an affidavit showing that the notices were posted on different specified days does not show on which day the first was posted. *Id.*
4 Meetings of a township board, unless duly called and notified, are not legal if not attended by all the members. *Beaver Creek v. Hastings*, 528.
5 Township orders received in the township treasury as money are equivalent to money, and must be accounted for in the same way. *Byles v. Golden Twp.*, 612.
6 The amount of drain tax collected against any specific parcel of land is a separate fund by itself, and is not to be confounded with any other assessment; the money obtained on one allotment cannot be appropriated on account of any other. And though such taxes are paid into the township treasury they do not become township moneys. *Wallace vs. Sortor*, 159.
7 The township treasurer, in Michigan, is an officer and agent of the township in collecting such taxes as would be retained in the township treasury after paying to the county treasurer the State and county taxes, and the township is liable to one who has been wrongfully taxed for the amount received from him even though it has been paid out from the township treasury on orders from the proper school and highway authorities. *Byles v. Golden Twp.*, 612.
8 A township is not an insurer of heavy machinery moved across a bridge within its limits. *Fulton Iron Works v. Kimball*, 147.
9 Municipalities are under no legal obligation, outside of the Constitu-

tion and statutes, to build bridges where none have been before. *Id.*
10 While a township putting up public bridges is bound to make them strong and secure, it is not obliged to anticipate every conceivable strain to which they may be subjected, such, for instance, as the passage of heavy machinery of a kind not used when the bridge is built. And in repairing, it is only required to put a bridge in the same condition of strength and soundness as new bridges of the same kind. *Id.*
11 In an action against a township for an injury done to heavy machinery from the giving way of a bridge over which it was being moved, there was no error in admitting testimony that the approaches to the bridge were so deep that it had not seemed likely that very heavy loads could be placed on it without using extra teams; and that for several years and up to the day of the accident it had been safely crossed by unusually heavy loads. *Id.*
amount due newly created school district, 344.
action for unpaid taxes on personalty, 458.
charter provision creating a lien for city taxes, 272 (5).
levy of highway money tax, 509 (1), 510 (2-4).
mandamus to compel township to refund taxes, 612 (2).
township liability for defects in bridges, 383 (1).
murder by assault; evidence, 289 (6-8).
where criminal assault causes death, 24 (2).
Mutual—benefit association; action against for money, 487.

Name—of court; variance in caption of demurrer, 324 (1).
of witness indorsed on information, 564 (1).
attached to statutory notice, may be printed, 517 (1).
Navigable streams—obstruction of, by boom companies, 203.
NEGLIGENCE.
1 A sudden call to supper, addressed by a conductor to a brakeman, is not such an improper or negligent command that the brakeman can recover for any injury sustained in hastily obeying it. *Piquegno v. Chic. & G. T. R. R.*, 40.
2 A railroad company is not negligent in omitting to clear show and ice from the ground alongside its track even in the neighborhood of depot platforms; and a brakeman who is injured in consequence of slipping on it has no remedy against the company. *Id.*
3 In an action for injury resulting from the breaking of a bridge, evidence of new methods in building bridges is immaterial, unless it appears that there was fault in not knowing and using them. *Fulton Iron Works v. Kimball*, 147.
4 Proof of the reasons for precautions taken after an accident does not indicate foreknowledge of their necessity, and is irrelevant in an action for resulting injury if evidence is given of the real condition and appearance of the premises beforehand. *Id.*
5 It is gross negligence to drive upon a street railway track in front of an approaching car without looking around until the car runs into one's vehicle; and it is a wrong not only to the railway company but to persons riding in or waiting for the car, to willfully obstruct its progress in this way when there is nothing to hinder one from getting off the track. *Wood v. Detroit Street Ry. Co.*, 402.
6 There is contributory negligence in driving across a bridge so recklessly and turning off from it so abruptly as to suffer injury in consequence of catching the wheel in or upon some crack or obstruction not in the traveled part of the way. And it is no excuse that others are similarly careless, especially if one is not familiar with the bridge, and cannot, therefore, rely upon such carelessness in others. *Abernethy v. Van Buren*, 383.

7 It is not negligence in a railway passenger to leave a car at its rear end in the absence of any rule or general custom making the forward end the only proper place. *Cartwright v. Chic. & G. T. R. Co.*, 606.
negligence in using a highway that is dangerous, 108 (2).
of railway company, in regard to landing passengers, 606 (1).
Negotiable—paper; conditions as to payment of interest, 525.
New trial—discretion in denial of, 575 (1).
for irregularities in guarding jury, 575 (2).
Non-feasance—damages for, not recoverable for malfeasance, 196 (2).
non-fulfilment—of conditions of warranty, 602 (3).
non-presentation of premium note at maturity, 188 (1).
non-residence; effect on co-indorser's obligation to contribute, 143.
non-resident stockholder's liability, 557 (1-3).
non-resident waiver; of exemption from process, 523 (4).
NOTARY PUBLIC.
A notary public or justice of the peace cannot properly take the acknowledgment of a person to a deed if he believes him mentally incompetent to make a will; nor may he take an acknowledgment through a third person. *Hoban v. Piquette*, 346.
weight of notarial certificate as evidence, 375 (1).
Notice—attached to plea of general issue, 94 (2).
notice by construction, of corporate acts, 87 (4).
notice of trial waives defective appeal, 409 (1).
notice of application for division of townships, 517 (1, 3).
notice of authority to act as agent of corporation, 87 (1).
notice of divorce proceedings taken without jurisdiction, 117 (2).
notice of intention to recoup against landlord, 630 (2).
notice of meetings of township board, 528.
notice of proceedings to set aside execution sale, 641 (1, 2).
notice of rights affected by consolidation of contracts, 77 (5).
notice of sale under forfeiture clause in lease, 549 (1).
notice of want of authority to exceed instructions, 87 (3).
notice of fraudulent purpose in transfer of property, 267 (1).
publication of notice of guardian's sale, 304 (7).
notice to occupant of amount of rent required, 141.
notice to quit terminates a lease, 630 (1).
notice to remove obstructions from highway, 50 (1).
want of venue in affidavit of service of notice, 304 (3).
NOVATION.
A tenant who has refused to pay rent until repairs are made, and is accordingly notified to quit, has a right to regard the lease as ended, and if the landlord then agrees to make the repairs provided the tenant will stay, the lease is a new one. *Conkling v. Tuttle*, 630.

OATH.
A guardian's oath is not defective for being entitled "In the matter of the estate of Henry McVay et al. minors," since this identifies the estate, which is the purpose of the title. *Persinger v. Jubb*, 304.
oath of supervisor to valuation of property, 28 (1).
Obligation—of municipal corporations to build bridges, 147 (6).
of township to keep its bridges safe, 146 (1), 147 (2, 7).
to pay rent arises from entry on premises, 141.
Objection—for variance in action on contract, 435 (2).
objection to excluding drunken person from jury, 506 (2).
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PARTITION.
1 Partition before expiration of a dower interest is not forbidden by How. St., § 5983; that statute only provides for making partition afterwards. *Persinger v. Jubb*, 304.
2 Proceedings for partition need not be held invalid on review merely because the petition therefor was made by an administratrix, as such, so long as it appeared that she had a dower interest and was guardian for minor heirs; the misdescription could have been amended at any stage by leave of the judge of probate. *Id.*
3 A recital in a decree for partition that a specified party is entitled to

share cannot be collaterally attacked even though it be an adjudication that ought properly to have preceded the decree, and though the person named be illegitimate and therefore precluded by statute from claiming any part of the estate. *Id.*

PARTNERSHIP.

1 An association in which the conditions of membership are the payment of an entry fee and of *pro rata* assessments, but which does no business involving profit or loss, is not a partnership; and the members are not personally liable on contracts made by its officers. *Burt v. Lathrop*, 106.

2 The estate of a deceased partner is not liable for the amount of bonds left without his knowledge in the hands of other members of the firm as a special deposit, when it was no part of the firm's business to receive such deposits. *Hathaway's Appeal*, 112.

3 Partnership relations between a man and a woman are dissolved by their marriage; and the man's continued possession of property owned by the woman but used by the firm is by virtue of a license, merely, which would cease at her death. *Bassett v. Shepardson*, 3.

4 It is a fatal variance for one to sue in tort, as survivor of a partnership, upon a cause of action that did not arise until after the firm was dissolved by the death of the partner. *Mead v. Raymond*, 14.

5 An action upon the covenants of a lease which purports to have been given by a firm will not lie against the partners if, after having been left with the lessees' attorney to be held until an absent partner has approved of it, such approval is not given. *Simon v. Bewick*, 388.

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PAYMENT.

1 Payment for goods sold with a warranty does not necessarily preclude the purchaser from tendering them back for non-fulfillment of conditions if the payment was made as an accommodation and without waiving any rights. *Felt v. Reynolds Rotary Fruit Evaporating Co.*, 602.

2 Payment of a demand note is not presumed from the neglect to present it, until time enough has passed to outlaw it. *Id.*

3 The payee in a cheque is not to be assumed to have received payment thereon if it is not shown to be indorsed; the fact of payment is for a jury. *Id.*

4 The burden of proving payment of a debt is upon the debtor when in an action to recover upon it the debt has been established by competent evidence. *Id.*

5 In a proceeding against an estate to recover the amount of a note given by the decedent, the fact that since the date of the note the payee has received from decedent cheques enough to pay it, does not of itself establish the payment of this particular note nor does it even place upon the claimant the burden of showing that it was not paid. *Id.*

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PLEADING.
1 Such a variance in the caption of a demurrer or other unsworn pleading or paper as to call the court in which it is filed "The Superior Court of the city of Grand Rapids," when it should be "The Superior Court of Grand Rapids," is of no consequence when there can be no doubt what court is meant. *Comstock v. McElvoy*, 324.
2 A general expression superadded to specific words in the charging part of a declaration is construed as a term of the same class as the rest. *Macumber v. White River Log &c. Co.*, 195.
3 In an action upon the common counts for use and occupation the tenant can, under the general issue, set up a new agreement; and by way of recoupment can, on giving notice, show damage to goods on the premises. *Conkling v. Tuttle*, 630.
4 Where a special notice is attached to the plea of the general issue, and the proof offered thereunder is insufficient to establish a defense, the defendant is limited to such matters as may be introduced under the plea itself. *Waldo v. Waldo*, 94.
5 A demurrer is an appearance and a general demurrer waives objections to jurisdiction of the person. *Thompson v. Mich. Mut. Benefit Ass'n*, 522.
6 A motion to strike from the files is the proper proceeding for getting rid of a defective demurrer; it is not good practice to move that it be not heard. *Comstock v. McElvoy*, 324.
7 Where no special counts are needed in an action on a contract in which both special and common counts are used, the objection that the contract as proved differs from that set forth in the special count is unimportant. Even if the contract were void recovery might be had upon the common counts. *Fuller v. Rice*, 435.
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PRINCIPAL AND AGENT.

1 A bookkeeper has no authority as such to make his employer liable for the debts of a third person. *Ruppe v. Edwards,* 411.

2 One who deals with another, supposing him to be an agent, is not protected by the other's assumption of authority to act. *Rice v. Peninsular Club,* 87

3 A principal is bound by the act of an agent who has only exceeded his authority or has violated special instructions, unless the party with whom he dealt had notice of the want of authority in the particular case. *Id.*

4 A claim for commissions on a sale of logs was based on the following advices from the owner: "I would sell them for $8 or, if you thought necessary, as low even as $7.50. I want you to find a customer for me, and I will feel greatly obliged, besides paying you whatever you ask for your trouble." The logs were in fact sold to a purchaser designated to the agent by the owner, at prices lower than those stated, and the agent acted in part in the purchaser's interest. *Held* that he was not entitled to commissions. *Williams v. McGraw*, 480.

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The writ of prohibition issues to stay proceedings begun in one court to cancel a judgment entered by a competent court of co-ordinate jurisdiction. *Maclean v. Wayne Circ. Judge*, 258.

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PROSECUTING ATTORNEY.

The prosecuting attorney is a sworn minister of justice whose duty it is to see that the innocent are protected as well as that the guilty are brought to punishment. *People v. Davis*, 570.

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RAILROAD COMPANIES.
1 A railroad company crossing a public highway is bound to keep the approaches to the crossing in safe condition for travelers on the highway. *Maltby v. Chic., &c., R. Co.*, 108.
2 The Highway Law of 1881, in providing that where any highway is established across a railway the railroad shall open, construct and maintain the highway and the necessary crossing therefor across its right of way and tracks, cannot be so construed as to compel the company to build that part of a highway which would cross its right of way, if the highway itself is not made necessary by the existence of the railroad. *People v. Lake Shore, &c., R. Co.*, 277.
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of obstructions from highway; notice, 50 (1).
of tortious intruder by employee; assault and battery, 105.
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REPLEVIN.
1 Replevin lies for property seized upon an execution issued in void garnishment proceedings. *Iron Cliffs Co. v. Lahais*, 394.
2 A bill of lading was sent to a bank, together with a draft upon the consignees, to whom the bill was not to be delivered until they had paid the draft. The bank, however, let them remove the merchandise to examine it, and they contested payment. *Held*, that the bank, on paying the draft itself, was fairly entitled to replevy the merchandise; and that the fact that it had at first attached it without the consignor's authority was unimportant. *West Mich. Sav. Bank v. Howard*, 423.
3 Replevin cannot be made to lie on a demand which, when made, was in violation of the injunction of a court of competent jurisdiction. *Smith v. Smith*, 538.
4 Where replevin against an officer who had taken the property under an attachment was brought by a person to whom a bill of sale had been given as security but not put on file, it was *held* proper for defendant to show that part of the debts on which the attachment issued accrued after the bill was given and in reliance upon the vendor's continued possession and apparent ownership. *Talcott v. Crippen*, 633.
5 Where goods held by the sheriff under an attachment or execution are taken from him on writ of replevin, a judgment in his favor, before the attachment proceedings are decided, must be for the return of the property and not for the special value of his lien; and if the judgment has been erroneously entered mandamus will lie upon a seasonable application to change the journal entry thereof accordingly, unless such change will prejudice the rights of strangers. *Frederick v. Circuit Judge*, 529.
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replevin by tenant in common for share of crop, 471.
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to take documents to jury room, 545 (2).
to work out a highway tax in labor, 510 (2).
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SALE.

1 If the parties to a sale that would be void under the Statute of Frauds, choose to treat it as valid, it will be so as to them, and may become effectual for all purposes. *Spalding v. Archibald*, 365.

2 The sale of goods by a purchaser who has accepted them on condition that they comply with a warranty makes the conditional acceptance absolute; but a conditional acceptance alone does not perfect his right of action upon the warranty until it appears, upon reasonable trial, that the goods do not comply with it. *Felt v. Reynolds Rotary Fruit Evaporating Co.*, 602.

3 Where a contract for the sale of machinery contemplates that it shall be tested and put in running order, a cause of action does not arise upon the warranty therein until a reasonable time has been allowed for the necessary tests; and the time taken by the parties in trying to make the machinery fulfil the conditions of the contract is a proper criterion as to what is reasonable. *Id.*

4 The rule that one cannot rescind a contract in part and affirm it in part does not apply where a purchaser of stock, the items of which are particularly described in the bill of sale, refuses to accept an article which varies from the description, and sues the vendor for failure to fulfil the contract of sale. *Lampson v. Cummings*, 491.

5 A vendor's right to a lien is not, *it seems*, confined to the sale of a legal title or of a title in fee, but extends to equitable titles subject to the risk that bona fide purchasers from the legal holder may intervene and break it. *Ortman v. Plummer*, 77.

6 Where the purchase price of one parcel of land is so blended, in a mortgage, with that of another, that it cannot be separated, no lien beyond the mortgage itself can properly be enforced. *Id.*

7 A bill of sale of a livery stock included "two two-seated full-top carriages," but it afterward appeared that one of the carriages which the vendor supposed was a full-top was not so. *Held* that this mistake of fact could not, in law, relieve him of the obligation to deliver a full-top in its place or account for the value of such a carriage. *Lampson v. Cummings*, 491.

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SCHOOLS AND SCHOOL DISTRICTS.

Mandamus lies on relation of a school-district assessor to compel the clerk of a township to which the district formerly belonged to certify to the supervisor of the township to which it now belongs the amount ascertained by the school inspectors as due to the relator's district from what remained of the old district out of which it was erected. *Ramsay v. Everett Town Clerk*, 344.
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service on principal defendant in garnishment, 640 (1).
return of service conclusive in collateral action, 260.
want of venue in affidavit of service, 304 (3).
within jurisdiction; stockholder's liability, 557 (1).

SET-OFF.

1 A claim for personalty received by plaintiff while acting as defendant's guardian, but not accounted for by him, is proper set-off in an action on a note, being for goods sold or for money had and received. How. St. § 7365. *Powell v. Powell*, 432.
One who has sold stock and leased a store to a firm and has then taken a parnership interest in the business can offset the amount due him on such sale and lease in an action brought against him by the firm, and need not leave it to a partnership accounting already pending. *Kinney v. Robison*, 389.

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SETTLEMENT.
1 Compromising with one person does not amount in law to admitting liability to a stranger to the compromise, even if his claim grows out of the same transaction. *Fulton Iron Wks. v. Kimball*, 147.
2 It is against public policy to permit a party to a written settlement to contest his liabilities thereunder on the ground that he had fraudulently contrived it for the purpose, merely, of screening his property from justice. *Bassett v. Shepardson*, 3.
3 In assumpsit against former partners for the amount found due plaintiff on a partnership settlement, and which defendants had promised to pay him, the facts of settlement and of the joint promise to pay were for the jury. *Reynolds v. Patrick*, 590.
between county and townships; payment of balance, 16 (1–3).
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SHERIFF.
1 A sheriff is not entitled to payment for merely colorable attendance in court, when he can produce no certificate from the court show his attendance, and when he has, in fact, been employed elsewhere. But he should be paid for any substantial performance of his duty. *Vincent v. Mecosta Supervisors*, 340.
2 Supervisors cannot be compelled, in the absence of statutory authority, to allow a sheriff ten cents a mile for travel in bringing back goods seized on a search warrant, where they have already made that allowance for going to the place of service. *Id.*
3 Where a board of supervisors has permitted the sheriff to draw periodically from the county treasurer the amount of his actual expenses, leaving the rest of his account for future audit, they may properly, upon the final audit, refuse to allow credit for such of the expenses as they find improper, and may deduct the treasurer's payments to that extent from what would otherwise be due. *Id.*
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TAXES.
1 Logs cannot be taxed in the township where they are temporarily left afloat for sawing if the firm to which they belong has its place of business in another township and the partners live elsewhere. *Torrent v. Yager*, 506.
2 The listing of taxable property is clerical work; but the ascertainment of its value is judicial, and requires the supervisor's judgment under his official oath. How. St. § 1019 *Woodman v. Aud. Gen.*, 28.
3 Every taxpayer was entitled, under How. St. § 1020, to an opportunity to see how his property had been assessed and to show that the assessment was illegal or unjust. *Id.*
4 Goods assigned for the benefit of creditors are exempt from levy to satisfy a personal tax during the ten days allowed to the assignees for filing their bond. Act 198 of 1879, sec. 1. *Lyon v. Harris*, 272.
5 A township treasurer is not liable in trover, or in any action of tort, for enforcing the collection of an excessive tax, if his warrant therefor from the supervisor is fair on its face. *Byles v. Genung*, 504.
6 An action by a city for unpaid taxes on personal property will not lie, except so far as specially provided for, if provision is already made by the city charter for a specific remedy, such as collection by process from the receiver of taxes and by levy on any personal property within the city. *Detroit v. Jepp*, 458.
7 The Charter of Detroit, in providing that city taxes shall be liens

upon the property assessed, until paid (Act 486 of 1869: Charter ch. v. sec. 22, subd. 64). did not mean that the lien should attach to personal property. *Lyon v. Harris*, 272.

8 Injunction lies to restrain the collection of taxes where the opportunity to ascertain the amount of the assessment, and to be heard as to its fairness has been withheld. *Woodman v. Aud. Gen.*, 28.

9 Payment of a personal tax is not voluntary when made under protest, and for the purpose of avoiding the immediate seizure of goods to satisfy it. *Lyon v. Harris*, 271.

10 The General Tax Law (1 How. St. p. 1277, sec 42), in providing for written protest upon payment of a tax, refers only to taxes on real property. *Id.*

11 Where an insolvent firm has assigned its stock for the benefit of creditors, a personal tax against the firm cannot be satisfied from the stock in the hands of the assignee upon any other terms than any other claim; and if the assignee pays the tax under protest in order to avoid seizure of the stock, he can bring suit against the officer collecting it, to recover it back, so long as it remains in the officer's hands. *Id.*

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TRESPASS.
1 In a declaration in trespass quare clausum allegations of trespass to the person, and of conversion, may be inserted as matters of aggravation. *Waldo v. Waldo*, 94.
2 In an action of trespass for the improper seizure of property belonging to an estate but at the time in the peaceable possession of plaintiff, a question as to whether the plaintiff had not converted property belonging to the estate after the owner's death, was immaterial. *Id.*
3 The relation of landlord and tenant is material and must be shown in an action of trespass brought by the tenant for the removal of his goods by the landlord if the plaintiff counts upon the relation as still subsisting and a constituent fact. *U. S. Mnfg. Co. v. Stevens*, 331.
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TRIAL.
1 Mandamus does not lie to enforce a disputed stipulation to settle a case, even though money has been paid thereunder. The parties to the stipulation are entitled to have the fact as to the settlement tried on a regular issue before a jury; and if the validity of the stipulation is contested it should be brought into the case by plea and not by motion. *Leavitt v. Detroit Superior Judge*, 595.
2 A trial court cannot interfere with a lawful stipulation which the parties enter into presumably for their own advantage. *People v. Murray*, 189.
3 Mere general objections to evidence need not be noticed unless the true point of the objection is plain.. *Stevens v. Hope*, 66.
4 A request to charge is properly refused if unsupported by testimony. *Rasch v. Bissell*, 456.
5 A request to charge must be founded upon testimony in the case, or it is not error to refuse it. *Smith's Appeal*, 415.
6 A jury was instructed that their answers to special questions must conform to their general verdict or they would overrule it. *Held*,

that if this was misleading as giving the general verdict precedence it was too late to object to it after the jury had retired and when the judge could not correct it. *Maclean v. Scripps*, 215.

7 Jurors cannot ordinarily take books, papers and depositions with them to the jury-room. But the irregularity of permitting it is waived by failing to object thereto. *Chadwick v. Chadwick*, 545.

8 A justice of the peace has no right to go alone into the jury room to advise the jury, even at their request, unless the parties or their counsel consent. *Galloway v. Corbett*, 460.

9 Facts cannot be considered established by the finding of a jury, if the finding was based on improper testimony and an erroneous charge. *Fairbanks v. Bennett*, 61.

10 An instruction to a jury to answer the special questions put to them, keeping in mind that the answers should be consistent with their general verdict, though carelessly expressed, is not necessarily open to the criticism that it requires the jury to conform the findings to the verdict; it may simply mean that the verdict should be in accord with the facts as found. *People v. Murray*, 489.

11 Where a jury answered a special question by saying they had no means of knowing, and that they did not know from the evidence, and afterwards answered simply that they did not know, and court and counsel treated the answer as a negative, it was so treated in the appellate court. *Maclean v. Scripps*, 215,

12 A general verdict was given for the plaintiff in a libel suit based on the republication of statements already published in Canada, and affecting the reputation of plaintiff, who was a professor in the University of Michigan. The jury were then asked specially whether the publication had been made because the charges had been published generally in Canadian papers, injuriously affecting, in plaintiff's opinion, the best interests of the University, and for the purpose of calling attention thereto as a matter of public duty, and in order that there might be a public investigation by the regents of the University. The jury answered, as to previous publication, "We say, not generally to his knowledge, the evidence only going to show he had seen the two Tilsonburg papers"—and as to the purpose of the republication they answered negatively. They afterwards answered the whole question in the negative. *Held*, that the answers were legally identical. *Id.*

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TROVER.

The rule that one who has taken part in the conversion of timber may be held as a joint wrong-doer with any one who thereafter does anything in pursuance of such conversion, does not prevent the Statute of Limitations from running in favor of one who took such part without any knowledge that any wrong was intended, and did not participate in subsequent acts of conversion. *Knisely v. Stein*, 380.

does not lie against officer] for collecting tax, 504.
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TRUSTS.

1 An insolvent firm made an absolute warranty deed of its business and other property to its principal creditor. The latter conveyed it

in trust to certain persons to be managed for his sole benefit, and empowered them to carry on the business, buy property, borrow money, sell lands and personalty and exercise other powers not inherent in mortgage relations. But at the same time the creditor and the trustees together executed a declaration of trust in favor of the firm, whereby, after the trust should be satisfied, the remainder of the property was to be conveyed to it. *Held* that as between these parties this arrangement established a trust, and not merely a mortgage, relation, and that it placed the creditor under fiduciary obligations to the debtor. *Loud v. Winchester*, 174.

2 A discretion confided to trustees jointly cannot be independently exercised by one of them so as to ignore another, even with the consent of others who, with him, would constitute a majority. *Id.*

3 Trustees must not receive from their employment personal benefits that are not provided for in the trust; as *e. g.* by receiving special compensation for supervising transactions connected with the business confided to them, but unauthorized by the trust. *Id.*

4 Strict performance of trust duties may be waived; but such waiver in the past and in the case of completed transactions will not justify or excuse subsequent laxity that has not been authorized or approved. *Id.*

5 Beneficiaries under a trust have the right at all times to be kept informed by the trustees as to its management. *Id.*

6 Under a bill for an accounting by trustees any testimony that throws light on their management of the trust bears directly on the performance of their duty to keep the beneficiaries informed; and proof of misconduct and misappropriation by them is admissible whether anticipated and charged in the bill or not. *Id.*

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WATERS AND WATER COURSES.
1. A boom company is liable in damages for needlessly or wilfully obstructing a navigable stream to the hindrance and consequent injury of persons driving their own logs. *Watts v. Tittabawasse Boom Co.*, 203.
2 The statutory right of action for services in breaking jams caused by another's logs, and for driving the logs themselves, where it becomes necessary to do so to enable the plaintiff to get his own logs down a stream that is obstructed by the other's, does not arise when the stream is not naturally in a navigable condition, and the plaintiff has had to resort to artificial means, such as flooding, to create any floatage whatever. *Kroll v. Nester*, 70.
contract to clear innavigable stream, 435 (4).
WAYS.
1 One who has opened a street which the public authorities have accepted and improved, has no right, after much time has gone by and rights have grown up, to shut it up again on the ground that the authorities have not performed an oral condition which was made with them at the time of opening the street; but he may have a remedy at law for breach of condition. *Port Huron v. Chadwick*, 320.
2 A highway tax cannot be imposed without express warrant of law; and it will be illegal if the mode of levy and collection prescribed by statute is not followed and the tax levied upon the property specified. *Ryerson v. Laketon*, 510.
3 Where the township board imposes a highway tax they represent the town meeting in doing so, and are confined to the same subjects of taxation. *Id.*
4 The right to work out a highway tax in labor is superseded by a vote of the township electors residing outside of an incorporated village that the tax shall be paid in money. But this does not affect the village whose inhabitants shall then maintain their own roads by a tax on their own property, while the people of the rest of the township maintain their roads by a tax on theirs. How. St. §§ 1354, 1356. *Id.*
5 Where a township board votes a highway money tax upon the town property in addition to the labor rate, the supervisor must levy it

upon all the property in the township, including that of any incorporated village within its boundaries. How. St. ch. 29. *Id.*

6 The statutory action of trespass for encroachments on a highway (How. St. § 1372) does not lie where the notice to remove them shows that the alleged encroachment is caused by fences entirely obstructing the road. *Highway Com'r v. Withey*, 50.

7 The right to use a public highway, even if it be in a dangerous condition, cannot be abridged by the act of putting it in such condition, or by neglect to repair it. *Maltby v. Chic, &c., R. Co.*, 108.

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Wife—claim for allowance as against estate of former husband, 592 (1, 2).

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WILL.

1 Average mental capacity is not required for the making of a will; power to buy and sell, to deal in property on the basis of contract, to give deeds and leases and make gifts by delivery, implies sufficient capacity to devise property. *Hoban v. Piquette*, 346.

2 Proof of such imbecility of mind as disqualifies one from making a will should be shown, if it does not amount to idiocy, by the testimony of witnesses who have had personal knowledge of the facts within twenty years before the will was executed. *Id.*

3 The facts that one is an invalid, nervous, reserved and disinclined or even hardly able to read and write, do not of themselves prove anything against one's testamentary capacity. *Id.*

4 Where the contestant of a will claimed that it had been revoked by a later will which had been destroyed, and the proponent sought to show that testator was incompetent to make the second will, the testimony of testator's physician and of others that testator had said she wanted the first will to stand, is inadmissible upon an issue of competency, and cannot sustain a finding that there was a revoking clause but that testator did not so understand. *Wurzell v. Beckmann*, 478.

5 Whether the contestant of a will can raise the issue that the testator was unduly influenced after appealing from the probate of the will on the sole ground that he lacked testamentary capacity—*Q.* *Hoban v. Piquette*, 347.

6 When a will has once been expressly revoked by a later one, nothing can ever be claimed under it, even though the later will has been lost or destroyed. *Stevens v. Hope*, 66.

7 A probate proceeding to establish a will and adjudicate the status of an estate belongs to the class of actions in rem; and all who are concerned or interested are parties. *Stevens v. Hope*, 65.

8 Where the contestants of a will attack the competency of the testator but make no case entitling them to go to the jury on that point, they cannot be injured by any rulings as to the admission of rebutting evidence. *Hoban v. Piquette*, 346.

9 Where the existence of a later will is in question, in proceedings to prove an earlier one, the facts as to a motive and opportunity for its destruction cannot be ignored, and it is proper to show that if the will had ever existed it would have fallen under the control of persons who were beneficiaries in the other will. *Stevens v. Hope*, 65.

10 The non-production of an alleged revoking will is immaterial in contesting a proceeding to prove a former one, if there is sufficient evidence that it ever existed. *Id.*

11 Such facts in regard to a testator's fortune and the circumstances

and relations of his family, within his knowledge, as would naturally influence him in his testamentary dispositions, are admissible in proceedings to prove his will. *Id.*
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WITNESS.

1 Defendant in a suit brought by an administrator cannot testify to matters known to no one else besides the decedent. *Bassett v. Shepardson*, 5.

2 A survivor cannot testify adversely as to private dealings with a deceased person even in rebuttal of another's testimony as to a conversation between them overheard by the witness. *Chadwick v. Chadwick*, 543.

3 The rule forbidding the survivor of two persons adversely interested to testify to facts known equally to both does not apply where the opposing party has introduced as admissions, the statements drawn from the survivor in a preliminary proceeding in which he did not have the aid of counsel. In such a case the survivor is entitled to testify fully as to the subject matter of such admissions, and his opponent must be presumed to have waived the benefit of the statutory rule. *Smith's Appeal*, 415.

4 A circus man on trial for a murder committed in a fight, had introduced evidence tending to show that his character and that of his fellows was peaceable. *Held*, that on cross-examination the question "As a member of this circus, how many different fights with outsiders have you been engaged in?" was proper in rebuttal. *People v. Murray*, 289.

5 A woman appearing as complaining witness in a case of alleged indecent assault was required to state that she had been undergoing treatment at a medical college. *Held*, that she ought not to have been asked whether it was in the presence of a class, but that the error of allowing the question was probably cured by the sympathy the jury would naturally feel for her if she were compelled to answer so outrageous a question. *Derwin v. Parsons*, 425.

6 Impeaching testimony can be used for impeachment only, and not to establish the main facts in the case; a fortiori, where the witness impeached is not a party and his impeachment concerns statements by him which in themselves were only hearsay and could not bind a party. *Brown v. Dean*, 267.

7 A defendant denying a charge of indecent assault cannot be discredited by showing that he had improperly approached a judge or had been charged with buying votes. *Derwin v. Parsons*, 425.

8 The complaining witness in a prosecution for adultery testified that he caught the parties thereto in the act upon a certain date and at a particular place. *Held*, that respondent was entitled to show, by the testimony of a former prosecuting attorney, that the complainant, in laying the case before him, had stated that at the place and date specified he saw nothing wrong between them. *People v. Davis*, 70.

9 In a prosecution for larceny from the person the refusal of the court to require the prosecuting attorney to call a particular witness whose name was indorsed upon the information was *held* to be no error where there was no claim that the witness was present at the commission of the offense. *People v. Henshaw*, 564.

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WRIT AND PROCESS.
1 Jurisdiction of a personal action begun by summons against an absent defendant cannot rest upon a service made only by copy at defendant's last place of residence several days before the return day or an adjourned day. *Iron Cliffs Co. v. Lahais*, 394.
2 An alias summons may be treated as a new writ for a new suit if the first suit has gone down; it is not void merely because the return to the original summons did not furnish a proper basis for it. *Axtell v. Gibbs*, 639.
3 A non-resident waives his exemption from the process of even a local court of general jurisdiction if he does not object seasonably. *Thompson v. Mich. Mut. Benefit Ass'n*, 523.
4 *It seems* to be within the discretion of a judge in trying an action upon a recognizance of special bail, to permit the sheriff to amend his return to a capias in the original suit, by adding the date. *Heymes v. Champlin*, 26.
5 An alias summons can be taken out against the principal defendant in a garnishment proceeding, even though the return of the first summons was informal; the return may be amended. *Axtell v. Gibbs*, 639.
6 The return, by an officer, of service of process is conclusive, in any collateral proceeding, upon the parties to the suit in which the process issued. *Michels v. Stork*, 260.
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