# REPORTS

OF

# CASES

## ARGUED AND DETERMINED

IN THE

# SUPREME COURT

OF THE

## STATE OF MICHIGAN.

## VOL. II.



By SAMUEL T. DOUGLASS.



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1849.

# JUSTICES

OF THE

# SUPREME COURT

DURING THE TIME OF THESE REPORTS.

Hon. EPAPHRODITUS RANSOM, Chief Justice.

Hon. CHARLES W. WHIPPLE,
Hon. ALPHEUS FELCH,
(Resigned in November, 1845.)
Hon. WARNER WING,
(Appointed in November, 1845.)
Hon. DANIEL GOODWIN,
(Resigned in October, 1846.)
Hon. GEORGE MILES,
(Appointed in October, 1846.)
} Justices.

Attorney General.

Hon. ELON FARNSWORTH,
(Whose term expired April 17, 1845.)
Hon. HENRY N. WALKER,
(Appointed April 17, 1845.)

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# SUPREME COURT RULES.

For Rules of the Court adopted previous to May Term, 1846, see preceding Volume, pages v. to xvi.

ADDITIONAL RULE, ADOPTED MARCH 22, 1849.

## Rule 49.

Ordered, that Rule 17 be amended by striking out the words, "or from the judge of probate," and Rule 18 by striking out the words, "or if an appeal from the judge of probate, then a certificate from such judge," and that Rule 20, and Rules 29 to 44 inclusive, be and the same are hereby repealed.

Also, it is ordered, that Rule 47 of the chancery rules for the Circuit Court be, and the same is hereby repealed.

# CASES

ARGUED AND DETERMINED

IN THE

# SUPREME COURT

OF THE

# STATE OF MICHIGAN,

In January Term, 1845.

(CONTINUED FROM VOLUME ONE.)

PRESENT:

HON. EPAPHRODITUS RANSOM, CHIEF JUSTICE,
HON. CHARLES W. WHIPPLE, }
HON. ALPHEUS FELCH, } JUSTICES.
HON. DANIEL GOODWIN, }

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## PEOPLE *v.* MOORE.

A constable does not acquire authority to execute writs directed to the sheriff, in consequence of being in attendance upon a session of the circuit court in the discharge of his duties under R. S. 1838, p. 66, § 51.

A sheriff cannot constitute a deputy for a particular act, except by warrant in writing; and the arrest, on a bench warrant, of a person indicted, and under recognizance to appear, by one having only verbal authority from the sheriff, is illegal, and does not discharge the recognizance.*

CASE certified from St. Joseph Circuit Court. Moore was indicted for forgery at the March term, 1843, of the Circuit Court, and, being arrested and brought into court, plead not guilty to the indictment, and entered into a re-

* The several provisions of R. S. 1838, viz: § 51, p. 66, and §§ 44 and 47, p. 46, cited in this case, were re-enacted by R. S. 1846, § 84, p. 93, and §§ 73, 76, p. 74, and are now in force.

cognizance with one Harlan, as his surety, to appear at the next term of the court and abide the order thereof. On the first day of the next term, Moore not appearing, the prosecuting attorney caused a bench warrant for his arrest to be issued to the sheriff, who gave it to one of the constables in legal attendance upon the court, and directed him orally, to go to the residence of Moore, arrest him, and bring him forthwith before the court, according to the mandate of the process. The constable made the arrest in pursuance of the sheriff's instructions, but Moore subsequently escaped from his custody, and was not retaken. Whereupon, the prosecuting attorney moved for judgment against Moore, and Harlan, his surety, upon the recognizance, and the following questions arising upon this motion, were reserved for the opinion of this Court, viz:

1. Was the arrest of Moore by the constable, without a special deputation in writing from the sheriff, valid?

2. Was the recognizance discharged by such arrest?

*J. N. Chipman*, for the People.

*S. Clark and Chas. E. Stuart*, contra.

Goodwin, J. delivered the opinion of the Court.

The first question is, was the arrest by the constable valid? The writ was directed to the sheriff, and on the face of it, was a mandate to him, to be executed by him, or those properly authorized to execute it. It is supposed that, by the provision of the Revised Statutes, (R. S. 1838, p. 66, § 51,) which requires constables to "attend the session of the circuit court of their county, when notified for that purpose by the sheriff," they may execute precepts of this nature issued by the court. No authority, however, is given them to execute precepts directed to the sheriff, and in the same section they are made "ministerial officers of justices of the peace." And, in the part of

the Revised Statutes of 1838 relative to sheriffs, it is expressly provided, in conformity to the general rule of law on this subject, "that the sheriff, and each of his deputies, shall serve or execute according to law, all writs, precepts and orders issued or made by lawful authority, and to him or them directed." R. S. 1838, p. 46, § 47. Constables, then, acquire no authority to execute writs directed to the sheriff, in consequence of being required to attend the court. Their province while attending the court is, to perform all those ministerial duties, within the precincts of the court, usually required of such officers. They may act in *aid* of the sheriff or his deputies, either within or beyond the precincts of the court, when required to do so. And he may authorize them, by warrant, to serve precepts to him directed; and in such cases they are *quoad hoc* his deputies.

From the case it appears that there was a verbal authority given by the sheriff to the constable to execute the writ. Was this sufficient? Section 44 of the statute relating to sheriffs, (R. S. 1838, p. 46,) contemplates a power in a sheriff to constitute a deputy for a particular act. It does not provide how such appointment shall be made, but leaves this to the general law: and by it, most certainly, the authority must be in writing. In 6 Bacon's Abr. 441, Title Sheriff, in treating of sheriffs and undersheriffs, and the manner of their appointing bailiffs and other officers, it is laid down that, it being impossible for them to execute all writs and processes directed to the sheriffs themselves, "they are to make out warrants or precepts to their bailiffs and other officers, who are to execute the same; and for that purpose they are empowered to appoint a bailiff in each hundred, and may appoint a special bailiff, or particular person, to execute a writ, upon any certain occasion." In *Blatch* v. *Archer*, Cowp. 63, upon an arrest on a *ca. sa.* the point is directly made and conceded, that a verbal authority would be illegal, and

that it must be by warrant: the court, however, deciding in that case, upon the facts presented, that a warrant was sufficiently shown before the jury. And it is a general rule in regard to criminal arrests, that bailiffs and constables, if they be sworn, and commonly known as officers, while they need not *show* the parties to be apprehended their warrant, though demanded, yet, are required to acquaint them with the substance of it; and that private persons to whom a warrant may be directed, and even officers, if not sworn and commonly known as such, or acting out of their precinct, must show their warrant if demanded. 1 Chit. Cr. L. 51. Indeed, the whole doctrine in regard to those acting in aid of a sheriff or other officer upon his request, is incompatible with the idea of such verbal warrant to act in the place of the proper officer. To render an arrest by them legal and justifiable, the officer in whose aid they act, must be present or near, and acting in the arrest. 1 Chit. Cr. L. 49; 1 Cowp. 66; 13 Mass. R. 321. These remarks of course do not apply to the cases where, upon the commission of a felony or breach of the peace, a peace officer or private person may arrest without warrant. But in this case, the accused had been indicted, arrested, arraigned, and was at large on bail. The arrest then, by the constable, upon the writ directed to the sheriff, was invalid; and the first question proposed in the case must be answered in the negative. This answer disposes also of the point involved in the second, to wit: Was the recognizance discharged by the arrest?—for, the arrest being of no validity, it could have no effect upon the recognizance. The second question proposed must, then, be also answered in the negative.

It should, therefore, be certified to the circuit court for the county of St. Joseph, that it is the opinion of this court, that the arrest of the respondent Moore, upon the writ

mentioned in the case, without any deputation or authority in writing, was illegal, and the recognizance therein mentioned, was not thereby discharged.

*Certified accordingly.*

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## Prentiss v. Webster & Carpenter.

The statute (S. L. 1840, p. 186, § 14,) allowing to certain officers therein named, one dollar per day "for attending on subpœna with bills, records, or other written evidence," does not apply to a justice of the peace in attendance with his docket.

In an action for damages occasioned by the defendant's non-attendance as a witness in obedience to a subpœna, the plaintiff is entitled to recover any damages immediately consequential upon such non-attendance: *e. g.* that occasioned by the postponement of the trial wherein the defendant was subpœnaed, in consequence of his failure to attend.

It is no answer to such an action that the court from which the subpœna issued, refused, on motion, to impose a fine upon the defendant for contempt in disobeying the subpœna, but accepted his excuse.

Case reserved from Macomb Circuit Court. The cause came before that court on certiorari to a justice of the peace, before whom the suit was brought by Webster & Carpenter, against Prentiss, to recover damages for his neglect to attend as a witness on the trial, before a justice's court, of a cause wherein they were plaintiffs, and one Dryer was defendant. The declaration alleged that Prentiss was duly served with a subpœna *duces tecum*, commanding him to appear as a witness at said trial with the docket kept by him as a justice of the peace, and all the papers pertaining to a cause between the same parties before that time tried before him, and paying him his legal fees for one

half day's attendance and six cents for one mile's travel, in all thirty-one cents. To this declaration the defendant demurred, insisting that it did not show a legal service of the subpœna, and claiming that a tender of one dollar for a day's attendance was necessary to constitute such service under S. L. 1840, p. 186, § 14. The justice overruled the demurrer; whereupon, a plea of the general issue was filed, and the cause proceeded to trial.

The only evidence adduced on the part of the plaintiffs below to show damage, was, that in consequence of the failure of Prentiss to attend as a witness in the cause wherein he was subpœnaed, the trial thereof was postponed for three days, and the plaintiffs were put to extra expense, and lost considerable time.

The defendant below proved in defence of the action, that the plaintiffs below moved the justice before whom the cause against Dryer was tried, to fine Prentiss for contempt in disobeying the subpœna, and that the justice refused to impose any such fine, but accepted his excuse for non-attendance.

A judgment was rendered against Prentiss in the court below for $11.50 damages, to reverse which he removed the cause to the circuit court, from which it was certified to this court, for its opinion upon the questions arising therein.

The errors assigned appear in the opinion of the Court.

*D. C. Walker*, for the plaintiff.

*W. F. Mitchell*, for the defendants.

Felch, J. delivered the opinion of the Court.

1. It is insisted that the justice erred in overruling the demurrer to the declaration. The ordinary fees of a witness under the statute of 1840, (S. L. 1840, p. 186,) are alleged by the declaration to have been tendered; but the plaintiff in error contends that he was entitled to one dol-

lar for one day's attendance, under the provision of the same statute allowing this sum to "the secretary of state, auditor general, any clerk, register of deeds, county surveyor, or judge of probate, attending on subpœna with bills, records, or other evidence."* A justice of the peace is not expressly named in this provision of the statute, and we are clear that he cannot be brought under the designation of clerk, as is claimed by the plaintiff in error. True, he is required to keep a docket, but not as clerk. The statute nowhere designates him as a clerk, nor does it prescribe to him any duties as such.

2. It is alleged as error that the plaintiffs below did not show that they proceeded to the trial against Dryer without the attendance of Prentiss as a witness, with his docket, or that they became nonsuit in consequence of his neglect to attend. This was not necessary. The neglect of a witness, duly subpœnaed by proper service and tender of his fees, to attend in obedience to the subpœna, subjects him to an action on the case, at the suit of the party injured, to recover such damages as are immediately consequential upon *his neglect*. Such damages appear to have been proved in this case.

3. It is also contended that the judgment is erroneous, because the testimony given on the trial showed a reasonable excuse for the non-attendance of Prentiss, in obedience to the command of the subpœna.

No evidence of any fact or circumstance showing an excuse on the part of the plaintiff in error for not obeying the subpœna, appears by the return to have been given. It was shown, however, by the testimony of the justice who tried the cause in which the subpœna issued, that a motion was made therein, to fine Prentiss for non-attendance as a witness, and that the justice refused to impose

* Re-enacted by R. S. 1846, p. 648, § 10.

a fine, but accepted his excuse. It is not even stated what that excuse was.

The proceedings to impose a fine were under sec. 49 of the justices' act of 1841, (S. L. 1841, p. 95,*) which gives to justices of the peace the power to punish for contempt in disobeying subpœnas, by fine, unless such contempt be purged by reasonable excuse therefor, and were purely of a criminal nature, and designed to punish the delinquent for disobeying the lawful command of the court;—not to compensate the party injured;—the fine imposed would not go to him when collected.

The present action is founded upon the following section of the same statute, which provides that the delinquent shall also be liable to the party in whose behalf he shall have been subpœnaed, for all damages which such party shall have sustained by reason of such non-appearance,† and was brought to recover compensation for a private injury which the defendants in error had suffered. It would not have been barred by the imposition and payment of a fine under the previous section, for the contempt; nor would the excuse of such contempt by the justice, prevent the defendants in error from a trial of their rights in this suit. It is true that the same facts might sometimes afford an excuse on a charge for contempt, and a defence in a suit for private damages, but the facts relied on should be shown in evidence in each case. It can be no answer to the latter action, for the defendant to show that he succeeded in preventing the imposition of a fine under a charge for contempt.

It is therefore the opinion of this court that the judgment of the justice should be affirmed by the circuit court, with costs.

*Certified accordingly.*

* Re-enacted by R. S. 1846, p. 398, §§ 69, 70.

† Re-enacted by R. S. 1846, p. 398, § 93.

## The People v. Brown and twenty-three others.

A joint and several bond for the faithful performance of the duties of sheriff, drawn in the penalty of $25,000, after having been signed by the sheriff and six co-obligors as his sureties, was altered by the judges of the circuit court, who were empowered to direct the amount of the penalty, by making the penal sum $20,000, and was then signed by seventeen other sureties, and approved and filed according to the statute. *Held*, that the bond was void as to the six sureties who signed before the alteration was made, but valid as to those who signed afterwards.

*Semble*, That even as to latter it would have been void for want of delivery, if, when they signed it, they had made it a condition that it should not be delivered until executed by the other parties whose names were therein inserted as co-obligors, and it had been delivered to the principal obligee or his agent on this condition.

Case certified from Berrien Circuit Court. Debt upon the official bond of A. B. Munger, late sheriff of Berrien county, in the penalty of $20,000, made by Munger and twenty-three others as his sureties, defendants in this suit, and in form joint and several. Plea, *non est factum*.

It appeared on the trial that the bond was originally drawn in the penalty of $25,000, and was thus signed by Munger, and by six others of the defendants, as his sureties; that afterwards, without the consent of such sureties, and with the knowledge of only one of them, (Love,) the associate judges of Berrien erased the word "five" after the word "thousand" in the bond, and thus altered its penalty from $25,000 to $20,000; and that after the bond had been thus altered, it was signed by the other defendants, seventeen in number, and approved and filed.

By consent of parties, a verdict was taken for the plaintiff, subject to the opinion of the court upon the question of "What effect the alteration had upon the validity of the bond?" Whereupon, the Presiding Judge reserved the question for the opinion of this court.

*C. Dana*, for the People. 1. It is clear that the instru-

ment declared on is the bond of those who signed it after the alteration was made. *Lovett* v. *Adams*, 3 Wend. 380; *Cutler* v. *Whittemore*, 10 Mass. R. 442; *Adams* v. *Bean*, 12 Id. 137; *Collins* v. *Prosser*, 1 Barn. & Cress. 682; *Henfee* v. *Bromley*, 6 East, 309; *Thompson* v. *Lockwood*, 15 John. R. 256.

2. And we maintain that it is likewise the bond of those who executed it before the alteration was made. (1.) Because it was executed with reference to an adjudication and approval by the judges of the circuit court as to the sum and securities. R. S. 1838, p. 45, § 43. It was incomplete until that adjudication, and the signers are chargeable with knowledge of the law. It is, therefore, as if a blank had been left in the bond to have been filled up by the judges. *Ex parte Kerwin*, 8 Cow. 118; *Woolley* v. *Constant*, 4 John. R. 60; 17 Serg. & Rawle, 438; 1 Marsh, 311; *Waugh* v. *Bussell*, 5 Taunt. 707. (2.) Because the responsibility of the parties was not varied by the alteration. *Marson* v. *Pettit*, 1 Camp. 82; 2 Wheel. Am. Com. L. 226, note. Every greater includes the less. Again, the liability of the obligors depended upon the condition, and that was not altered. (3.) Because the alteration was made by the *agents of the law*, and not by the obligees, before delivery of the bond, and with the knowledge and consent of at least one of the obligors, who had the custody of it as the agent of the rest of them. The obligees had nothing to do with the bond until it was approved and delivered. The judges were not their agents, and had no other relation to the parties, or the bond, than any given contingency, established by the parties, on the happening whereof the agreement is to take effect. The filing of the bond was the delivery of it. The obligors were solely responsible for the identity and preservation of it prior to delivery. They placed it in the custody of their own chosen agent, and if any body must

suffer for his wrongful act, it should be those who empowered him to commit that act. (4.) Because the alteration was *acquiesced in* by the six obligors who signed before it was made, with sufficient knowledge of the facts. They knew that the sum was to be fixed at a future time by the judges, who having, as the agents of the law, reduced it, the bond was afterwards filed and became a public record, and was allowed to remain, without question, until after the death of the sheriff. *Master* v. *Miller*, 4 T. R. 320; *Paton* v. *Winter*, 1 Taun. 420.

*N. Bacon*, for defendants. 1. Any alteration of a bond, after execution, in a material part, without the knowledge or consent of the obligor, even by a party to the bond, makes it void. *Hunt* v. *Adams*, 6 Mass. R. 519; *Master* v. *Miller*, 4 T. R. 320; *Sanderson* v. *Symonds*, 1 Ball & Beatty, 430; 10 Serg. & Rawle, 164; 1 Sand. Pl. and Ev. 76; 4 Wheel. Am. Com. L. 279.

The alteration in this case is material, and was made by the parties required to receive and approve the bond. R. S. 1838, p. 45, § 43.

It may be proved under the plea of *non est factum*.

2. An alteration in a material part, discharges the defendant, even though beneficial to him. 2 Ves. 542; *Heard* v. *Wadham*, 1 East. 619; *French* v. *Campbell*, 2 H. Bl. 163; 6 T. R. 200; *Maton* v. *Booth*, 5 Maule & S. 223. Even though it be made by a stranger, the instrument is void. 11 Coke, 27; 4 T. R. 322; Id. 345.

3. The defendants have plead *non est factum*. Is the bond declared on the deed of the defendants? The seven first named obligors signed a bond in the penal sum of $25,000, while the bond declared on is for $20,000.

4. Erasures or interlineations in the substantial part of any contract or deed, are presumed to be false or forged, and must be satisfactorily accounted for, before the instru-

ment can be received in evidence. *Prevost* v. *Prevost*, 1 Pet. C. C. R. 379; *Crogan* v. *Gratz*, 5 Wheat. 502; *Heffilfinger* v. *Shurtz*, 16 Serg. & R. 46; *Singleton* v. *Butler*, 2 Bos. & Pull. 283; *Johnson* v. *Marlborough*, 2 Stark. R. 213; Chitt. on Bills, 212, note, (ed. 1839.)

GOODWIN, J. delivered the opinion of the Court.

In the question presented in this case, two are in fact involved;—first, as to the validity of the bond under the plea of *non est factum*, in respect to those who signed it before the alteration made by the associate judges; and, second, its validity as to those who signed it afterwards.

1. First, then, as to the former:—The statute, (R. S. 1338, p. 45, § 43,*) requires that, "every sheriff elected shall execute to the people of this state, a bond, in such penal sum, and with such sufficient sureties, not less than three in number, as the judges of the circuit court shall direct and approve." It seems, from the case, that the judges had not determined the amount of the penalty of the bond, until after it was prepared and signed by six of the obligors, and then, upon its being presented to them, instead of directing the penalty in the sum inserted in the bond, or approving it as drawn, which would be the same thing in effect, they altered it, reducing the amount of the penalty from $25,000 to $20,000. This was certainly a material alteration of it; and it cannot be said that a bond with a condition in penalty of $20,000, is the same with a bond in the penalty of $25,000. The alteration made it another and a different bond. It is such an alteration as if made after its execution by a party interested, would render it void. *Pigot's case*, 11 Coke, 27; *Master* v. *Miller*, 4 T. R. 320; *Powell* v. *Divett*, 15 East. 29; and *Hunt* v. *Adams*, 6 Mass. R. 519, are a few of the many cases deciding this point.

* *Vide* R. S. 1846, p. 73, § 68.

The judges were the officers of the law, appointed to determine as to the penalty and the sufficiency of the sureties, and they not approving the bond, but materially changing, before accepting and filing it, that which the six defendants executed was never delivered in contemplation of law, or had a legal existence, and the one which was approved and filed was not in fact their deed; consequently, as to them, has no validity. If they had assented to the alteration it would have been otherwise; for then, when delivered, it would have been their deed. *Speake* v. *United States*, 9 Cranch, 28. The case of *O'Neale* v. *Long*, (4 Cranch, 60,) is analagous to the present. There a bond under somewhat similar circumstances was held void against the party signing before the alteration. It was where an appeal bond, being once rejected, another surety was inserted without consulting the former sureties.

It is insisted that the responsibility of the parties is not changed by the reduction of the amount of the penalty;—that it is the condition which imposes the liability; and that the sureties are not prejudiced. Whether the sureties were prejudiced or not is wholly immaterial. Any alteration in the terms of their contract, by the parties to it, which changes their situation, without their consent, discharges them, when the contract has been actually made. Whether beneficial or not is for them, and them alone, to determine,—not for the other parties. They have the right to stand upon the terms of the contract; and, if varied without their consent, to say, *non in hoc fœdus veni*. Equally so, certainly, when the stipulations of their contract, after receiving their assent are varied by officers to whose approval it is required to be submitted before it is consummated.

It is argued that the bond was signed and sent to the judges by an agent of the defendants, with authority to alter it in this respect so as to meet their approval. No

such facts appear in the case, and certainly they cannot be implied from the fact that the approval of the judges was, by the law, required.

As to one of the six, (Love,) it appears from the case that he had a knowledge of the alteration, but as to any assent by him it is silent.

The position taken that, because the bond was filed, and remained in the proper office without any objection being made by the defendants in question, their consent is to be presumed, cannot be entertained. To whom should they make objection until sued? They might suppose that they were not deemed liable, and that the bond was deemed sufficient without their names. Nay, it does not appear from the case that they were even informed of the alteration before the suit was brought.

2. A different question is presented as to the effect of the alteration upon the liability of the other seventeen obligors. They executed the bond, which it is to be observed is joint and several, as it is. Each has bound himself, in the penalty, to be void upon the performance by the sheriff of the condition. Can the fact, then, that other names appear in the body of the instrument, intended to be obligors, who never, after the alteration, executed it, and who therefore are not in fact parties to it, relieve them from its obligation? I know of no principle or case which would lead to such a conclusion. If, when they signed the bond, they had made it a condition that it should not be delivered until executed by the other parties whose names were inserted in it, and it was delivered to the principal or to an agent under this condition, a different question would be presented,—to wit: whether there were any legal and effectual delivery until the performance of the condition. The case of *Cutter* v. *Whittemore*, 10 Mass. 450, is in point. In that case an arbitration bond, drawn as the bond of three, was executed by two. The court held it valid as

the bond of the two, remarking, "that if there had been any agreement or condition at the time, that it should not be delivered as their deed, unless the third person named as obligor should also execute it, this would show that it was only delivered as an escrow, and the defendant might have proved that fact under the plea of *non est factum*." In *Adams* v. *Bean*, 12 Mass. 140, the same doctrine was held in a case where a lease to two lessees was written as if to be executed by both, but was executed by only one of them. In an action on a guaranty indorsed on the lease, the guarantor was held,—the jury finding that the lease was intended to be delivered to the plaintiff.

The case of *Johnson* v. *Baker*, 4 Barn. & Ald. 440, is in conformity with this view. There in an action of covenant, upon a special plea that the deed was delivered as an escrow, and on condition that it should not be delivered to the plaintiff, but be void unless executed by certain other creditors, the proof sustaining the plea, the deed was held void and the plaintiff not entitled to recover.

It is the opinion of this court, then, that as to the six defendants who signed the obligation before the alteration of the penalty by the associate judges of Berrien county, the bond is of no legal validity; but that it is valid and binding upon the other seventeen who executed it afterwards.

*Certified accordingly.*

## NORRIS v. SHOWERMAN & CHURCH.

The object of interpretation is to ascertain the intention of the parties.

Such intention should be gathered from a consideration of all the parts of an agreement, and one clause should be interpreted by another.

The situation of the parties, and the subject matter of the transactions to which the contract relates, may be taken into consideration in determining the meaning of any particular sentence or provision.

Water was leased by the following words, viz: "*The right and privilege of drawing from the west side of the race now making by the said party of the first part, in Ypsilanti aforesaid, and leading to his new saw mill, at any place within sixteen rods from the head gate of said race, as much water as will run through an aperture of two feet square, under a head of four feet from the top of said aperture, for the use of carrying machinery for iron works, provided so much shall be needed by the said party of the second part for such use:*" And the lease further provided as follows: "*That in case the two feet square of water should not be enough for the use of such iron works as the said party of the second part may hereafter erect, near said race, he shall have as much more as shall be necessary for such use, by paying therefor at the same rate as for the two feet square aforesaid;*" and also, "*That in case a sufficient quantity of ore cannot conveniently be procured for carrying on said iron works to advantage, the said two feet square of water may be used for such other machinery as the said party of the second part shall think fit and proper.*" *Held*, that construing the words of demise by the other parts of the instrument, the lessee was entitled to as much water as would run from the race, into a flume conducting it to the iron works, through an aperture two feet square, made in the side of the race, not lower down than four feet below the surface of the water in the race; and not to as much water as would flow through an aperture of the size and under the head mentioned, into open space, or directly upon the wheel where it was applied.

*Held*, also, that the correctness of this construction was made more manifest by a consideration of the extrinsic fact that ten-sixteenths of the whole volume of the river, or sufficient water to propel six or seven run of stones in a grist mill, would pass into open space, through an aperture of the size and under the head mentioned.

*Held*, further, that on the hearing, on a bill filed to obtain an admeasurement of water under the lease, such extrinsic fact, though not alleged in the bill, might be given in evidence for the purpose of showing the intention of the parties to the instrument.

Norris *v.* Showerman.

After the execution of a lease of as much water as would flow through an aperture of a certain size, to be taken from the side of a race, the parties agreed *by parol* that the water should be taken from the dam, instead of the race; and that, in accordance with what was the original understanding, though ambiguously expressed in the lease, the water should be measured at the head gates. While the whole agreement rested in parol merely, but after that part of it which related to the place from which the water should be taken, had been executed, the lessee agreed to assign the lease to a third person, who thereupon entered into possession and continued to take the water from the dam. Before any written assignment was executed, however, the following memorandum—"*It is further agreed that the water is to be measured at the head gates*"—was added to the lease and signed and sealed by the lessee. *Held*, that the partial execution, by taking the water from the dam, of the agreement varying the terms of the lease, took the whole agreement out of the statute of frauds.

*Held*, also, that in equity, that is notice of a fact, which is sufficient to put the parties on inquiry; and that the fact, that, at the time of his contract to assign the lease, the lessee was in possession, taking the water from the dam instead of the race, in accordance with a part of the agreement varying the terms of the lease, was notice to his assignee of the whole agreement, and he was therefore bound by it.

APPEAL from Chancery. (*Vide* S. C. reported 1 Walk. Ch. R. 206.)

The bill in this case was filed by Norris to obtain an admeasurement of water, under a lease executed by him to one A. M. Hurd, and alleged that the defendants were joint owners, by assignment, of the entire leasehold interest. The defendant, Showerman, put in an answer, from which it appeared that Church, his co-defendant, had assigned to him a long time before the bill was filed, and that he thereupon became and was the sole owner of the leasehold interest. Church having, therefore, no interest in the suit, suffered the bill to be taken as confessed against him.

The lease was in the following words:

"Article of agreement made and entered into this ninth day of June, in the year of our Lord one thousand eight hundred and thirty-two, between Mark Norris, of Ypsilanti, county of Washtenaw, and territory of Michigan, of the first part, and Alanson M. Hurd, of Detroit, in the territo-

ry aforesaid, of the second part, witnesseth; That the said party of the first part, for and in consideration of the covenants and agreements herein after contained, to be performed and kept by the said party of the second part, doth hereby grant and convey to the said party of the second part, and to his heirs, for fifty years, and the privilege of renewing this agreement for fifty years more, at the end of this term, the right and privilege of drawing from the west side of a race, now making by the said party of the first part, in Ypsilanti aforesaid, and leading to his new saw mill, at any place within sixteen rods from the head gate of said race, as much water as will run through an aperture of two feet square, under a head of four feet from the top of said aperture, for the use of carrying machinery for iron works, provided so much shall be needed by the said party of the second part for such use, and also the right of erecting a bridge across said race, and using the same. In consideration whereof, the said party of the second part hereby agrees to pay to the said party of the first part the sum of fifty dollars per year, payable annually, on the ninth day of June, for the payment of which sum, the said party of the second part hereby binds himself, his heirs, executors and administrators."

"It is hereby further agreed by and between the parties aforesaid, that in case two feet square of water should not be enough for the use of such iron works, as the said party of the second part may hereafter erect near said race, that he shall have as much more as may be necessary for such use, by paying therefor, at the same rate as for the two feet square aforesaid. It is further agreed that in case a sufficient quantity of ore cannot conveniently be procured for carrying on said iron works to advantage, that the said two feet square of water may be used for such other machinery as the said party of the second part shall think fit and proper.

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

"In presence of } *Mark Norris*, [L. S.]
"*E. M. Skinner.* } *A. M. Hurd*, [L. S.]"

The race mentioned in the lease extended seventy or eighty rods below a dam on Huron river, owned by Norris, and drew water from the pond to supply the saw mill mentioned in the lease, and also a flouring mill about seventy rods below the dam, owned also by Norris, and erected in 1838.

Soon after the lease was executed, and as early as the fall of 1832, it was agreed verbally between Norris and Hurd, that the water leased, instead of being taken from the side of the race, as provided in the lease, should be taken, by a flume, directly from the pond; and on the erection of the iron works, such a flume was constructed, through which the water was taken by Hurd, and continued to be taken by those who successively became owners, by assignment, of the leasehold interest, until the time of the filing of the bill. It was also agreed, at the same time, that the water should be measured at the head gates, and that this should be added to the lease: Accordingly, Hurd afterwards made the following memorandum at the foot of it.

"It is further agreed that the water is to be measured at the head gates.

"Witness present, } *A. M. Hurd*, [L. S.]"
"*E. M. Skinner.* }

In February, 1833, Hurd agreed to sell one half of the leasehold interest to one Morris Sage, who soon afterwards entered into possession; but it did not appear that the agreement between the parties was reduced to writing until about a year after it was made. And, in December, 1833, Hurd also agreed with James M. Edmunds and Abel Godard, to sell them the other half of the leasehold

interest, and they thereupon entered into possession with Sage, and Hurd's possession terminated. The contract with them, although in writing, was made, on the part of Hurd, by his father as his agent, and it did not appear that he acted under any written authority.

As to whether, at the time when these parties (and especially Sage,) purchased of Hurd, the memorandum signed by him was at the foot of the lease, there was much conflict in the testimony. In the view taken by the court this was immaterial.

The lease, with the memorandum at the foot of it, was recorded June 26, 1834, and on the 22d day of May, 1835, Hurd executed a formal assignment of one half of the leasehold interest to Sage, and also a like assignment of the other half to Edmunds, Godard, and one Allen Stewart, in consummation of the above mentioned agreements; both assignments referring to the lease as recorded. There was testimony going to show that Norris knew of these transfers by Hurd, and acquiesced in them.

Showerman, whose title was derived through these assignees of Hurd, on coming into possession of the leasehold interest, insisted that the memorandum added to the lease, was made by Hurd without authority, after he had parted with the leasehold interest, and therefore constituted no part of the instrument, and he was not bound by it; and he claimed such definite quantity of water, ascertainable by calculation, as would flow through an aperture of the size and under the head mentioned in the lease, into open space, or directly upon the wheels of the machinery to be propelled by it:—in other words, that he was entitled to a definite quantity of water independent of the mode of taking it, and might have it measured by an aperture placed under the proper head wherever he chose.

Norris, on the other hand, insisted that the memoran-

dum was a part of the lease, and binding upon all persons claiming rights under it; and that even if it was not, the proper construction of the lease itself required that the water should be measured by an aperture, of the size and under the head mentioned, placed in a head gate at the side of the race, or in the dam from which the water was taken by a flume to the iron works, and that Showerman was entitled only to so much water as would pass through such aperture so situated.

Showerman, using, and insisting upon his right to use, more water than he would be entitled to under this latter construction, in December, 1838, Norris gave him notice to attend and assist in putting in a head gate, for the purpose of measuring the water. He refused to attend, and thereupon Norris put into the dam a head gate with an aperture two feet square in it, for the water to pass through from the mill pond into the flume, which head gate Showerman soon afterwards removed. And again, in May, 1839, Showerman still refusing to assist, Norris caused a new head gate, with an aperture as aforesaid, to be fitted into the same place, which Showerman likewise removed.

Whereupon, Norris filed the bill in this case, setting forth the facts, and praying that Showerman might be required, under the direction of the court, or of some one to be appointed for that purpose, to replace the head gate so removed, and that he be enjoined from afterwards removing it.

There was much evidence in the case as to the measurement of the water, and of extrinsic facts throwing light upon the intention of the parties to the lease. Such of it as the view taken by the court renders material, sufficiently appears in the opinion.

On the hearing, the chancellor granted a decree in accordance with the prayer of the bill. From this decree Showerman appealed to this court.

*James Kingsley* and *H. T. Backus*, for complainants, contended:—

1. That the court of chancery had jurisdiction to grant the relief prayed for. *Belknap* v. *Trimble*, 3 Paige, 577; *Arthur* v. *Case*, 1 Id. 448; *Robinson* v. *Lord Byron*, 1 Brown's Ch. R. 588; *Lane* v. *Newdigate*, 10 Ves. 192.

2. If Hurd had never assigned his interest in the lease, and the present controversy was with him, he would certainly be bound by the memorandum at the foot of it. As the defendants claim through him, they are likewise bound by it, for the following reasons:—(1.) The lease or agreement not being in its own terms assignable, (running to Hurd and his heirs, not *assigns*,) Hurd's assignees, even after a formal written assignment, acquired but a mere equity; *Thompson* v. *Rose*, 8 Cow. 263, 266; *Spencer's case*, 5 Co. 17; 6 Cow. 302; and took it subject to all equities between the original parties; *Murray* v. *Lilburn*, 2 John. Ch. R. 441; *Livingston* v. *Dean*, Id. 479; *Norton* v. *Rose*, 2 Wash. C. C. R. 233; *Picket* v. *Norris*, 2 Id. 255; and would be concluded by the acts *in pais* of the assignor, or by a legal decision against him. *Curtis* v. *Cisna's Adm.* 1 Ham. R. 436; *Grey* v. *Cuthbertson*, 2 Chit. R. 482.—(2.) Hurd's immediate assignees, under whom Showerman claims, had full legal notice of the rights of the complainant under the agreement of Hurd, by virtue of which the memorandum was placed at the foot of the lease. When they contracted to purchase, the water was taken from the pond, instead of the race, by virtue of a part of the same agreement. This was notice to them of the whole agreement; *Smith* v. *Low*, 1 Atk. 490; *Mertins* v. *Joliffe*, Ambl. 313; *Daniels* v. *Davison*, 16 Ves. 250; Fonbl. Eq. 416; *Green* v. *Slayter*, 4 John. Ch. R. 46; 12 John. 343; 17 Ves. 433; *Sandford* v. *Manning*, 6 Paige, 383; and they would have been bound by it, even if the memorandum had not been made until after actual assignment.—

(3.) Under the statute of frauds, Hurd's assignees could acquire no legal interest in the lease until actual assignment in writing. R. L. 1833, p. 342; *Mumford* v. *Whitney*, 15 Wend. 380; *Thompson* v. *Gregory*, 4 John. R. 81; *Jackson* v. *Buel*, 9 Id. 298. As the memorandum was in fact made before the execution by Hurd, of any written assignment, Showerman must be bound by it.—(4.) Had it even been made afterwards, then the equities of the parties would have been equal, and neither party having the legal title, the prior equity should prevail; *Grimstone* v. *Carter*, 3 Paige, 421; and, the agreement to take the water from the dam, and to have it measured at the head gate, being prior to interest or claim by Showerman, or by any of Hurd's assignees, the complainant would be entitled to have it carried into effect; for, the maxim of equity as well as law is, *qui prior est tempore potior est jure. Berry* v. *Mutual Ins. Co.* 2 John. Ch. R. 608.

3. But the true construction of the lease, independently of the memorandum, would require that the water should be measured at the head gates.

In the construction of instruments the intent of the parties is to control; *Quick* v. *Stuyvesant*, 2 Paige, 92; Kames on Eq. 80, 81, 99; 8 Cow. 32; 4 Conn. R. 10; 1 Burr. 285; *Howell* v. *Richards*, 11 East, 642; *Bull* v. *Follet*, 5 Cow. 178; *Marvin* v. *Stone*, 2 Id. 781; 2 Id. 195; Chit. on Contr. 19. And, in ascertaining the intent, the situation of the parties and of the subject matter is to be considered. *Wilson* v. *Troup*, 2 Cow. 195. Now, looking at the purposes to which the water was to be applied, as expressed in the instrument,—the provision for an increase of the quantity, in case it was needed,—the price which was to be paid for it,—the fact that the complainant had other mills supplied from the same dam,—the very large quantity of water, and the proportion of the whole power, which would be taken under the construction claimed by

the defendants,—can there be a doubt that it was the intention of the parties that the water should be measured in the ordinary way, by an aperture in the head gate, and not upon the abstract principles of spouting fluids?

*C. W. Lane* and *Wm. A. Fletcher*, for defendants.

GOODWIN, J. delivered the opinion of the court.

I have examined with much care the various questions presented by the case upon the pleadings and testimony and will proceed to state the conclusion at which I have arrived.

The principal questions are, 1. What is the construction of the instrument executed by complainant, granting the water power to Hurd, without the addition made to it? 2. What with that addition? and, 3. If the addition varies the construction of the original instrument, is it, in respect to the defendant, a subsisting and valid part of it?

The defendant, Showerman, insists that, by the terms of the lease, the water granted to the lessee was to be measured, not by an aperture to be inserted in a gate at the race or dam, from which it was to be transferred to the iron works of the lessee, but that it should be measured, as stated in his answer, on the wheel; that the words in the lease, "as much water as will run through an aperture of two feet square, under a head of four feet from the top of said aperture," contemplate the quantity of water, ascertainable by calculation, which will flow through an aperture of the size mentioned, under the pressure of the head mentioned, into open space, without the obstruction of any flume or channel conducting it to the machinery to be propelled by it; that he has the right to that definite quantity of water, to be applied on the wheels of the machinery;—in other words, that he is entitled to a definite quantity of water, independent of the mode of taking

it. On the other hand, it is contended on the part of the complainant, that, by the terms of the lease, the water granted is to be drawn in a particular manner, through an aperture of the size mentioned, from under the given head in a gate at the race mentioned in the lease, or the dam from which the flume was made to the iron works; and that the defendant, by the true construction of the lease, is entitled only to the volume of water which will, in this mode, pass through the given aperture.

The first question which presents itself, is, which of these two constructions of the lease is the true one. The great end in construing instruments is to ascertain what was the actual intention of the parties, and it is the object of courts of law and equity to enforce them according to such intention. To ascertain the true meaning and intention of the parties, it has been long a well settled rule, that the whole instrument is to be examined, and every part taken into consideration. As was said by Chief Justice *Hobart*, in the case cited by Lord *Ellenborough*, in *Howell* v. *Richards*, 11 East, 643, "Every deed is to be construed according to the intention of the parties, and the intents ought to be adjudged of the several parts of the deed, as a general issue out of the evidence: and the intent ought to be picked out of every part, and not out of one word only." This general principle is found in all cases on this subject, ancient and modern, and the soundness of the rule I think cannot be questioned.

It is also a further well settled rule, that in the construction of contracts, the situation of the parties, and the subject matter of their transactions to which the contract relates, may be taken into consideration in determining the meaning of any particular sentence or provision. *Wilson* v. *Troup*, 2 Cow. 228.

Let us apply these principles to the construction of the instrument under consideration. The complainant was in

possession, claiming title to, and recognized by the lessee as the owner of, a dam or water power on the river Huron, at Ypsilanti. He had erected a saw mill some seventy or eighty rods below, and was making a race from the dam, along the vicinity of the river, on the east side, to the saw mill. The lessee contemplated erecting, or was erecting, iron works, a little below the dam, between the race and the river. And in reference to these facts, all of which that are material, appear from the instrument, the lease is made, by which the lessor grants "The right and privilege of drawing from the west side of a race now making by the party of the first part, in Ypsilanti aforesaid, and leading to his new saw mill, at any place within sixteen rods from the head gate of said race, as much water as will run through an aperture of two feet square, under a head of four feet from the top of said aperture." If the grant had stopped here, and there were nothing more of it, probably the defendant's construction would be the correct one; but it proceeds, "for the use of carrying machinery for iron works, *provided, so much shall be needed by the party of the second part for such use.*" Here, in the sentence specifying the thing granted, is one restriction, which would have been operative had iron ore been found to carry on the contemplated works. The instrument proceeds, and after providing for a rent of fifty dollars per annum, contains a further agreement, *that in case two feet square of water should not be enough* for the use of such iron works as the said party of the second part may hereafter erect near said race, that he shall have as much more as may be necessary therefor, at the same rate *as for the two feet square aforesaid*," and further, that "in case a sufficient quantity of ore cannot be conveniently procured for carrying on said iron works to advantage, *that the said two feet square of water may be used* for such other machinery," &c. It seems to me that these provisions are the descrip-

tion of the grant by the lease, and mean a volume of two feet square, to emanate from the race, under the pressure of four feet head, and to be thence conducted to the iron works, and thus qualify the previous general words. This view certainly derives force from the fact that one of the clauses supposes that the quantity granted might not be sufficient for the proposed iron works.

When we take into consideration the quantity of water the defendant would have by his mode of interpreting the grant, (one of the witnesses stating that it would take ten-sixteenths of the whole, and the others, generally, that it would give enough to carry six or seven run of mill stones in a grist mill,) we can hardly presume the parties intended that such a quantity should be drawn from the side of complainant's race, which he was making to conduct the water to his own mill. The whole language, however, taken together, seems to me to indicate the other construction.

As to the evidence tending to show the large quantity of water defendant's interpretation would give, it is insisted by the counsel for defendant, that the fact is not averred in the bill and made the ground of relief, and that the evidence is therefore irrelevant. This position would undoubtedly be correct if it were made a ground of relief on the score of mistake, or other equitable consideration. But here it is introduced to show the situation of the subject matter to which the contract refers, and the consequent effect of one of the two different constructions contended for.

When the addition to the lease,—"it is further agreed that the water is to be measured at the head gates,"—is taken in connection with it, the construction above regarded as the correct one, is still more apparent; though, from the construction which appears to me to be the correct one of the original lease, this is unimportant. It is contended

that the addition to the lease was made after the purchase by Sage, and Edmunds and Godard, and that they had no notice of any modification of the agreement at the time of their purchase. As to the time when the addition was made, the evidence is somewhat conflicting. The chancellor, in his decision, deems this immaterial, on the ground that neither having the legal title, the older equity should prevail. This is doubtless a correct principle, and applicable, unless the earlier agreement, that with Sage, were void under the statute of frauds. The agreement with Sage does not appear, from the evidence, to have been reduced to writing at the time it was made, or until a bond was given in February, 1834. That with Edmunds and Godard, it appears, was; but, it was made and signed on the part of Hurd, by his father, as his agent, though, whether his authority was in writing does not appear. It appears from the evidence of A. M. Hurd and Philo Hurd, that soon after the making of the original lease, and as early as in the fall of 1832, a further verbal agreement was made, modifying the original lease, by which the water was to be taken from the pond instead of the race, and that it was then agreed that the water should be measured at the head gates, and that this should be added to the lease. Whether this latter addition was to be made in consequence of a supposed ambiguity, or an omission, does not distinctly appear, though Hurd states that it was the original understanding that the water should be measured where it was drawn from the race. Under this modification, a flume was constructed, conducting the water from the dam to the iron works, which flume continued until after Hurd's sale and transfer, and indeed ever since,—the premises having been in this manner occupied and enjoyed by all the successive assignees, the defendant included, down to the time of filing the bill. Here, then, was a parol agreement, undoubtedly after the original lease was made, part-

ly executed; and so far executed, it appears to me, as to take it out of the statute of frauds. And the part of the agreement relative to the change of location yet rests in parol. The defendants do not, it is worthy of remark, seek to avoid this part of it, but acquiesce in the change of location which the complainant sets up, while they seek to avoid that part which was afterwards added to the lease. When Hurd's assignees purchased of him, there was the possession under the modification of the lease, which was notice to them of the modification; for, in equity, that is notice of a fact, which is sufficient to put a party on inquiry. And here, when Hurd's assignees purchased, finding the location variant from the lease, and upon Norris' premises, drawing the water from his pond, upon inquiry of him, they would have learned the agreement under which the change was made, and if the place of measurement were an alteration, of course they would have heard of that also. Notice of a part of the agreement under which Hurd held and occupied, must be deemed notice of the whole of it. It may be remarked, also, that it appears from A. M. Hurd's testimony, that Sage, at the time of the agreement with him for a sale, had actual notice. If, then, the addition to the lease made a change of its terms as to the measurement of the water, and varied the proper construction and effect of the original lease, I could not, I think, avoid coming to the conclusion that, at the time of the purchase, by the defendant's assignors, of Hurd, the agreement, having been thus far performed, was valid in equity; that they, even if they had, at the time of their purchase, acquired a full assignment, should be deemed purchasers with notice; and that the modification of the agreement was obligatory upon them; and, consequently, that even if the construction which I give to the original lease, be not the true one, yet, that with the addition em-

braced, it is so; and that the conclusion of the chancellor is therefore correct.

It is said that the chancellor should, by his decree, have enjoined the defendant from using an excess of water, instead of directing the gates and aperture guaged and inserted. But I think the decree in this respect unobjectionable, and sanctioned by the case of *Arthur* v. *Case*, 1 Paige, 448, on the authority of *Martin* v. *Sherman*, Mosely, 144.

The defendant's counsel also complains that, by the decree, the gates and aperture, &c. are required to be put in at the defendant's expense. I see nothing wrong in this. *He*, under the agreement, must draw the water from the pond, for his own benefit, and of course at his own expense. He was requested to put in gates and take only the water that was his under it. According to the construction we deem the true one, he was taking more. He should have complied with the request. That it should be done under the direction of a master was rendered necessary by his course.

The case is of a novel character in our courts, and has been argued with much zeal and ability. After full and careful consideration of the questions presented, I have come to the conclusion that the decree of the chancellor must be affirmed. And such is the opinion of the court.

*Decree affirmed.*

## DAYTON v. WILLIAMS.

A declaration on a guaranty within the purview of the statute of frauds, (R. S. 1838, p. 330, ch. 2, § 2, subd. 2,) need not aver that the guaranty was in writing.

Nor that the undertaking guarantied, though within the purview of the third section of the same statute, was made with the formalities the statute requires.

That the averment, in a declaration on a guaranty, of notice to the defendant of non-performance by his principal, omits to state *when* or *where* the notice was given, is no ground for arresting judgment, but only of special demurrer.

CASE reserved from Oakland Circuit Court. This was an action of assumpsit, founded upon the defendant's guaranty of the performance, by one Tuel, of his contract to deliver to the plaintiff a specified number of sheep, at a place in Buffalo. The cause having been tried, and a verdict found for the plaintiff, the defendant moved in arrest of judgment for the reasons:—

1. That the declaration did not aver that the defendant's guaranty was in writing.

2. Nor that the guaranty was made with the formalities required by the statute of frauds.

3. That the averment of notice to the defendants, of Tuel's non-performance, did not show *when* or *where* the notice was given.

*T. J. Drake* and *M. L. Drake*, in support of the motion.

*Hunt & Watson*, contra.

GOODWIN, J. delivered the opinion of the Court.

The first reason urged for arresting judgment in this case, assumes that, as the statute relating to fraudulent conveyances and contracts in respect to goods, chattels, and things in action, requires every special promise to answer for the debt or default of another, to be in writing,

(R. S. 1838, p. 330, § 2,) therefore it is necessary that the declaration should aver it to have been so. This, however, is not necessary. The rule is, that where a thing is originally authorized by statute which could not be done at common law, then, in pleading, every thing must be averred, which the statute requires to bring the act done within it. Thus, in the case of a will of lands, it must be averred to be in writing. But where a statute makes a writing necessary, in a case where it was not so at the common law, then such averment in pleading is not necessary. And, as before the statute a promise to answer for the default of another was valid, if upon a sufficient consideration, though not in writing, it is not necessary to aver it to have been so. That it was so, is a matter of evidence to be shown on the trial. A distinction, however, is taken between a declaration and a plea, it being said that the plea must show that the contract was such as would sustain an action. The reason of the distinction does not seem very obvious. But the rule as to declarations is well settled. 1 Saund. R. 276, *a*. n. 1 and 2; 211, *b*. n. i; 1 Chitty's Pl. 227, 237; 4 John. R. 237, '9.

The second reason is similar to the above, to wit; that the contract of the party whose undertaking was guarantied by the defendant, is within the third section of the statute of frauds above referred to; and that it is not averred to have been made with the formalities required by the statute, by the delivery of a part of the property embraced in the contract, or any thing in earnest, or by writing. The answer to this is the same as to the first objection, that, if necessary to give validity to the guaranty, it is a matter of evidence, to be proved on the trial, and not necessary to be set out in the declaration; and, after verdict, must be presumed to have been proved.

The third reason is, that the averment of notice to the defendant, the guarantor, of the non-performance of the

contract by the principal, does not state any time or place when and where it was given. This is mere matter of form, and could be the ground only of a special demurrer. On a motion in arrest, only errors in substance will be considered; and such only can prevail as are not cured by verdict.

*Ordered certified that the motion should be denied.*

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JOHN DREW AND OTHERS *v.* THE STEAMBOAT CHESAPEAKE.

In cases of collision, the burthen of proof is on the plaintiff, not only to show negligence on the part of the defendant, but ordinary care on his own part.

A general custom of navigation, *e. g.* for vessels to pass each other to the left, may be proved by the testimony of persons skilled in navigation.

Such custom is a part of the law of the land; and a departure from it occasioning collision, will render the party liable, unless the other party, by reasonable effort, *might* have prevented it; and each party should act upon the presumption that the other party will adhere to the custom.

CASE certified from Wayne Circuit Court. This was a proceeding by complaint under the provisions of the "act to provide for the collection of demands against boats and vessels," S. L. 1839, p. 70. The complaint alleged that on the fifth day of October, 1839, Drew and others, complainants, were the owners of the sloop Democrat; that while she was passing up Detroit river, within the limits of this state, with four hands, and a cargo of stone on board, she was met by the steamboat Chesapeake, on her way down the same river, and was run down and crushed by said Chesapeake, and sent, with her crew, to the bottom of said river, where she has ever since remained,

broken in pieces, and utterly destroyed, together with her cargo, tackle, furniture, &c.

The cause was tried before the Hon. CHAS. W. WHIPPLE, Presiding Judge, at the May term, 1843, of the circuit court. On the trial, it was proved that the collision occurred on the American side of the channel of Detroit river, and while the Democrat was coming up, and the Chesapeake was going down the river, on that side of the channel.

On the part of the defence, several nautical men, four of whom had been commanders of vessels on the lakes for several years, being introduced as witnesses, testified that it was customary for vessels passing each other, to leave each other at the left; and that in navigating Detroit river, it was usual, when vessels were passing each other, for the one upward bound to keep the right or Canada shore, and for the one descending the river to keep the American side. Other witnesses testified that they knew of no such custom.

The evidence being closed, the defendant's counsel requested the court to charge the jury that the existence of the custom testified to by some of the witnesses, was matter of fact for their determination upon the evidence; that if proved to exist, such custom became a part of the law of the land, and as such, was binding upon the parties; and if the injury complained of occurred while the Democrat was violating the custom, no recovery could be had without proof of gross negligence or wanton injury on the part of the defendant.

On this point, the only charge of the court, given by the presiding judge, was as follows:—"I am not prepared to assert that the custom has the force of law, but if it was universal and known, or supposed to have been known, to the captain of the Democrat, and if he, regardless of the same, and having the ability, while on the Canada

shore, of keeping that shore, yet did not do so, then the custom may be shown for the purpose of establishing the fact that there was negligence or unskilfulness on the part of the captain of the sloop; but if, from the course of the wind, it became necessary to tack, or if the captain of the sloop exhibited such a light as was sufficient to indicate her position to those on board the Chesapeake, and he has good reason to believe, having reference to the custom, that, by his tacking, he could, without danger of collision, cross to the American shore, he had the right so to do. It is for the jury to say, however, whether such an act, under the circumstances, was imprudent, negligent, or unskilful. If it was, the plaintiff cannot recover, unless the boat could have avoided the collision by the exercise of common diligence."

The jury found a verdict for the plaintiff for $1275. Whereupon the defendant's counsel moved that the verdict be set aside, and for a new trial, on the ground, among others, that the above charge to the jury was erroneous.

*A. D. Fraser* and *A. Ten Eyck*, in support of the motion, cited 6 Pet. 715; Pet. C. C. R. 225; 8 Wheel. Am. C. L. 231, 235, 240, '2, '3, '5, '8; 1 Caines' R. 44; 5 Binn. 287; 20 E. C. L. R. 201; Doug. 207; 9 E. C. L. R. 22; 36 Id. 166; 1 How. R. 91; 19 Wend. 399; 21 Id. 190; 19 E. C. L. R. 298; 21 Wend. 615; 25 E. C. L. R. 534; 14 Id. 430; 24 Id. 368; 1 Cow. 78; 21 Wend. 615; 2 Hall's R. 151, 161; 22 E. C. L. R. 280; 24 Id. 393, '4; 34 Id. 435, '6.

*J. M. Howard* and *Alex. Davidson*, contra, cited 1 Dane's Abr. 515; Co. Litt. 113, a; 36 E. C. L. R. 166; Story on Bailm. § 611, n. 4, §§ 611, *a*. 611, *b*.; 8 E. C. L. R. 300; 14 Id. 446, 431; 2 Wend. 452; 1 Law Reporter, (1839,) 313; 13 Wend. 603; 11 East, 60; 2 Esp. N. P. 207;

21 Wend. 622; 5 Esp. R. 44; 8 E. C. L. R. 300; 24 Id. 395, note; 3 Carr. & P. 554; 4 Id. 106.

RANSOM, C. J. delivered the opinion of the court.

We are clearly of opinion that the charge of the court, framed as it was, may have misled the jury. The statute under which the proceedings in this case were had, provides that "every boat or vessel shall be liable for all injuries done to persons or property by such boat or vessel, in all instances, where the same is shown to have occurred through the *negligence* or *misconduct* of the master or hands thereon employed." S. L. 1839, p. 70. To entitle the complainant to a recovery under this statute, he must prove that the injury complained of proceeded from the negligence or misconduct of the master or hands employed on the boat or vessel against which the proceedings are instituted.

If it were shown satisfactorily to the jury, that it was customary for boats or vessels descending the Detroit river to keep the American side of the channel, and that the Chesapeake was in the accustomed track at the time she came into collision with the complainant's vessel, her master or hands could not be charged with negligence or misconduct, unless it were also shown, either that they had neglected the precautionary measures usual and necessary to prevent such disasters, such as lights, men to keep a look out, &c. or that, seeing the plaintiff's vessel in time, and having sufficient sea room to avoid a collision, they had neglected or refused to do so: and the burthen of proof is on the complainants; they must adduce the evidence necessary to fix the liability of the defendant. "In cases of collision, the burthen of proof is on the plaintiff, not only to show negligence on the part of the defendant, but ordinary care on his own part." 1 Western Law Journal, 30; *Lane* v. *Crombie*, 12 Pick. 177. In this view

of the case, the circuit court should have been prepared to assert that the custom in question, if proved, had the force of law, and should have so instructed the jury.

"A general custom is a general law, and forms the law of a contract on the subject matter, though at variance with its terms; it enters into and controls its stipulations, as an act of parliament, or of a state legislature. The court not only *may*, but are bound to notice and respect general customs and usages, as the law of the land, and, when clearly proved, they will control the general law." *United States* v. *Arredondo*, 6 Pet. 715, and cases there cited.

"Whether there be any general custom of navigation, and what it is, are matters to be proved by the testimony of persons skilled in navigation. If there be such a custom, a departure from it, occasioning collision, will render the party liable, unless the other party by reasonable effort might have prevented it; and each party should act upon the presumption that the other party will adhere to the custom." 1 Western Law Journal, 30; *Jamison* v. *Drinkald*, 12 Moore, 148; S. C. 22 E. C. L. R. 442; *Lowry* v. *Steamboat Portland*, 1 Law Reporter, 313; *Handayside* v. *Wilson*, 3 Carr. & Payne, 528.

Several questions were presented on the argument of the motion, which we have not deemed it necessary to consider, satisfied as we are, that the motion should prevail, on the ground that the jury *may* have been misled by the charge of the court as to the effect of the custom, in relation to which testimony was adduced on the trial.

The opinion of this court, then, is, that the defendant's motion that the verdict be set aside, and for a new trial, ought to be granted; and we direct that the same be so certified to the circuit court.

*Certified accordingly.*

## BRONSON *v.* NEWBERRY.

The act abolishing imprisonment for debt, (S. L. 1839, p. 76,) operated upon the remedy to enforce contracts made before it took effect.

It did not, thus construed, *impair the obligation of contracts.*

Debt, by B against N, on a recognizance of special bail. The recognizance was entered into in the year 1837, in an action upon contract, brought by B against one C, wherein judgment was rendered against C, in April, 1842, upon which a *ca. sa.* was afterwards issued, and returned *non est inventus.* N moved that an *exonere retur* be entered upon the recognizance: *Held*, that the motion should be granted, for that the act abolishing imprisonment for debt, which took effect May 10, 1839, (S. L. 1839, p. 76,) operated to prohibit the arrest or imprisonment of C upon any process issued upon the judgment against him, and thereby rendered the recognizance void.

Upon the hearing of the motion, it appeared that B formerly had a claim against the United States for property destroyed during the late war with Great Britain, which claim the accounting officers of the treasury department were authorized, by an act of congress, to adjust; and that C, who was not an attorney or counsellor at law, and did not hold himself out as such, being employed for a pecuniary compensation, and duly empowered for that purpose, had acted as the attorney of B in establishing such claim, and in procuring its adjustment by, and receiving payment thereof from, the treasury department; that he afterwards refused to pay to B the amount so received, and that the action by B against C, was brought to recover it: *Held*, that such action was not "for misconduct or neglect in a professional employment," within the purview of the second section of the non-imprisonment act of 1839.

It also appeared that C was, and ever since the commencement of the action against him had been, a non-resident of this state, without property in the state out of which the money could be made to satisfy the judgment rendered against him; but that ever since the rendition of the judgment, he had had property and effects elsewhere, which he unjustly refused to apply to its payment: *Held*, that these facts did not show any forfeiture of the recognizance, or in any way affect N's liability thereon.

CASE reserved from Wayne Circuit Court. A *capias ad respondendum*, issued out of Wayne circuit court, in a suit wherein Bronson was plaintiff, and one Camp defendant, returnable at the November term, 1837, of said

court, having been returned duly served, Newberry thereupon, on the 20th day of December, in the same year and term, joined Camp in executing a recognizance of special bail, whereby they acknowledged themselves to owe unto Bronson the sum of $3080, to be levied, &c. upon condition, that, if Camp should be condemned in the action at the suit of Bronson, he, the said Camp, should pay the costs and condemnation of the court, or render himself into the custody of the sheriff of the county of Wayne for the same, or, if he failed to do so, he, the said Newberry, would pay the costs and condemnation for him. June 1, 1840, Bronson recovered a judgment in the suit against Camp for $2981.36 damages, and $43.14 costs; upon which a *capias ad satisfaciendum*, directed to the sheriff of Wayne county, was issued, April 26, 1842, and returned *non est inventus*, on the 3d day of May following.

The present action was thereupon brought by Bronson against Newberry, upon the above mentioned recognizance of special bail, which, it was claimed, had been forfeited. It was commenced January 6, 1843, by summons issued out of Wayne circuit court. A declaration had been filed, and default for want of plea entered, when Newberry moved the circuit court, upon affidavit of the above facts, for an order that an *exoneretur* be entered upon the recognizance, claiming that it had been, in effect, rendered void, by the operation of the "act to abolish imprisonment for debt and to punish fraudulent debtors," approved April 10, 1839. (S. L. 1839, p. 76.)

Affidavits were read in opposition to the motion, for the purpose of showing that the judgment against Camp was for "misconduct and neglect in a professional employment," within the purview of the second section of the non-imprisonment act, and that therefore Camp was liable to imprisonment on process issued thereon. The contents of these affidavits, and also of counter affidavits introdu-

ced on the part of Newberry, sufficiently appear in the opinion of the court.

It also appeared by affidavit in opposition to the motion, that, at the time of the commencement of the action against Camp, he was, and ever since had been, a non-resident of this state, without property in this state out of which the money could be made to satisfy the judgment recovered against him; but that, ever since the rendition of the judgment, he had had property and effects elsewhere, which he unjustly refused to apply to its payment.

The motion was reserved by the presiding judge of the circuit court, for the opinion of this court upon the questions arising thereon, and was argued at the present term.

*Geo. C. Bates*, in support of the motion.

1. The non-imprisonment act, (S. L. 1839, p. 76,) went into effect before judgment was rendered, or *ca. sa.* issued thereon, against Camp, and operated to prohibit Newberry from making any surrender, and to discharge Camp from all liability to imprisonment upon process issued upon the judgment. Newberry's liability on the recognizance could never afterwards become *fixed* by return of *ca. sa. non est.* The *ca. sa.* against Camp was issued in violation of law, and was void. §§ 1, 25. The sheriff would have been a trespasser, if, finding Camp within the county, he had taken his body upon it. 21 Wend. 670; 22 Wend. 612. The court ought, therefore, to order that an *exoneretur* be entered, as has often been done in analogous cases. 1 Caines' R. 9, n. 8; Colman's Ca. 60; 2 John. R. 101; 6 D. & E. 247, '50; 2 John. Ca. 403; 9 Wend. 462; 1 Cow. 428; Doug. 45; 4 John. R. 409; 2 B. & P. 45.

2. The abolishment of imprisonment for debt on pre-existing contracts, by the act of April 10, 1839, was not unconstitutional as impairing the obligation of contracts. 12 Wheat. 213; 9 Pet. 359; 1 How. (U. S.) R. 328, 314;

3 Story on Const. 250; 1 Kent's Com. 419; *Sturges* v. *Crowninshield*, 4 Wheat. 122; *Mason* v. *Haile*, 12 Wheat. 376.

3. It does not appear that the judgment against Camp was for misconduct or neglect in a professional employment, so as to bring the case within the exception contained in the second section of the non-imprisonment act. 17 Wend. 32; 10 Id. 581; 1 Hill, 226. On this point the affidavits in opposition to the motion are insufficient, in not showing that Camp was a *professional man*, or that the money was received by him in a *professional capacity;* 3 Hill, 44; and the counter affidavits, showing that such was not the case, are admissible. 2 John. R. 100; 5 Id. 363; 10 Wend. 602; 9 Id. 463.

*A. D. Fraser*, contra.

1. The act abolishing imprisonment for debt being, in respect to the action against Camp, as well as to the recognizance and this suit, *retrospective*, does not apply to this case. A statute will not be construed to apply retrospectively unless it is so expressly provided. 1 Ves. Sen. 225; 3 Atk. 551; 2 Ld. Raym. 1350; 4 Burr. 2460; 2 Nott & McC. 505; 8 Am. Com. Law, 150; 4 Serg. & Rawle, 401; 4 Wend. 211; 12 Id. 490; 7 John. 477; 1 Ohio R. 13; 3 Serg. & Rawle, 590, '8.

2. But if the act does apply, it is, in respect to this case, unconstitutional and void; being a violation of the obligation of the contract which was the foundation of the action against Camp. *Bronson* v. *Kinzie*, 1 How. R. 311; *McCracken* v. *Hayward*, 2 How. R. 608; Swift's Dig. 14.

3. The second section of the act excepts from the operation of the first section, actions "for misconduct or neglect in any professional employment." The affidavits in opposition to the motion show that the action against Camp was within this exception. 2 Stark. Ev. 18; *Lips-*

*combe* v. *Holmes*, 2 Camp. 441. The counter affidavits offered on this point were not admissible. Rule 24.

4. This case does not come within the purview of the act, because it appears that Camp is, and always has been, a non-resident of this state, and has property which he wrongfully and unjustly refuses to apply to the payment of the plaintiff's judgment. These facts make a case within the fourth section of the act, which would deprive Camp, if within this state, of the benefit of the first section. It cannot have been the intention of the legislature that a debtor should be entitled to the exemption from imprisonment provided by the first section in such a case, while both himself and his property remained beyond the reach of that scrutiny permitted by the act as the only security for the creditor.

RANSOM, C. J. delivered the opinion of the Court.

It is very clear that the defendant is entitled to have an *exoneretur* entered upon his recognizance, if the act abolishing imprisonment for debt, (S. L. 1839, p. 76,) operated to prohibit the imprisonment of Camp, his principal, upon any process issued upon the judgment against him. 9 Pet. 358, and cases there cited.

1. But it is contended on the part of the plaintiff, that the defendant's recognizance of bail having been acknowledged and entered into *prior* to the passage of the act, is not affected by it; the act containing no express words declaring it retrospective in its operation, and the general rule being that no statute shall be construed to apply retrospectively, unless the intention of the legislature to give it such effect clearly appears.

We recognize the rule of construction contended for by the plaintiff's counsel, but it is an equally well established principle, that, in the exposition of statutes, every part is to be considered, and the intention of the legislature to be

extracted from the whole. *United States* v. *Fisher*, 2 Cranch, 358.

The first section of the act under consideration provides, "That no person shall be arrested or imprisoned on any civil process, issuing out of any court of law, or on any execution issuing out of any court of equity, in any suit or proceeding instituted for the recovery of any money due upon any judgment or decree, founded upon contract, or due upon any contract, express or implied, or for the recovery of any damages for the non-performance of any contract."

If the language of this section be taken according to its ordinary acceptation and meaning, it must be intended to prohibit arrest or imprisonment on civil process, absolutely, in existing, as well as in future cases. The terms are clear and explicit, that no person shall be arrested, &c. Still, under the application of the rule insisted on by the defendant's counsel, and which we have assumed to be the correct one, we might well conclude that the legislature did not intend to make the law apply to pre-existing cases. Subsequent sections, however, we think necessarily exclude such a conclusion. The third and fourth sections, and those following, to and including the sixteenth, contain provisions for the arrest, imprisonment and discharge of debtors charged with fraud, in the disposition or concealment of their property, or in contracting their debts, &c. and who could not be arrested or imprisoned by the preceding provisions of the act.

The seventeenth section is as follows:—"Every person imprisoned on civil process, at the time of this act taking effect as a law, in any case where by the preceding provisions of this act, such person shall not be arrested or imprisoned may, at any time after the taking effect of this act, give the plaintiff, his agent or attorney, ten days' notice of the existence of this act, which notice the jailor

shall cause to be served, if the plaintiff, his agent or attorney, be within the county in which the defendant is imprisoned; and if not, then by publication in the nearest public newspaper; which publication shall be taken and considered to be full notice to such creditor; and unless the creditor at whose suit such person shall be imprisoned, shall, within the time aforesaid, make application and complaint to some judge of the court, or to the justice of the peace, as the case may be, in which, or before whom, such suit was brought, as specified in the third and fourth sections of this act, and upon such application being made, if a warrant is not issued, as herein provided, such imprisoned person shall be entitled to be discharged from such imprisonment; and if such warrant be granted, the same proceedings shall be had thereon, as herein after provided, and the removal of the defendant from any jail in which he may be imprisoned by any warrant in such proceedings, shall not be deemed an escape."

This section, in language too plain and positive to be misunderstood, applies the act to cases in which there is not only a pre-existing debt, but in which a judgment has been obtained, final process issued, and the debtor actually arrested and imprisoned. Can it be supposed that the legislature intended to bring within the operation of this statute, this class of cases, and exclude from its application those in which an indebtedness had only been contracted, or an obligation incurred? We think such a supposition not warrantable under the most stringent rule of interpretation that has been contended for.

But again. The last section strongly fortifies us in the view we have taken of the act. It is thus:—"The provisions of this act shall not extend to residents of a foreign power, who have contracted debts with residents of this state before this act takes effect, until the expiration of one year after the taking effect of this act." The obvious mean-

ing to be gathered from this section is, that the provisions of the act shall be extended to all persons who shall have contracted debts with our citizens before the act took effect, *except* to residents of a foreign power, and to them also, after the expiration of one year from the time of the taking effect of the act.

2. It is insisted, however, that if the act is construed to apply to this case, it impairs a right which the plaintiff had acquired prior to its enactment, and is therefore *quoad hoc*, in conflict with the provision of the constitution of the United States, which declares that "no state shall pass any law impairing the obligation of contracts."

It is contended by the plaintiff's counsel, that the cases of *Bronson* v. *Kinzie*, 1 How. R. 211, and *McCracken* v. *Hayward*, 2 How. R. 608, are directly in point, and settle, conclusively, the doctrine they maintain. It should be recollected, however, that the precise question now under discussion, did not arise in either of those cases. The first was an adjudication upon the constitutionality of the appraisal laws of Illinois, as applicable to *existing* mortgage contracts. The second, *McCracken* v. *Hayward*, applied the principles laid down in *Bronson* v. *Kinzie*, to sales upon execution.

It is admitted that the language of the court, in both cases, is sufficiently broad and comprehensive to embrace the point now in controversy. Judge *Baldwin*, in delivering the opinion of the court in *McCracken* v. *Hayward*, laid down this proposition:—"Where the contract becomes consummated, the law defines the duty and the right; compels one party to perform the thing contracted for, and gives the other a *right to enforce the performance, by the remedies then in force.*" Again, he remarks—"If any subsequent law affect to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract, in favor of *one* party, to the injury of the

other; hence, any law which, in its operation, amounts to a denial or obstruction of the rights accruing by a contract, though *professing* to act *only* on the *remedy*, is *directly obnoxious* to the prohibition of the constitution."

Now, had the question then before the court been, whether a state could abolish imprisonment for debt, upon subsisting contracts, without impairing the right of the creditor; and *not*, as it was, *solely* as to the validity of the Illinois appraisal laws, the decision unquestionably must have determined the rights of the present parties. Such, too, must be the effect of that decision, if it be found that the remedy by imprisonment entered into and formed a part of the contract between Bronson and Camp. The plaintiff's counsel contend that it did. Can the position be maintained, either upon principle or authority? If it be true that this remedy was incorporated into the contract, and constituted an essential part of it, it must necessarily go with it, and might be applied for its enforcement, wherever the party might be found. A doctrine leading to such a result, it seems to me, is untenable. Justice *Story*, in treating of this subject, remarks, that, "Although there is a distinction between the *obligation* of a contract and a remedy upon it; yet, if there are certain remedies existing at the time when it is made, *all* of which are afterwards wholly extinguished by new laws, so that there remains no means of enforcing its obligation, and no redress; such an abolition of all remedies, operating *in presenti*, is an impairing of the obligation of such contract." "But," he continues, "every change and modification of the remedy does not involve such a consequence." "No one will doubt that the legislature may vary the nature and extent of remedies, so always that some substantial remedy be in fact left." "And a state legislature may discharge a party from imprisonment, upon a judgment, in a civil case of contract, without infringing the constitu-

tion; for this is but a modification of the remedy, and does not impair the obligation of the contract." 3 Story on Const. 250.

*Sturges* v. *Crowninshield*, (4 Wheat. 122,) a leading case on this and kindred subjects, is strongly in point. Chief Justice *Marshall*, in deciding the case, held this language: "To punish honest insolvency by imprisonment for life, and to make this a constitutional principle, would be an excess of inhumanity which will not readily be imputed to the illustrious patriots who framed our constitution, nor to the people who adopted it. The distinction between the obligation of a contract, and the remedy given by the legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified, as the wisdom of the nation shall direct." "Confinement of the debtor may be a punishment for not performing his contract, or may be allowed as a means of inducing him to perform it. But the state may refuse to inflict this punishment, or may withhold this means, and leave the contract in full force. *Imprisonment* is no part of the contract, and simply to release the prisoner, does not impair its obligation."

The case of *Mason* v. *Haile*, (12 Wheat. 370,) is to the same effect. "Can it be doubted," said Judge *Thompson*, "but the legislatures of the states, so far as relates to their own process, have a right to abolish imprisonment for debt altogether, and that such law might extend to present, as well as future imprisonment? We are not aware that such a power in the states has ever been questioned. This is a measure which must be regulated by the views of policy and expediency entertained by the state legislature. Such laws act merely upon the remedy, and that in part only. They do not take away the entire remedy,

but only so far as imprisonment forms a part of such remedy."

The doctrine of both these cases is reaffirmed in *Beers* v. *Haughton*, 9 Pet. 359. The question involved in the case now before us, constituted the turning point in that case. "There is no doubt," observed Judge *Story*, in delivering the opinion of the court, "that the legislature of Ohio possessed full constitutional authority to pass laws whereby insolvent debtors should be released, or protected from arrest, or imprisonment of their persons, on any action for any debt or demand due by them. The right to imprison constitutes no part of the contract, and a discharge of the person of the party from imprisonment, does not impair the obligation of the contract, but leaves it in full force against his property and effects."

Neither of these cases were commented upon, or even referred to, by the majority of the court, or by the counsel, in *Bronson* v. *Kinzie*, or *McCracken* v. *Hayward*. They are not, therefore, overruled or modified by those cases, nor can we perceive that there is any conflict between them, if it be admitted that the remedy by imprisonment, where it exists, is not one of the elements of a contract. Judge *McLean*, in delivering a dissenting opinion in *Bronson* v. *Kinzie*, says inquiringly:—"Does any one doubt that a state legislature may abolish imprisonment for debt, as well on past as future contracts?" "Here," he continues, "is a modification of the remedy, which takes away a means, and often a principal means, of enforcing payment of the debt; and yet, this is admitted by all to be a constitutional law."

Swift's Dig. vol. 1, p. 14, is cited in behalf of the plaintiff, and, it is insisted, fully sustains his position. The case of *Sturges* v. *Crowninshield*, is there referred to and commented upon, as follows:—"There is some question respecting the correctness of all the principles above laid

down. To say that the legislature has a right to modify the remedy upon a contract, as they think proper, and to withhold the means of enforcing it by imprisonment, is giving them, in effect, the power to destroy the obligation of it. I apprehend the real obligation of a contract to be, that the contracting party shall perform it, and that he shall be liable to have it enforced against him by taking his estate, or by imprisoning his body to compel him to produce it; for a contract is of little value without a legal remedy for a breach of it, and a remedy would be of little value without the power of imprisoning the body to enforce it. Of course a suspension of the execution, or an exemption of any portion of the debtor's estate from execution, &c., would be a violation of the constitution; for, it would lessen, and might defeat the remedy. So, the total abolishment of imprisonment for debt, is repugnant to the constitution; for it deprives the creditor of the most effectual means to compel the debtor to produce his property for the payment of his debts, &c. But where, by a proper proceeding, it is ascertained that the debtor has no estate, or he delivers up all his estate in payment of his debts, then, as the imprisonment of the person could have no effect to compel the production of property for the payment of the debt, the discharge of the person will not impair the obligation of the contract; for, in such case, imprisonment, instead of being a means to enforce the payment, will only be a punishment for not having property to make the payment."

It will be readily admitted, that the opinions of Judge *Swift* are entitled to the most respectful consideration, emanating as they did, from one of the most able jurists of his time in this country. But, applying the principles laid down by him, to the non-imprisonment act of this state, will it be found obnoxious to the charge of unconstitutionality? I apprehend not; for it contains pro-

visions the most ample, to compel a discovery of the debtor's effects, if he have any, and their application to the payment of his debts.

We may add, in concluding the discussion of this point, that most of the states of this union, have abolished imprisonment for debt, as well upon contracts existing at the time, as upon future ones; and we are not aware that such legislation has ever been adjudged an infringement of the constitutional provision in question.

3. But it is contended further, that the recovery against Camp, being for *misconduct* and *neglect* in a professional employment, is, by the second section of the act, expressly excepted from its operation.

That section is as follows:—"The preceding section shall not extend to proceedings as for contempt to enforce civil remedies, nor to actions for fines and penalties, or on promises to marry, or for moneys collected by any public officer, or for any misconduct or neglect in office, *or in any professional employment.*"

The facts on which the plaintiff relies to bring this case within the exceptions of the act, are stated in his affidavit as follows:—"And this deponent further says, that the said action on which the said recovery was had in favor of this deponent, against the said John G. Camp, was for misconduct and neglect in a professional employment; that this deponent, under the provisions of an act of the congress of the United States, for the relief of this deponent, approved on the 14th day of July, 1832, a copy of which is hereto annexed, employed the said John G. Camp, for a pecuniary compensation, as the attorney of this deponent, and gave him the requisite authority for that purpose, to procure and present to the treasury department of the United States, the requisite evidence to establish this deponent's claim, mentioned in said act, and procure the adjustment and allowance thereof, and obtain

from said treasury department, and pay over to him, this deponent, the money to which he was entitled, and which should be allowed him under and by the provisions of the said act; that the said Camp did act as the attorney of this deponent in said matter, and did, as such attorney, obtain from the said treasury department, the sum of $5340, allowed to this deponent, under and by virtue of the provisions of the said act, of which sum, the said Camp paid to this deponent only the sum of $2929.95; and that the residue of said money the said Camp wholly neglected and refused to pay to this deponent, and for that cause and no other, the said action was brought and prosecuted against the said Camp, and the judgment aforesaid recovered against him, and in favor of this deponent."

By the act of congress referred to, the proper auditing officers of the treasury department were authorized to adjust the claim of John Bronson, for a house and store destroyed by the enemy in the village of Buffalo, during the late war, and pay to him, &c.

With a view to meet the allegations in the plaintiff's affidavit, the defendant's counsel, on the argument of the motion in the circuit court, offered to read several affidavits to show that Camp was not, and never had been, by profession, an attorney or counsellor at law; the reading of which was objected to on the ground that they had not been filed, and copies served, agreeably to the 24th rule of the circuit court. Admitting the objection to have been well taken, it might have been obviated by an application to the circuit court, for leave to file the affidavits as of the time when the motion was made; or, the defendant might have withdrawn his motion, and, on a renewal of it, filed and served his affidavits in conformity to the rule. We incline, therefore, to treat the affidavits as properly before us, that we may form and certify to the circuit court

an opinion upon the merits of the question presented by that court for our advice.

But, it is here urged by the plaintiff that, inasmuch as Camp assumed to act as an attorney, the defendant is estopped from denying that he acted in that capacity; and we are referred to 2 Stark. Ev. 18, and *Lipscombe* v. *Holmes*, 2 Camp. 441, in support of the position.

There is no allegation in the plaintiff's affidavit, that Camp held himself out to the plaintiff as an attorney by profession, or that he in fact was such. Nor does it appear from the affidavit, that the business about which he was employed, was of such a character that it could be performed *only* by an attorney at law. It is apparent, on the contrary, that it could have been properly done by any man of common intelligence, possessing an ordinary knowledge of business. The plaintiff does not aver that he reposed confidence in Camp, by reason of his *supposed* or *assumed* professional character.

In view of the facts before us, we are clearly of opinion that the rule established by the authorities cited, and which is doubtless the true one, is inapplicable in this case.

4. It is contended that the defendant's motion ought not to be granted, because Camp is, and always has been a non-resident of this state; and has had, ever since the rendition of the judgment, and yet has, elsewhere than in this state, property and effects which he unjustly refuses to apply to the payment of the judgment.

We have seen that the language of the first section of the non-imprisonment act is general and without qualification, "that *no person* shall be arrested or imprisoned," &c. The only restriction upon the generality of its application, is contained in the last section, which provides that it "shall not extend to residents of a foreign power who have contracted debts with residents of this state, before

the act takes effect, until the expiration of one year after the taking effect of the act." The year expired May 10, 1840, some twenty days prior to the rendition of the judgment against Camp. The mere fact, then, of Camp's non-residence, did not prevent the act from operating to discharge him from liability to imprisonment on the judgment.

I can perceive no materiality to the fact that Camp had property elsewhere than within this state which he unjustly refused to apply to the payment of the plaintiff's judgment against him. Does it tend to show a forfeiture of the defendant's recognizance of special bail? To my mind, clearly not. What was the defendant's undertaking? It was, that, if Camp was condemned in the action at the suit of the plaintiff, and failed to pay the costs and condemnation of the court, or to render himself into the custody of the sheriff of the county of Wayne, he, Newberry, would pay the costs and condemnation for him; and *not* that, if Camp had property and effects out of the state, and unjustly refused to apply the same to the payment of the judgment, he would pay, &c.

The fact last stated might well be made the foundation for proceedings against Camp, if he were within the jurisdiction of the court in which the judgment was rendered, under the provisions of the third and fourth sections of the act. But I am unable to see how it can, in any way, affect the liability of Newberry.

If it be said that the plaintiff is prevented from resorting to the remedy provided by the non-imprisonment act, for compelling a disclosure of the debtor's effects, by reason of his having gone without the jurisdiction of the court in which the judgment was rendered, and that, *therefore*, there has been a forfeiture of the defendant's recognizance, it may be well answered, that the defendant did not undertake that Camp should remain or be found here for

any such purpose; but that he should be surrendered to the custody of the sheriff, on execution issued upon the judgment obtained against him.

Suppose Camp were within the county of Wayne, and were, in fact, liable to be proceeded against, under the third and fourth sections of the act, for a fraudulent concealment of his property. Could that operate a forfeiture of the defendant's recognizance? That will not be pretended. Camp could not be taken by a *ca. sa.* on account of such fraud. In a proceeding under the sections of the act mentioned, he could be punished for such fraud by imprisonment, until he should pay or secure the debt, or surrender his property for that purpose. But, as we have just said, the defendant did not obligate himself to keep or have Camp here that he might be thus punished.

GOODWIN, J. did not participate, having formerly acted as counsel for the plaintiff in the circuit court.

*Ordered certified that the motion ought to be granted.*

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## SCALES *v.* GRIFFIN.

The lien (under R. L. 1833, p. 406,) of a mechanic or material man, for labor done or materials furnished in the construction of a building, attaches only upon the interest of the person for whom it was erected; and does not encumber any pre-existing right or title of any other person.

If, therefore, when the lien attaches, the person causing the building to be erected, has no title to the premises on which it stands, but a mere right, resting in contract, to a conveyance on the performance of a condition precedent, and that right is afterwards lost by his failure to perform the condition, subsequent proceedings to enforce the lien, will convey no right or title to the purchaser.

CASE reserved from Berrien Circuit Court. Ejectment by Scales against Griffin to recover possession of a cer-

tain story and a half wooden dwelling house, 18 by 25 feet, in the village of Niles, together with the lot of ground 63 feet front, by 132 feet in depth, whereon said dwelling house stands. Plea, general issue.

To establish his title, the plaintiff proved on the trial the filing, (under R. L. 1833, p. 406,) by Milton Hall, of a claim of lien upon the dwelling-house described in the declaration to the amount of $155, for labor expended and materials furnished in erecting the same;—*scire facias* issued thereon, June 20, 1837, and served upon William P. Derby;—judgment rendered on default of said Derby, April term, 1838;—an execution issued upon said judgment requiring the sheriff to sell the house;—the sheriff's certificate of the sale of the house, by virtue of the execution, to said Milton Hall, May 16, 1839;—a deed of the house, executed by the sheriff to said Milton Hall, May 21, 1841, in consummation of such sale;—and, a conveyance of the house, with the appurtenances, to the plaintiff, by deed executed by Milton Hall and wife, Oct. 6, 1841.

The plaintiff proved also that the lot was of the size and dimensions mentioned in the declaration;—that it was the usual size of village lots in Niles, and not larger than was necessary for the enjoyment of the dwelling-house; and that it was, and always had been, enclosed and occupied with the same.

The plaintiff further proved that the dwelling-house was erected in 1837, by Milton Hall, a master builder, carpenter and joiner;—that he was employed by William P. Derby, who was at that time in the peaceable possession of the lot;—that Orrin Derby lived at the time within a few rods of the premises, and knew that Hall was erecting the building for William P. Derby:—that he stated to Hall and others, that he had sold the premises to said William P. Derby, though there was no evidence

that Hall was informed of the terms and conditions of such sale.

On the part of the defence a contract was read in evidence between Orrin and William P. Derby, for the sale by the former, and purchase by the latter, of the premises in question, bearing date May 16, 1836, and before the building was commenced. [The terms of the contract are not given in the case certified to this court.] And it was admitted by the plaintiff that when the building was commenced, the legal title in fee simple of the premises, was in Orrin Derby. It was also admitted that in October, 1838, Orrin Derby conveyed the premises by deed to the defendant, who had occupied the same ever since.

Upon this evidence the cause was submitted to the jury; a verdict was taken for the plaintiff; and the question of whether upon the evidence the plaintiff was entitled to such verdict, was raised by a motion for a new trial, and reserved by the presiding judge for the opinion of this court.

*V. L. Bradford*, for the plaintiff.

*N. Bacon* and *C. Dana*, for defendant.

Felch, J. delivered the opinion of the Court.

The case made shows a legal title in the premises in Orrin Derby, and no legal conveyance, by him, of that title, by deed to the plaintiff, or any person through whom he claims. On the contrary, the defendant derived title directly from him by deed in fee, and possession under that deed. The plaintiff's title is derived through the proceedings and sale had by virtue of the mechanics' lien of Milton Hall, who was the purchaser at the sheriff's sale, and conveyed his title, thus acquired, to the plaintiff.

The first question presented, is, whether any title passed to Milton Hall by virtue of the lien and the proceedings to

enforce it. The regularity of the proceedings under the lien law is not controverted; but it is contended, that, under the statement of facts here presented, no title to the premises passed. The labor of erecting the house was done by Hall, on a contract with William P. Derby, who was in possession of the premises, under contract for a title with the owner. The conditions of that contract are not reported in the case; and there is no evidence that those conditions were ever performed by William P. Derby; nor is this material, since it is clear that no conveyance of the title of the premises was ever made to him in pursuance of that contract. When the mechanic's labor was performed for William P. Derby, he had no legal title to the premises, and though he had a contract with the view of obtaining it, with the owner, yet it never ripened into a title. On the contrary, the legal title passed by deed from the owner to the defendant, who held by virtue of it. To what, under these circumstances, did the lien attach? Was it to the interest of William P. Derby only? If so, it was liable to be defeated with his title, and must fall, unless his contract with the owner was succeeded by the conveyance of the title. Or, was the lien of such a character as to take the title itself, regardless of the question whether the contract was ever performed, or the conveyance made, to the contractor? Did it cut up and destroy the title of the owner, transferring a fee, clear of all prior interest in him?

The answer to these inquiries involves a construction of the statute, (R. L. 1833, p. 406,) under which these proceedings were had.

The first section of this act provides, "that all and every dwelling-house, or other building, hereafter constructed and erected within the territory of Michigan, shall be subject to the payment of the debts contracted for or by reason of any work done or materials found and provided by

any brick maker, &c. *before any other lien which originated subsequent to the commencement of such house or other building.*" The same section provides, that, when the building is erected under a contract entered into with the owner, no sub-contractor or furnisher of materials shall have a lien, unless he shall give notice thereof to the owner or owners within thirty days after being so employed.

It is evident from his language, that the lien thus given was not intended to be paramount to all other claims to the premises. If, for instance, an execution had been levied prior to the commencement of such building, the mechanic's lien would be subject to such levy, and might be entirely defeated by a sale under it. So also, of a prior mortgage; upon a foreclosure and sale, the title would pass to the purchaser, who, after the expiration of the time of redemption, would hold the premises free of any incumbrance on account of such mechanic's lien. This limitation in the statute, shows clearly, that it was never intended to allow the mechanic, or the material man, to close his eyes upon all incumbrances and titles, and hold a lien upon the fee, and deprive all others interested, by an enforcement of his claim, of their legal rights in the property. Like a purchaser, he must see to it, that he does not interfere with the rights of innocent bona fide incumbrancers.

The rights of Orrin Derby were more perfect than those of a mere incumbrancer. Not having parted with the fee, he was the legal owner of the title, and so the record showed to the world. In giving a reasonable construction to the statute, we cannot suppose that it was designed to afford greater protection against the lien created by it, to a mere incumbrancer, than to him who held the legal title. Suppose a trespasser obtrudes himself into, and occupies, the village lot of a non-resident, and procures a mechanic to erect a house upon it:—it would be monstrous

to assert, that by proceedings to enforce the mechanic's lien, and a sale under those proceedings, the true owner could be deprived of his title. Little less monstrous would be the doctrine, that the owner, who has contracted to convey a lot upon certain terms, and given the possession until those terms be fulfilled, without parting with his title, but who, on account of a breach of the contract, was obliged to take possession of his land again, should be subject to be deprived of his title by virtue of such a lien for buildings erected for the contractor, and without the privity or consent of the owner. The statute, in my opinion, neither requires nor authorizes such a construction. It was intended to give to the mechanic or the material man, for a limited time, a right to obtain his pay for his just wages and claims, out of the very building erected by him, to the exclusion of those whose claims attached to the property at a date subsequent to his demand. It is a statute designed to be highly beneficial to those whose rights are protected by it, and should be so construed as to protect the laborer to the utmost extent of its provisions; but it was never intended to give to him a right paramount to that of the true owner of the land whereon the building was erected, or to a previous lien.

The second section of the act, which provides the method of enforcing the lien, appears to me to be in accordance with this view of its provisions. Two methods are provided for enforcing a lien filed under the statute. The first is by personal action against the debtor; the second is by *scire facias* against the debtor or owner of the building. Both these methods seem to contemplate the enforcing of a claim depending on the contract between the mechanic or material man, and his employer. The claims may be enforced by suit, as in other cases, against the debtor; and in that event, a levy and sale of the property would clearly convey only the debtor's interest in the

premises. The proceeding by *scire facias* is also against the debtor, or the owner of the building, and results in a judgment against the defendant for the amount of the lien, which judgment can only be enforced by sale of the building. The purchaser's title would date back to the time the lien commenced, and would take precedence of all subsequent claims to the premises. Still it is simply a proceeding to enforce a claim against the debtor; and that too, out of the property of the debtor; although, by virtue of the statute, a lien is given upon the specific property, from the time of the date of the claim, by pursuing the steps given by the statute to secure it. It has been supposed that the word *owner*, in that part of the section which authorizes the *scire facias* to be issued against the debtor or owner of the building, implies, that whoever may be the owner at the time the lien attaches,—whether the person who contracts for the building, or any other person,—the lien attaches to the property absolutely, and a sale under it carries with it a perfect title as against the world. But it will be observed, that the declared object of the statute is to secure the mechanic's demand to the exclusion of all subsequent claims to the property. A person employing a mechanic to erect a building on land to which he has only a title subject to prior rights of a third person, and liable to be defeated by his claim, may sell his interest, and yield his possession of the premises to another, subject, of course, to the mechanic's lien, and in that event, the purchaser, as owner, should be made a party to the *scire facias*. So, the absolute owner of the fee may convey the land, subject to the lien of his mechanic; and in that case, the subsequent owner should be made a party to a proceeding which seeks to enforce a lien upon his property. The word *owner*, then, in this section, does not enlarge the estate subject to the lien, but, in perfect consonance with the provisions of the first section, provides for

notice to an owner who takes the property after the lien has attached. In such case, notice should be given to him, either by service of the *scire facias* upon him, or by fixing a copy of the writ upon the door of the building against which the claim is sought to be enforced.

From a view of the whole statute, I am satisfied that the mechanic's lien attaches only to the property as it existed in the person causing the building to be erected, and that a sale under such lien, would carry with it only such title as he possessed at the time the lien attached.

It is said, in the case before us, that Orrin Derby, living near, and knowing of the erection of the building by Hall, while in the employment of William P. Derby, must be considered as assenting, both to the erection of the building, and the mechanic's lien thereon, and should therefore be chargeable with the lien. But all this was perfectly consistent with the relation existing between him and William P. Derby. The latter having contracted for the purchase, and having the possession under his contract, must be supposed to have made the improvements with the expectation of obtaining a title when the terms of his contract were performed. And Orrin Derby's knowledge of the erection of the building, without dissent, instead of being construed into an assent to become himself chargeable for the labor and materials, in fact only shows that he might have looked upon the expenditures as a guaranty that the contract would be performed by Wm. P. Derby. The building was erected by the latter, subject, of course, to the paramount title of Orrin Derby; who could no more be chargeable with such improvements, after a breach of the contract, than a purchaser under a mortgage sale, for improvements made on the premises subsequently to the execution of the mortgage. His silence, when no assent was required, and when the expenditures were made by one in possession, with the right

to improve, and the expectation that the improvements would inure to his own benefit, by his subsequently procuring a title under the contract, can never be considered as an implied promise, by the owner, to pay for the expenditures, or as charging his estate with a lien for them. If such were to be the effect, all such contracts, highly beneficial as they often are to the contracting parties, must cease. No landed proprietor would thus contract to convey his land upon the payment of the price at a future day, if the bargainee should have, under his contract, the power to encumber the premises by erecting buildings thereon, in such a manner as to charge him, upon a failure in the performance of the contract, with the payment. This would be to allow the opposite party to break his contract of purchase, and thereupon to compel the owner to pay for improvements without limit, or lose his property on the lien, without consent, and without compensation.

I have thus fully remarked upon the construction and application of the statute in question, because a totally different view has been urged with zeal and ability, by the plaintiff's counsel, and authorities cited to sustain his position.

Three cases are cited from the Pennsylvania Reports, which, it is contended, give such a construction to a statute similar to our own, as to sustain the plaintiff's claim. The lien law of Pennsylvania, of 1806, is similar to ours in the terms by which the lien is created, except that the entire provision as to the lien of a sub-contractor, contained in our statute, is not found in theirs. This difference affects materially the extent of such liens.

The case of *Steinmetz's Executors* v. *Boudinot*, 3 Serg. & Rawle 541, was under the lien law of 1803, and was a case where the lien claimed was for materials furnished by a sub-contractor; and it was held, that under the terms of that law, no lien was created in favor of any one but

the person who contracted with the owner. The court, however, in that case, remark that the law of 1806 was intended to give the lien for all work done, or materials furnished, whether furnished to the owner of the building or not. In *Lewis* v. *Morgan*, 11 Serg. & Rawle, 234, the lien was filed under the law of 1806, and *scire facias* was brought by a sub-contractor, to enforce it against the building. The court held that the sub-contractor had no personal claim against the owner for his debt; but that the claim of the laborer, or material man, did attach specifically to the building, in the hands of the owner, and that the lien might be enforced. And, in *Savoy* v. *Jones*, 2 Rawle's R. 343, it is said that the lien arises from the credit having been given, not to the owner, but to the building.

The principle here recognized by the court of Pennsylvania, is, simply, that when a building is contracted to be built by an architect, for the owner or possessor of a lot, sub-contractors, and the laborer, and the furnisher of materials, have a lien upon the building;—that such lien does not depend upon a contract between the latter and the owner, but is extended by the statute to all material men and laborers, although employed by the contractor. In the first two cases above cited, the only question was whether such lien was good as against the person erecting the building by contract with the architect. Such person is here called the owner; and it was decided to be a good lien on the building as against him, but no question was raised, nor was it there decided, whether such lien would carry with it the title of a third person, of a date prior to the erection of such building.

The case cited from 2 Rawle, goes farther. The lot, in that case, was deeded to Savoy by Salter and wife, in trust, first, to the use of the wife during her life; secondly, to the use of Salter, if he survived her, during his life; and, third, to the use of his children. While the estate was

held in trust for the wife, she caused a building to be erected, the brick for which were furnished by Jones, who filed his lien under the statute, and then commenced proceedings to enforce it against Savoy and Salter, and his wife. The wife died before the trial; and it was contended by Salter, that her estate terminated at her death, and with it must terminate the lien. The court, however, held otherwise; and declared that, "the object of the legislature was to enable the mechanic to follow his labor or materials into the building, which is pledged for the price, without regard to the estate of the owner." "Did the lien proceed from the contract with the owner," the court proceed to say, "the argument drawn from the apparent injustice of permitting a tenant for life to effect the estate of the remainder man, who was not a party, would not be destitute of plausibility." And, it is again said, that the credit is given to the building, and not to the owner; and, "in a majority of cases, the labor or material is furnished to the master builders, who have no interest in the ground; so that the construction contended for would frustrate the object of the legislature nearly altogether."

These decisions are founded on the construction given to the statute, that the lien for materials furnished or labor performed—whether under contract with the owner, or with an architect who had contracted to erect the building—under all circumstances, attached to, and followed, the labor and materials in the building.

Under our statute of 1833, this broad construction, it appears to me, cannot be sustained. The first part of the first section gives the lien to all laborers and material men, in terms as unqualified as those in the Pennsylvania statute; and would, under the decision above recited, carry with it the title to the property, upon a sale, on the enforcement of the lien. The subsequent portion of the section

provides that, when the building has been erected under contract entered into by the owner with any person, no person furnishing materials or doing work on the building for the contractor, shall have any such lien, unless such laborer or material man shall give notice to the owner that he shall claim such lien, within thirty days after being so employed; and then his lien is confined to the amount which the owner was indebted to the contractor at the time such notice was given. This provision limits the extent of the lien. It does not, as under the Pennsylvania statute and the construction there given to it, follow all materials furnished, and all labor performed on the building, without regard to ownership or contract. This statute gives the lien to one furnishing the materials or doing the labor for the owner, to the amount of that owner's personal liability, and no more. Even when the sub-contractor, by taking the measures pointed out by the statute, acquires a lien, that can only be to the amount due from the owner to the contractor. And again: the laborer and material man have no such general lien as under the Pennsylvania statute, in case of sub-contractors, but a mere contingent right, depending upon giving notice to the owner; and being, not a general lien, attaching to and following his labor or materials to the amount of their value or price, but dependent upon, and limited by the amount due from the owner to the contractor. The lien under our statute does not depend simply on the furnishing materials or doing labor on a building, but also upon the contract with the owner. There are but two classes of cases in which it can exist: the first, is in favor of the person who erects the building or furnishes materials or performs labor, on a contract, express or implied, with the owner; the second, where there is a contract to build, and materials furnished or labor performed for the contractor, and proper notice given;

and this last instance is, in fact, a claim under the contractor's contract, and limited to the amount due him. In the case last cited, it is admitted by the court that if the lien proceeded from the contract with the owner, there would be much plausibility in the argument that a tenant for life could not, by erecting a building on the premises, create a lien which should affect the estate of the remainder man. But here there can be no such lien without a contract with the owner. The credit is the foundation of the lien by which the amount due is secured, and the lien does not exist unless there be such credit given. Our statute is, in its legal effect, then, more like the Pennsylvania statute of 1803, than that of 1806; and the general language, as to the nature and extent of the lien, used by the court in the two cases last cited, does not apply. Even under their statute, it is difficult to reconcile the decision in the case in 2 Rawle, with the principles of justice; but under ours, it is clear that the right depends upon the liability of the owner, on his contract for the labor or materials.

In these comments on the two statutes, I have used the word owner to designate the person erecting the building, or causing it to be erected, on premises under his control, without regard to the question whether the legal title was in him or not. So it is used in the Pennsylvania cases, and so in our statute. But, as we have shown, the lien depends upon, and is commensurate with, the liability of such owner. An enforcement of the lien would clearly carry with it only the title in the property owned by him; and it is only upon the principle that the lien did not proceed from such contract, under the Pennsylvania statute, that the court, in the case of *Savoy* v. *Jones*, above cited, held that the lien attached absolutely to the building—that the credit was given to the building, and not to the owner; and therefore, that the remainder man must take the pro-

perty subject to the incumbrance of such lien. This reasoning evidently does not apply to our statute, and the views of its provisions which I have above expressed, seem to me not only warranted by a fair construction of its terms, but perfectly in consonance with the rights of all parties concerned. The result will be that,—

1. The lien depends on the contract, either express or implied, by which the person erecting a building, or causing it to be erected by contract, is bound to pay for the labor or materials for the same, and can never exceed the amount so due from him.

2. This lien, like any other lien by which a debt is secured, attaches to the right and title of the debtor in the property, at the time it accrued.

3. If that person has no title to the land on which the building is erected, or has only a title subject to be defeated by the enforcement of the legal claim of another, outstanding at the time the mechanic's lien attached, a sale under the lien would carry only the interest of such person, subject to the outstanding claim; and,

4. The true owner of the title, who had made no contract with the mechanic or material man, would, when the right to possession became perfect in him, by reversion, or otherwise, under a previous claim on the fee, be entitled to his premises, free from the incumbrance of such lien.

From this view of the law, it follows, that, in the case before us, the mechanic's lien attached only to the interest and estate of William P. Derby in the premises; and his contract to purchase having never ripened into a title, and the possession having been re-obtained by the owner of the land, the lien was at an end; and the defendant, who is grantee of the true owner, could not be ousted by the purchaser under the lien. The verdict

below was therefore erroneous, and should be set aside; and it must be so certified to the court below.

It was contended by the defendant in this case, that the lien, if it attached at all under the statute of 1833, attached to the building only, and not to the land upon which it was erected. Admitting that it embraced both, as claimed by the plaintiff, the view of the case which we have taken, precludes his right to recover upon the facts stated, and we therefore express no opinion upon this question.*

*Verdict set aside, and new trial granted.*

* *Vide* R. S. 1838, p. 537, § 1, p. 541, § 26, and R. S. 1846, p. 554, § 1, p. 556, § 25, under which, it is apprehended, that neither of the questions involved in this case could arise.

## Henry W. Rood *v.* Erasmus W. Winslow, John F. Porter and Joseph G. Ames.

Where A was pardoned on condition he secured the payment of $1,000 to the county, and the county commissioners took a mortgage to themselves, instead of the county, *it was held*, that the mortgage was good, the commissioners being trustees for the county, by implication of law, from the nature of the transaction.

Lawful imprisonment, without illegal force, hardship, or privation, constitutes no duress to avoid a contract. *Semble.*

*Held*, that where, on a bill filed to set aside a mortgage as wholly void, it was decreed that the mortgage was good as to part of the amount secured by it, but void as to the residue only, costs were properly awarded against the complainants.

Where, in a conditional pardon, the person pardoned was required to secure the payment of $1,000 to the county, and the county commissioners obtained a mortgage for $1,150, the mortgage was held good as to the $1,000, and void as to the residue.

Appeal from Chancery. (*Vide* Walk. Ch. R. 340.)

The bill was filed by Rood to restrain a statutory foreclosure, and have the mortgage delivered up and cancelled.

The case was in substance as follows: At the November term, 1838, of the Berrien Circuit Court, one Shurte was convicted, on three several indictments for larceny, and sentenced, on one, to a year's imprisonment and costs, and on each of the other two, to pay a fine of $500 (in all $1,000) and the costs of prosecution. On the 9th of February, 1839, the governor of the state granted a pardon, requiring that Shurte should be set at liberty on his securing the payment, to the county, of the $1,000:—the pardon being silent as to costs. On the 8th of May following, Shurte executed a mortgage to the defendants, "Erasmus Winslow, John F. Porter and Joseph G. Ames, and their successors in office, commissioners of the county of Berrien aforesaid, of the second part," conditioned for the payment to them, "their executors, administrators or assigns," of $1,150, and interest, on the 8th of November following—the $150 being added for the costs of the three prosecutions. Shurte and wife conveyed the mortgaged premises to Heman Rood, December 16, 1839, who, on the 24th of January, 1840, conveyed the same to the complainant;—both conveyances containing covenants of seizin and warranty, and neither making mention of the mortgage. The mortgage and deeds were severally recorded in the order in which they were executed. The money not being paid when due, the defendants proceeded to foreclose the mortgage, by advertisement and sale under the statute, when the complainant filed the bill in this case, praying for an injunction to restrain the sale, and that the mortgage might be delivered up and cancelled.

On the hearing in the court below, the chancellor held the mortgage good for the $1,000, but void for all over that amount; and decreed that the complainant should pay the $1,000, with interest from the date of the mortgage,

and defendants' costs, in six months, or, in default thereof, the bill should be dismissed with costs.

From which decree the complainant appealed to this court.

*C. Dana*, for complainant.

*Charles E. Stuart*, for defendants.

Goodwin, J. delivered the opinion of the court.

1. It is insisted, as a ground for reversing the decree of the chancellor, that the county of Berrien is a body politic and corporate by law, and that the mortgage should have been to it as such; that there being no "privity of contract, or consideration between the parties, and no declaration of trust," it is void.

It is true, that the county is, by statute, a corporate body, and the mortgage might well have been executed to the county, as such; but it does not hence follow that the deed is void, because taken to the commissioners by name. It is true, also, that the statute of frauds requires trusts concerning lands to be in writing, (R. S. 1838, p. 261,) but it expressly excepts such as may arise or result by implication of law. In this case, the money for which the mortgage was given, was a fine imposed by the circuit court of the county, and which, when paid, was to pass into the county treasury, to be distributed among the school districts in the county, for the support of school libraries. The commissioners were officers of the county, expressly charged by law with "the care of the county property, and the management of the business and concerns of the county;" and by the pardon, the money was to be secured to the county.

The commissioners, then, in taking the security, were acting as the lawful and official agents of the county. By implication of law, without any declaration, a trust arose,

and they took and held the mortgage as trustees for the county. The doctrine in 6 Paige, 355, cited by the defendant's counsel, is to this effect, and is correct in principle. Further, the defendants, in their answer, state that they so held it. It is said, that to every grant there must be grantees capable of taking. There can be no doubt of this. But here were three grantees who were so.

The cases relied upon of *Jackson* v. *Cory*, 8 John. R. 385, and *Hornbeck* v. *Westbrook*, 9 John. R. 73, are inapplicable to the present case. The former was a case of a grant made to the people of county of Otsego, and the latter, of a reservation to the inhabitants of the town of Rochester. Neither were corporations by law, and the deed and reservation were respectively held inoperative,—neither being to any corporation, or to any individuals by name, but to the "people," and the "inhabitants," at large. In the former case, the court held that, "a grant, to be valid, must be to a corporation, or some certain person must be named, who can take by force of the grant, and who can hold, either in his own right or as a trustee." Here the mortgage was to individuals by name, and who were, by operation of law, trustees in respect to it.

2. It is alleged that the mortgage was given under duress, and is therefore void. On this point the complainant's case fails in two respects;—first, duress is not alleged in the bill;—and, secondly, it is not shown by proof. The bill alleges that Shurte was in prison, but under a sentence of conviction by a court of competent jurisdiction. Lawful imprisonment constitutes no duress to avoid a deed or contract. To constitute it in such case, there must be undue and illegal force used, or the party made to endure unnecessary and unlawful privation, and be induced to execute the deed, or make the contract, to avoid such illegal hardship or privation. Here, nothing of this kind is pretended. It appears from the testimony of one of

the witnesses, that a previous mortgage had been taken to the treasurer of the county, by the prosecuting attorney, and Shurte liberated. It is not produced, nor does it appear, that it was a valid security, taken in compliance with the terms of the pardon. It was treated as a nullity. For ought that appears it was so, and the liberation of Shurte an escape; and consequently, his re-capture and re-imprisonment lawful.

3. A third ground of complaint against the decree, by the appellant, is, that while the chancellor, by his decree, abated from the mortgage the $150 costs embraced in the sentence of the circuit court, and not in the condition of the pardon, he yet gave costs against him. The costs, by the statute, rested in the discretion of the chancellor. If it appeared from the allegations and proofs, that the commissioners had required as a condition of Shurte's liberation, that the additional sum should be embraced in the security, and he was thereby induced to assent to it, and the complainant had, before suit brought, proffered payment of the $1,000 and interest, there might be some ground for this complaint. Instead of this, they filed their bill to set aside the mortgage wholly. Although there is not, in the bill, any specific allegation of any such exaction on the part of the commissioners, or any thing of the kind shown in the proofs, yet, under the broad aspect of the bill, and the circumstances of the case, the chancellor came to the conclusion that the amount included for costs should be abated from the mortgage, and that it should stand as a security for only the residue. This was as favorable a view of it for the complainant as could well be taken, and, from the circumstances, no reason is apparent why he should not be charged with costs.

4. But it is further insisted, that the addition to the amount specified in the condition of the pardon being improper, the mortgage should be deemed void *in toto*.

This is not within that class of cases in which instruments, for want of power to execute them, or for fraud, are held void *in toto;* but rather that class in which the complainant seeking relief should do equity on his part, by paying or tendering the amount due. The course adopted in this case, is similar to that of the Chancellor of New York in the case of *Eagleson* v. *Shotwell*, 1 John. Ch. R. 536, in this point analogous; and no reason for complaint on the part of the appellant, against the decree, is perceived in this respect.

Upon the whole case, then, the decree should be affirmed with costs.

*Decree affirmed.*

## Adams v. Hamell.

Contracts made on Sunday are not void at common law. *Semble.*

Where two persons traded horses on Sunday, and one of them gave the other his promissory note for the difference in value of the horses as agreed upon, *Held*, in violation of R. S. 1838, p. 209, § 1, which prohibits "any manner of labor, business or work" on that day, "except only works of necessity and charity," and that the note was therefore void.

Case reserved from Oakland Circuit Court. Assumpsit upon a promissory note made by the defendant, and payable to the plaintiff. On the trial the defendant proved that the note was given for a balance due him on an exchange of horses with the plaintiff; and that the horses were driven up, examined, tried, the terms agreed upon, the exchange consummated, and the note made and delivered, on Sunday. The court charged the jury that these facts constituted no defence to the action; and, a

verdict having been found for the plaintiff, the defendant moved for a new trial on the ground that the charge to the jury was erroneous.

*Goodrich & Wisner*, in support of the motion.

*T. J. Drake*, contra.

FELCH, J. delivered the opinion of the Court.

Contracts made on Sunday are not void at common law. *Drury* v. *Defontaine*, 1 Taun. 135; *Story* v. *Elliot*, 8 Cow. R. 27. But our statute declares that "no person shall keep open his shop, warehouse, or workhouse, or shall do any manner of labor, business, or work, except only works of necessity and charity," &c. "on the first day of the week, and every person so offending, shall be punished by a fine not exceeding ten dollars for each offence." R. S. 1838, p. 209, § 1.*

It is clear that the note on which this action is founded, is void, and courts must refuse their aid to enforce it, if the transaction out of which it arose, and of which it formed a part, was in violation of this statute.

Similar statutes, though generally less broad in their terms of prohibition, have been the subjects of frequent adjudication in England, and in various states of this union.

The statute, 29 Car. 2, ch. 7, § 1, enacts that "no tradesman, artificer, workman, laborer, or other person whatsoever, shall do or exercise any worldly labor, business or work of their ordinary callings, upon the Lord's day." This statute has been construed, in the English courts, not to prohibit labor or business on the Sabbath, except such as is within the *ordinary calling* of the party; and in the several decisions there had upon it, the question has usually been whether the particular transaction

* Re-enacted by R. S. 1846, p. 191, § 1.

was within the party's ordinary calling or not; if it was, the courts have refused their aid to carry out the prohibited transaction; if not within his ordinary calling, it is considered no objection that a sale was made, or a contract entered into on that day. *Bloxsome* v. *Williams*, 3 Barn. & Cress. 232; *Fennell* v. *Ridler*, 5 Barn. & Cress. 406; *Smith* v. *Sparrow*, 4 Bing. 84; *King* v. *Inhabitants of Whitnash*, 7 Barn. & Cress. 596; *Sandiman* v. *Breach*, 7 Id. 96.

The statute of Massachusetts enacts that "no person or persons whatsoever, shall keep open his, her, or their shop, warehouse, or workhouse, nor shall, upon land or water, do any manner of labor, business, or work, (works of necessity and charity only excepted,) on the Lord's day, or any part thereof." Under this provision, it was held in *Greer* v. *Putnam*, 10 Mass. R. 313, that the giving of a promissory note on Sunday was not within the terms of the statute.

The New York statute provides that "no person shall expose to sale any wares, merchandize, fruit, herbs, goods, or chattels, on Sunday, except," &c. In *Boynton* v. *Page*, 13 Wend. R. 425, this was held to prohibit the public exposure of commodities to sale; but to have no reference to private contracts, which were made without producing, or tending to produce a violation of the public order and solemnity of the day.

In Pennsylvania, under a statute prohibiting the doing or performing "any worldly employment or business on the *Lord's day*," a contract made on Sunday, was held to be void. *Morgan* v. *Richards*, 1 Brown's P. R. 172. In this case it seems to have been erroneously declared by the court, that such a contract was void by the common law.

The statute of Connecticut prohibits all secular business from being done on the Lord's day, or any part there-

of; and there it is held that a contract, or promissory note, made on Sunday, is void. *Fox* v. *Abel*, 2 Conn. R. 548; *Wight* v. *Geer*, 1 Root R. 474.

In Alabama, the statute provides that "no worldly business or employment, ordinary or servile work," &c. shall be done on Sunday. In *O'Donnell* v. *Sweeney*, 5 Alab. R. (N. S.) 467, a promissory note given for a horse sold on Sunday, was held void.

The terms of our statute are very comprehensive, and their object evident. The prohibition is not confined to the public sale of goods, or the gross violation of the Sabbath, by keeping open shops or warehouses; nor is it limited to business of any particular profession or avocation. The evident intention was, and such are its terms, to prohibit all *business* on that day, whatever might be its character, except works of necessity and charity; and that, too, whether done openly or in private.

The transaction out of which the contract declared on arose, was a clear violation of the statute. The horses were examined by the parties, were driven up for that purpose, were tried by them, and the trade consummated, and the note for the difference agreed upon on the exchange was given, on the Sabbath. No case could be more clearly a matter of business within the statute; and no business transaction on that day more evidently demoralizing in its tendency and example.

*Ordered certified that the verdict should be set aside and a new trial granted.*

## Welles and others v. The Mayor, Recorder, Aldermen and Freemen of the City of Detroit.

The Mayor's Court of the City of Detroit, has no jurisdiction of proceedings against debtors by attachment under R. S. 1838, p. 506, ch. 1.

Certiorari to the Mayor's Court of the city of Detroit. The proceedings in that court were under the provisions of ch. 1, p. 506 of the Revised Statutes of 1838, entitled "Of proceedings against debtors by attachment." The Mayor, &c. were plaintiffs, and Welles and others defendants. The writ of attachment by which the suit was commenced, was issued against the defendants as non-resident debtors, October 4, 1841, and returnable on the 11th of the same month. They were regularly called at three successive terms of the mayor's court, held in October, November, and December of 1841; and at the third term they appeared by attorney, and moved to quash the proceedings in the cause for want of jurisdiction. This motion was overruled; and, final judgment having been rendered against them, they removed the cause into this court, and now claim a reversal of the judgment, on the ground that the court below erred in assuming jurisdiction.

*Barstow & Lockwood*, for the plaintiffs in error.

*C. O'Flynn*, City Attorney, for the defendants in error.

Goodwin, J. delivered the opinion of the Court.

The question presented by this case is, whether the Mayor's Court of the city of Detroit, has jurisdiction of proceedings instituted under the provisions of chapter 1, p. 506, of the Revised Statutes of 1838, entitled "Of proceedings against debtors by attachment."

It is claimed that the jurisdiction is conferred by the "act relative to the city of Detroit," approved April 4, 1827, (R. L. 1827, p. 570,) and the "act to amend the charter of the city of Detroit," approved April 12, 1841, (S. L. 1841, p. 192,)—especially by the latter.

It is most manifest that the jurisdiction cannot be sustained under the act of April 4, 1827; for, if the proceedings authorized by the attachment law found in the Revised Laws of 1827, were, as is insisted, embraced within its jurisdiction, by the act conferring its powers, yet, as by the Revised Statutes of 1838, that attachment law was repealed, and a new one passed, expressly designating the court in which those proceedings should be had, the jurisdiction would necessarily be excluded. This is a special statutory remedy, unknown to the common law; and in the chapter of the Revised Statutes of 1838, referred to, the proceedings are to be in the circuit court, and by its officers;—the writ to be issued by the clerk of that court;—to be directed to the sheriff of the county, and executed by him; and the whole are specially prescribed throughout, with reference to that court only. A reference, then, to the act of 1827, is only important as it is to be taken in connection with that of 1841, as to the jurisdiction claimed.

By the act of 1827, the mayor's court is made a court of record, the clerk of the city is its clerk, and the city marshal and constables are required to attend it;—and "the marshal and other ministerial officers" of the city are required to execute and return its process. Its sessions are monthly, on the second Monday of each month. It is clothed with a restricted criminal jurisdiction, over certain offences committed within the city, and power and authority is given to it, in the language of the act, "to hear, try, and determine, according to the laws of the United States, and of this territory, and according to the

by-laws and ordinances of the said common council, and according to the course of the common law, all actions, personal or mixed, arising within the limits of said city, to which the mayor, recorder, aldermen and freemen of said city, in their corporate capacity, are a party, and especially for the collection of taxes and other debts due to said corporation," &c. § 38.

The jurisdiction thus conferred is local, extending only to actions of the description mentioned, arising within the city, and to which the corporation is a party; in other words, it is a special, limited jurisdiction.

By the act of 1841, § 3, it is provided that, "in addition to the powers it now has, it shall have and exercise original jurisdiction in all personal actions and remedies at law, arising within the bounds of said city, and to which the mayor, &c. in their corporate capacity are a party plaintiff,"—"and the said court shall have and exercise all the powers usually exercised by any court of record at the common law, for the full exercise of the jurisdiction given to it by law."

By section 4, "any civil action, of which said mayor's court has jurisdiction, may be commenced and proceeded in, in the same manner as is or may be required by the laws of the state in relation to such actions in the circuit court for the county of Wayne, so far as the same can apply."

The question is, whether, by these provisions, the jurisdiction is conferred. The phraseology of the first clause of the third section, "personal actions and remedies at law," is very broad; but it may well be doubted whether the legislature intended thereby to authorize this special remedy, in regard to which the statute is express throughout as to the courts and officers by whom its proceedings shall be conducted, and minute in its directions as to all those proceedings; and the more especially, as

in the next clause of the same section, the exercise of "all the power usually exercised by courts of record at the common law, is expressly authorized for the full exercise of its jurisdiction." The proceeding by attachment is in the first instance *in rem:* it is strictly a statutory remedy, and one in which the course marked out by statute, at least as to all its substantial provisions, is required to be strictly pursued. If the provisions of the chapter referred to are literally pursued, the city officers, clerk, or marshal, can have no agency in executing them; but they are confined to the circuit court and its officers. But, if there be ambiguity in this section in reference to the intent of the legislature, it is removed by the provision in the fourth section, that any civil action may be commenced, and proceeded in, as by the laws of the state in relation to such actions in the circuit court for the county of Wayne, so far as the same can apply. Under the statute, civil actions of the nature of that in this case, may be commenced and proceeded in by attachment in the circuit court for the county of Wayne. It is one of the circuit courts embraced in the act. Can the law, and the proceedings under it, apply to the mayor's court? If not applicable to it, then, most manifestly, the mayor's court has not the jurisdiction. For the course of proceedings at the common law, and those prescribed relating to the circuit court for the county of Wayne, furnish the guides for its modes of proceeding under these sections.

By the attachment law, upon the return of the writ by the sheriff, a notice is required to be made by the clerk, and delivered to the plaintiff, which he is required to cause to be published, within thirty days—the publication to be for six weeks in succession. If a claim of property is interposed upon the service of the attachment, the officer serving it is required to give notice to a justice of the peace, who is thereupon to issue a venire for five jurors

to try the right, and from their decision and the judgment of the justice, an appeal may be taken to the circuit court.

The plaintiff, on an affidavit that the defendant in attachment has property in another county, may take another writ of attachment, directed to the sheriff of such county, upon which such property may be attached.

The defendant is to be called at the first, and two successive terms, and, at or before the third term, the plaintiff and other creditors may file declarations in the cause upon which proceedings may be had to judgment. After judgment, the property is required to be sold, and the proceeds distributed to those who have obtained such judgments, in proportion to their amount. And, if the original plaintiff discontinue, or is defended against successfully, it does not affect the proceedings of the other creditors who have filed their declarations.

If attachments have been issued by justices of the peace, under the statute authorizing such special proceedings by them, they are superseded by an attachment against the property of the defendant from the circuit court, and the property goes into the hands of the sheriff upon the circuit court process;—the parties, however, being allowed to proceed to judgment before the justices, and file transcripts of such judgments in the circuit court, and obtain thereon their *pro rata* distribution.

Can these provisions apply to the mayor's court? As respects the officers issuing and executing the writ, probably the city clerk and marshal may well be deemed or substituted for the clerk and sheriff.

As to the notice: The terms of the circuit court are held twice in each year, about six months apart; and the third term, before which the plaintiff could not, by the act, obtain judgment, is eighteen months or thereabouts, from the return day of the writ; and the publication of the notice to the defendant, being made within

thirty days, and for six weeks in succession, would expire before the second term, and the defendant have after that until the third term to appear. The terms of the mayor's court being monthly, the term for judgment would arrive in two months; and the plaintiff having to the last of the thirty days from the return day to commence the publication, judgment might, in many cases, be rendered before the expiration of the six weeks. In this very case, the writ was returnable on the 11th October. A publication of notice, commenced on the 10th November, would have been in time, which would have made the last of six weeks' publication on the 15th December. The defendant, however, was actually called the third time on the 13th; and, if there had been no appearance or defence, the third default would then have been entered. The statute designed, by the requirement of the notice, that the defendant should have ample opportunity to appear and defend; and, in the circuit court, such opportunity is given after the publication; while, by the arrangement of the terms of the mayor's court, this manifest and just intent of the statute is defeated.

An appeal to the circuit court, on the trial of the right of the property attached, if taken directly after a term of the circuit court, could not be determined until the next term, six months after; while the judgment in the mayor's court on the attachment issued therefrom, would, if recovered at the third term, as contemplated, be recovered about two months from the return of the writ, and before the determination of such appeal.

If an affidavit is made and filed of the defendant's having property in another county, how is a writ to be issued from the mayor's court into another county? It must be directed to the sheriff of such county. The executive officers of the mayor's court are, by the constitution of that court, the ministerial officers of the city—particular-

ly the marshal—and the court has no authority to direct a process to the sheriff of any county. This provision of the statute, then, cannot at all be executed by the mayor's court. Nay, as the city officers are confined to the city, the court cannot reach property out of the city, within the county of Wayne. Yet, it is obviously the intent and policy of the statute to bring the whole of the non-resident or absconding debtor's property within the jurisdiction of the court issuing the attachment, that its proceeds may be distributed amongst all his creditors who shall interpose their claims.

When other creditors than the original plaintiff file their declarations, they become parties plaintiff in the proceedings; issues may be made; and upon each there must be trial and judgment. And, if the defendant should defend successfully against the corporation when plaintiffs, these other creditors would be the only parties in interest. But the jurisdiction of the mayor's court is confined to cases where the corporation are a party, and cannot, I think, by such expansive implication, be extended to the cases of the other creditors contemplated by the statute.

An attachment issued under this chapter supersedes any like process issued by a justice of the peace against the same defendant, and the officer serving it is authorized to take possession of the property attached by virtue of the latter; and, if issued from the mayor's court, and the plaintiff before the justice should still proceed to judgment, and present his transcript to the mayor's court to obtain his dividend thereon, he would there find that, as respects him, the mayor's court had no jurisdiction; and he could obtain no dividend, while the property which he had first procured attached, was withdrawn from his reach. Further: if an attachment were issued by a justice without the limits of the city, and property attached, it would, by the strict letter of the statute, be superseded

by the writ issued from the mayor's court, if the latter had jurisdiction; and yet, the city officer, being confined to the city, could not go beyond it with his writ to take possession of the property. This portion of the statute, then, cannot be executed by the mayor's court as it is constituted.

From this consideration of the various provisions of the acts referred to in detail, as well as their whole scope, policy, and objects, it appears to us evident that the legislature did not intend to confer, and have not conferred on the mayor's court of the city of Detroit, the jurisdiction claimed for it, and which in this case it has assumed to exercise. Consequently, the judgment rendered by it must be reversed with costs.

*Judgment below reversed.*

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## Prentiss & Frost v. Spalding.

**Covenant.** The declaration set forth a covenant alleged to be contained in a replevin bond, of the same tenor with the condition of such a bond, as prescribed by the statute. (R. S. 1838, p. 524, § 5.) Default for want of plea, and final judgment for damages. On error to reverse the judgment, *Held*,

1. That it was competent for the parties to add to the condition of a replevin bond a covenant of the same tenor; and, on breach, covenant broken might be maintained upon it.

2. That it would be presumed that the bond in this case contained such covenant; and not that the action was founded upon the condition of the bond.

3. That it was not necessary that the declaration should set forth the penal part of the bond; it being sufficient for the plaintiff to set forth only so much of an instrument as constitutes the foundation of his action.

4. That the judgment was regular in being for damages, instead of the penalty of the bond.

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The assessment of damages by the clerk is considered as made by the court, (R. S. 1838, p. 451, § 4.) and should appear to have been so made in the judgment record; although the journal entry, from which such record is made up, properly shows that the damages were assessed by the clerk.

Under R. S. 1838, p. 450, § 4, the clerk may assess the plaintiff's damages, on default to a declaration upon a covenant to pay the costs and damages which should be awarded in a certain cause, alleging a recovery in the cause, and its date and amount.

Judgment against P. and F. on their joint covenant that P. should pay all costs and damages which should be awarded against him in a certain cause. It did not appear to have been shown to the court, nor did the record show it to be certified by the clerk, "which of the defendants was principal, and which surety or bail." (R. S. 1838, p. 451, § 9.) *Held*, no ground for reversal of the judgment on error.

ERROR to Monroe Circuit Court. Spalding was the plaintiff in the court below, and declared against Prentiss and Frost in an action of covenant broken.

The declaration, as appears by the record, after reciting the issuing from Monroe circuit court, and the service and return, by one Nims, a deputy sheriff, of a writ of replevin in favor of Prentiss, against Spalding, for one bay mare, alleges that "the said defendants in consideration of the premises, and in consideration that the said Nims, deputy sheriff as aforesaid, would then and there deliver to the said Prentiss, the possession of said bay mare, by virtue of said writ, did, on," &c. "in and by their certain deed in writing, commonly called a *replevin bond*, (in a penalty double the amount of the value of said mare, as so appraised as aforesaid,) sealed with their seals, and signed by the said defendants, (which said replevin bond so sealed by the said defendants the said plaintiff now brings here into court,) the date whereof is the day and year aforesaid, *covenant*, to and with the said plaintiff, that the said Prentiss should appear at the next circuit court for said county to which said writ was returnable, on the fourth Tuesday of June (then) next ensuing, and prosecute his said

writ of replevin to final judgment, and pay all costs and damages which should be assessed against him by said court, and return the said bay mare if return thereof should be ordered by the court; and the said Nims, deputy sheriff as aforesaid, did then and there deliver the said bay mare to said Prentiss by virtue of said writ." The declaration then sets forth the proceedings in the replevin suit to the recovery of a judgment by Spalding against Prentiss, for $63.00 damages and $50.08 costs, and avers that the defendants had "not kept their covenant aforesaid with the said plaintiff;" but that, on the contrary, a *fi. fa.* issued on said judgment, &c. had been returned *nulla bona*, and that the defendants had neglected and refused to pay the said damages and costs so recovered.

The record, after setting forth the entry of default for want of plea, proceeds as follows:—

"And now at this day, &c. comes the said Phineas Spalding, by his attorney aforesaid, and the said Ebenezer Prentiss and Issachar Frost, although solemnly called, come not, but make default: Whereupon, the said Phineas Spalding ought to recover his damages by reason of the premises."

"Therefore, it is considered that the said Phineas Spalding do recover against the said Ebenezer Prentiss and Issachar Frost, his damages aforesaid, on occasion of the breaches of covenant above assigned, *by the court now here assessed*, at the sum of $129.05, and also the further sum of $10.48, for his costs and charges," &c. "by the said circuit court, before the judges thereof, now here adjudged to the said Phineas Spalding, and with his assent."

After the return of the above record into this court, the plaintiff in error obtained an order for a further return to the writ of error; and thereupon, was brought up a tran-

script of an order in this cause, entered upon the journal of the circuit court, of which the following is a copy:—

[Title of the cause.] "In this case, on motion of Christiancy in person, interlocutory judgment of default confirmed and made absolute, and, ordered, that *the clerk assess the damages;* and, *the clerk having assessed the damages* to the sum of $129.05, on like motion, ordered, judgment final, for that sum, and costs to be taxed."

The errors assigned appear in the opinion of the court.

*H. T. Backus*, for the plaintiff in error.

*I. P. Christiancy* and *H. H. Emmons*, for the defendants in error.

Felch, J. delivered the opinion of the Court.

1. It is contended that the declaration in this case was in covenant upon the condition of the replevin bond, and not in debt for the penalty;—no penalty, and no particular amount for which the bond was given, being set forth; that covenant is not maintainable upon the condition of a bond; and that, therefore, the declaration was not sufficient to sustain a recovery.

The statute, (R. S. 1838, p. 524, § 5,) defines in general terms the condition of a replevin bond. Such bond does not usually contain an express covenant to pay the amount of the judgment, if the plaintiff in the replevin suit fails to recover: still, I cannot doubt that it would be competent to add such covenant to the usual condition of such bond. Nor, can there be any objection in law to a recovery upon such covenant voluntarily inserted by the parties.

The declaration in this case alleges that the bond declared upon contains such a covenant. Upon this writ of error, we can no more look beyond the description of the instrument contained in the declaration, than in case of a

general demurrer to the declaration. This declaration is not upon the simple condition of a replevin bond, in the ordinary form, but is in covenant upon a bond containing also an express covenant to pay the amount of the judgment in the replevin suit. The question whether covenant can be maintained upon the simple condition of a bond in the usual form, does not here arise. I am not aware that it has ever been doubted, that, upon an express covenant, contained in such a bond, the action may be maintained. And such is the instrument here described. Although denominated a replevin bond, it is alleged to contain the express covenant declared upon. For the purpose of this recovery, it was not necessary to set out the amount of the penalty. If there was any thing in the instrument which could limit or defeat the right to recover the amount claimed by the plaintiff below, on the covenant declared upon, the rights of the parties might have been secured upon oyer of the bond or upon a trial. But the plaintiffs in error have only presented the case made by the declaration, and that is sufficient to sustain the judgment.

2. Another error assigned is, that the damages were assessed by the court and not by the jury; and that judgment was rendered therefor, and not for the penalty of the bond.

Sections 8 and 9 of R. S. 1838, p. 460, are relied upon to sustain this assignment of error. These sections provide that, "in all actions brought for breach of the condition of a bond, or to recover a penalty for the non-performance of any covenant, contract, or agreement, when it shall appear by verdict, default, confession, or otherwise, that the condition is broken or the penalty forfeited, judgment shall be entered in the common form for the penal sum," and execution shall be awarded for so much only as is equitably due, to be ascertained by the court,

or, if either party desire it, or the court see fit so to direct, by a jury.*

The plaintiff's declaration, as we have already seen, shows that his action is not brought for the breach of the condition of the bond, or to recover a penalty contained therein. If it were so, then the provision of the statute would apply; and the judgment should be for the penalty, with an award of execution for damages duly assessed. But in this declaration upon a covenant, merely, the judgment is correctly entered for damages, as in ordinary cases; and by the general provision of our statute, (R. S. 1838, p. 450, § 2,†) the court has power, in all cases of the default of a defendant, to assess the damages.

That the above recited statute in reference to suits brought for breach of the condition of a bond, or to recover a penalty, does not apply in the case here made, is evident from R. S. 1838, p. 460, § 12,‡ which expressly provides that nothing contained in the sections before cited "shall prevent any person from bringing an action for the breach of any covenant or other contract, instead of suing for the penalty by which the performance of the covenant or contract may have been secured."

3. It is further assigned for error that two judgments are rendered in the case; one on assessment of damages by the court, and the other on an assessment by the clerk; and it is insisted also, that the clerk had no power to assess damages in the case.

The judgment record shows the judgment duly entered in the case, on an assessment by the court; but the plaintiff in error, under an order from this court for a further return to the writ of error, has procured the return of an entry in the journal of the court below, showing a confirmation of the defendant's default, and a reference to,

* *Vide* R. S. 1846, ch. 107, § 10. † Re-enacted R. S. 1346, ch. 107, § 17. ‡ *Vide* R. S. 1846, ch. 105, §§ 1, 2.

and assessment by, the clerk, upon which judgment was rendered.

I do not deem it necessary here to inquire how far this court will, upon error, consider the journal entries made in the circuit court in the progress of a cause, because the entry before us neither contradicts the record of the judgment, nor does it show error in the proceedings.

The power of the court to assess damages in all cases at default, we have already seen, is given by the statute in broad terms. Damages may also be assessed, under the general or special order of the court, by the clerk, "in actions on promissory notes, and other contracts, where the amount due appears to be undisputed." R. S. 1838, p. 450, § 4.* Did the damages in this case appear to be undisputed? It would be difficult to conceive of a case more clearly of this description. The contract was a covenant to pay all costs and damages which should be awarded against said Prentiss, in a certain suit, clearly described in the bond and in the declaration, with an allegation that judgment had been rendered against him, in the suit, on a day specified, for $63 damages, and $50.08 costs. Here the contract, the judgment referred to in it, and the amount of that judgment, which was the measure of damages in the case before us, were all clearly and fully set out in the declaration. These were all admitted by the defendant's default; and appear, in the words of the statute, to be "undisputed." Nothing remained in doubt, or dependant upon testimony to fix an uncertain amount of damages upon the case thus set out, and thus admitted, and the reference to the clerk might, therefore, properly be made by the court.

Nor is there any thing in the journal entry, inconsistent with the record, in reference to the judgment rendered in

* *Vide* R. S. 1846, ch. 105, § 2.

the case. Whenever the amount of damages is ascertained by such reference to the clerk, the statute further provides, that the "judgment shall be entered in the same form as if it had been awarded by the court, on an assessment or computation made by themselves." R. S. 1838, p. 451, § 4.* The journal entry is a memorandum of the daily proceedings of the court, during its sessions, and the entries there made in a cause, from time to time, afford materials from which the judgment record is to be made up. In an assessment made by the clerk on a reference to him, the journal entry should properly show the fact; but still the assessment by him is so far considered an assessment by the court, that the judgment, when formally made up, is, under the statute, to be made in the same form as if the court themselves had made the assessment. The entry and judgment record in this case, then, are perfectly consistent. Instead of showing two judgments, they show simply a proper entry on the journal of the proceedings of the court, and a judgment record made up in a proper manner from those entries of proceedings.

4. The last error assigned is, that it does not appear which of the defendants below was surety, and which principal in the bond. This, it is claimed, is necessary, both for the purpose of limiting the recovery against the surety, and also, because it is required by R. S. 1838, p. 451, § 9.

The section of the statute here referred to, introduces no new rule of pleading, and requires no new averment on the part of the plaintiff. It merely authorizes a party to show to the court, that one of several defendants, is a mere surety for the other or others; and, upon such showing, requires an entry thereof to be made, and the goods of the principal first to be taken on the execution issued. In this case, no such proof appears to have been offered,

* *Vide* a similar provision in R. S. 1846, ch. 105, § 9.

and the record is therefore properly made up in the usual form.

Whatever may be the rule of law as to the right of a recovery against either principal or surety in a bond, beyond the amount of the penalty, no such question can arise upon the record before us. The amount of the penalty in the bond is no where stated, nor was it, in my opinion, necessary to state it. It was sufficient for the plaintiff to set out such parts of the instrument upon which he declared, as formed the foundation of his action, and gave him a right to recover. This he has done by describing the instrument, and setting out the independent covenant upon which his suit was founded. If other portions of the same instrument so limited the right of recovery, under the covenant, as to be available to the defendants below, either to defeat the suit, or to reduce the amount of damages, the whole instrument was at their control upon oyer, or on the trial. The default of the defendants admitted the cause of action, as alleged; and it is now too late for them, upon a writ of error, to raise this objection to a record regular upon its face.

The judgment below must be affirmed with costs.

*Judgment affirmed.*

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## People v. Webster.

An indictment for a violation of the statute against the presuming to be "a seller of wine, brandy, rum, or *other spirituous liquors*," &c. without being licensed as an innholder, (R. S. 1838, p. 203, § 1,*) charged the defendant with presuming to be a seller of *whiskey*, alleging it to be *spirituous liquor*, without such license:—*Held*, sufficient; and that the presuming to be a seller of *whiskey*, was forbidden by the statute, although that kind of spirituous liquor was not therein specifically mentioned.†

* Re-enacted by R. S. 1846, p. 184, § 1. † Dwarris on Stat. 737, and East's P. C. 1075, *n. a.* were cited, on the argument of this case, to show the indictment bad.

## Drew, Receiver, &c. of Bristol v. Dequindre.

An attachment against a non-resident debtor, under R. S. 1838, p. 506, ch. 1, issued upon the filing of an affidavit sworn to on a day previous, is void; but will not be quashed on motion if the plaintiff file a new affidavit under S. L. 1839, p. 228, § 36.

An affidavit for an attachment, under R. S. 1838, p. 506, ch. 1, § 1, stated that the indebtedness sworn to was upon an *express* contract, without stating more particularly the nature of the contract: *Held*, sufficient.

To an attachment under R. S. 1838, p. 506, ch. 1, the sheriff returned that he had seized certain lands described therein, *in which the defendant had an interest as one of the heirs of A. D.* but did not state the extent of the interest; and it appeared that the lands were appraised without reference to it: *Held*, sufficient.

Where, in addition to what is required by the statute, (R. S. 1838, p. 506, § 6,) it was erroneously stated in the notice of the pendency of a suit in attachment, that the writ was returnable in November *next*, instead of *instant*, it was *held*, that this did not vitiate the proceedings.

Attachment under R. S. 1838, p. 506, ch. 1, at the suit of J. D. *Receiver, &c.* The journal entries of the calling and default of the defendant at the first and second terms after the return of the writ, omitted to state the special character in which the plaintiff sued. *Held*, no ground for quashing the proceedings; but that the circuit court would have power to permit such omission to be supplied by amendment, if, in fact, the defendant was properly called.

The statute of amendments, (R. S. 1838, p. 461, § 20,) applies to proceedings by attachment under R. S. 1838, p. 506, ch. 1.

Case reserved from Wayne Circuit Court. This suit was commenced by attachment under R. S. 1838, p. 506, ch. 1, issued June 12, 1843, and returnable at the following November term of the circuit court. The writ was duly returned served; and, at the third term thereafter, the defendant appeared and moved that the same be quashed, and that all the proceedings in the cause be set aside, for sundry alleged irregularities which sufficiently appear in the opinion of the court.

*C. O'Flynn*, in support of the motion.

*A. Davidson*, contra.

WHIPPLE, J. delivered the opinion of the Court.

The various grounds in support of the motion will be considered in the order in which they were submitted by counsel.

1. The affidavit in the present case states, among other things, that the defendant "does not reside in this state, and has not resided therein for three months immediately preceding the date of this affidavit;" and appears to have been sworn to June 10, 1843. The writ was issued on the 12th of June, the day on which it was filed with the clerk. It is contended, that, as the affidavit does not follow the statute, (R. S. 1838, p. 506, §§ 1, 2,) and as one day intervened between the making of the affidavit, and the application for the attachment, the same should be quashed. As the remedy by attachment is regulated by statute, and is unknown to the common law, great strictness is required. Any substantial deviation from the statute would be fatal to the proceeding. The affidavit does not conform to the statute in all respects: it states that the defendant has not resided in the state for three months immediately preceding *the date of the affidavit*, while the statute requires that it should be stated, that he has not resided in the state for three months immediately preceding *the time of making application for the attachment*. The statute would seem to contemplate that the *application* should be made, by filing with the clerk a precipe for the attachment, and the affidavit; and we think the affidavit should be sworn to on the day the application is made for the writ, for the reason that the defendant might become a resident of the state between the time when the affidavit is sworn to, and the application for the attachment. The affidavit is, therefore, defective in this respect; and this defect might prove fatal to the proceedings, but for the provision of § 36, S. L. 1839, p. 228, which declares, that "no writ (of attach-

ment) shall be quashed on account of any defect in the affidavit on which the same was issued: *Provided*, that the plaintiff, his agent or attorney shall, whenever objection may be made, file such affidavit as is required by law." If the plaintiff, then, can now make the affidavit which the law requires, the writ will not be quashed.

2. It is further objected that the affidavit does not state the nature of the *express* contract to which it refers, or the names of the parties thereto. The affidavit states "that the defendant is justly indebted to the plaintiff, as receiver of the property and effects, and choses in action of Charles L. Bristol, in the sum of $765, according to the belief of the plaintiff, and that the same is due upon a contract *express*." The statute seems to have been literally followed; and, we think, enough was stated in this respect to warrant the issuing of the writ. We are not aware that the practice under this statute makes it necessary to state, not only that the sum sworn to by the plaintiff is due upon contract express or implied, but also to state the *nature* of the contract. On the contrary, it is believed that the practical construction of the statute has been, to consider the affidavit as sufficient, when it states that the sum claimed by the plaintiff, is founded upon a contract either express or implied.

3. Objection is also made to the sufficiency of the return to the attachment. The sheriff states therein that he attached the lands, &c. mentioned and described in the inventory and appraisement, &c. "and, *in which lands the defendant has an interest as one of the heirs of the late Antoine Dequindre*," &c. It was urged that the return should have shown the extent of the interest of the defendant in those lands, in order that an appraisement might be made. As the attachment was against the defendant alone, it could only operate upon his interest in the lands; other persons interested therein could not be prejudiced. It

would seem that all lands in which the defendant was interested were appraised without reference to the particular interest of the defendant therein. It was insisted that it was the duty of the sheriff to ascertain the extent of the defendant's interest, and that an appraisement of that interest alone should have been made. We think questions of so delicate and complicated a nature as might arise in such an investigation, could be better settled by the court, than by the sheriff. No injury can possibly result from an appraisement of all the lands in which the defendant may be interested. Upon a proper application to the court the extent of the defendant's interest in the property can be determined, and, by a simple process, the value of that interest ascertained. The interest of the defendant, and the other heirs in the lands attached, is estimated in gross at $6,305, and it was asked in what amount a bond should be given, provided the defendant desired to release the property from the attachment. To this it may be answered, that the penalty of the bond to be given in such cases, is not determined by the appraised value of the property attached, but by the amount claimed by the plaintiff to be due.

4. The next objection to be considered relates to the publication of the notice required by law. Section 6 of the chapter above referred to, makes it the duty of the clerk, upon the return of the writ, to make out an advertisement, stating the names of the parties, the time when, from what court, and for what sum, the writ was issued. This notice is to be delivered to the plaintiff or his attorney on demand, who shall cause the same, within thirty days, to be inserted in some newspaper printed in this state, &c. for six weeks successively. The notice actually published contained all the statute requires, and is dated the 23d November, 1843. But it also states that the writ was "returnable on the second Tuesday after

the first Monday in November *next*. It was urged by counsel that, according to the notice, the attachment was made returnable at the November term, 1844, of the circuit court of Wayne county, and that, for this reason, the motion should be granted. The use of the word *next*, instead of *instant*, was a clerical mistake, for which the plaintiff is not responsible, and should not suffer. Besides, the notice would be perfect by striking out the words "returnable," &c. The defendant could not be misled by such a mistake; for the notice states that the attachment was issued on the 12th June, 1843, and, by our statute, it would necessarily be made returnable on the first day of the next succeeding term of the court, which would be on the second Tuesday after the first Monday of November next ensuing.

5. The last objection is, that the defendant was not called and defaulted as the statute requires. Section 12, of the chapter above cited, provides that, "the defendant in attachment shall be called at the first, and two next terms after the issuing of the writ of attachment, and, if he make default, the same shall be entered of record." The affidavit, writ, notice of publication, and declaration, all show that the plaintiff sued in a special character; to wit, as "Receiver of the property and effects and choses in action of Charles L. Bristol," and the proceedings throughout should also exhibit that fact. From an examination of the journal, which contains minutes of the daily proceedings of the court, it would seem that at the first and second terms the entries in the journal were as follows: "John Drew *v.* Antoine Dequindre, Jr." "The defendant being three times called," &c. At the third term the entry is in this form: "John Drew, Receiver, &c. *v.* Antoine Dequindre, Jr." "The defendant," &c. It is certain that if the defendant was actually called to answer the plaintiff generally, and not in the special character in

which he sues, the proceedings must be quashed. But the defendant may have been called to respond to the plaintiff in that character; if so, the omission of the clerk to entitle the cause so as to correspond with the affidavit, writ, &c. cannot prejudice the plaintiff. That omission can be supplied by amendment. It was suggested by counsel that our statute of amendments is inapplicable to proceedings of this character, and is confined to common law proceedings. There is nothing in the statute to warrant such an interpretation. The power given to our courts to authorize amendments is as broad as can well be imagined: "The court in which any civil action is pending, may at any time before judgment rendered therein, allow amendments, either in form or substance, of any process, pleading or proceeding, in such action, on such terms as shall be just and reasonable." R. S. 1838, p. 461, § 20.* Surely, an authority so full and ample, will authorize the court, before final judgment, and while the proceedings are yet *in fieri*, to direct an amendment intended to supply an omission of the clerk; especially, when all the proceedings, from the affidavit to the filing of the declaration, show a perfect correspondence in respect to the parties to the suit.

*Ordered certified that the motion ought to be denied.*

* *Vide* R. S. 1846, ch. 104, § 1.

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## Gaines v. Betts.

A justices return to a *certiorari* showed a verdict rendered by a jury in the cause, its amount, and the amount of costs taxed; but it did not appear therefrom that the justice had formally entered judgment upon the verdict, *Held*, sufficient; the finding a verdict, in a justices' court being, in legal effect, a judgment.

Gaines v. Betts.

A judgment will not be reversed on *certiorari* on the ground that the verdict of the jury was against evidence, unless it appears that there was a total want of testimony to sustain the finding.

It will be presumed that there was evidence to sustain the finding, though none appears, unless the return to the *certiorari* shows that the whole of the testimony in the case is returned.

CASE reserved from Wayne Circuit Court. A sufficient statement of the case appears in the opinion of the court delivered by

FELCH, J. Betts sued Gaines before a justice of the peace, and declared against him on a contract for building a barn, alleging that he had performed his contract, and was entitled to the price agreed to be paid by Gaines. The suit was tried by a jury, and a verdict rendered in favor of Betts. Gaines removed the cause to the circuit court by *certiorari*.

The first question presented by the case is, whether there is any judgment to be either affirmed or reversed. According to the return, the justice's docket shows that the case was submitted to the jury on proofs, and that,

"The jury returned with a verdict for the plaintiff of eighteen dollars damages, - - - $18.00

"And costs of suit taxed at five dollars, - 5.00."

No other formal entry of judgment by the justice is made on the docket. The defendant in error, in whose favor this entry is made, contends that here is no judgment to be affirmed or reversed; and, consequently, the court will not examine it on *certiorari*.

The justices' act (S. L. 1841, p. 98,) imperatively requires the justice to render judgment on the verdict of a jury called to try a cause. He has no power over the verdict, and no discretion in the matter; he can do nothing to avoid or set it aside. The verdict is itself the judgment of the law in the case, and the justice is simply required s o

to make the entry on his docket. If he neglects to do so, still the verdict must be considered the final determination of the cause. In New York, under a statute similar to ours, such finding of a verdict has been considered in legal effect a judgment. *Felter* v. *Mulliner*, 2 J. R. 181; cited and approved in *Hess* v. *Beekman*, 11 Id. 457.

It would be clearly a bar to another suit for the same cause of action, and, being a determination of the rights of the parties as a final adjudication, must be so considered for the purposes of review by *certiorari*.

It is contended that the evidence showed that the plaintiff below had not built the barn according to the terms of his contract, and, therefore, could not recover the stipulated price. Without proof of performance, it is clear that he was not entitled to recover in the case. Whether he had performed or not was a question of fact to be determined by the jury on the whole testimony, and the judgment should not be reversed on *certiorari*, unless there was a total want of testimony to sustain the finding of the jury on the point in question. If there was any proof to sustain the finding, the verdict should stand. Of this we can judge only by having before us all the testimony given upon the subject to the jury; and the return should show that all this testimony is returned. Where the justice merely returns the names of certain witnesses, and states the testimony, without showing that he has given the whole of that testimony, we should presume that other proofs were given in the case upon which the verdict was founded. If a party asks a superior court to reverse a judgment, upon the testimony merely, he must see that his return contains all the evidence, and that it *shows* that the whole is returned.

This is not shown in the return before us. The justice has returned, as a part of the entry on his docket, what certain witnesses stated; but does not return that he has

given us the whole testimony. We cannot presume that the jury found a verdict without evidence to satisfy them that the barn had been built according to the contract.

*Ordered certified that the judgment below ought to be affirmed.*

*G. V. N. Lothrop*, for the plaintiff in error.

*B. F. H. Witherell*, for the defendant in error.

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## Logan *v.* Anderson.

A, by deed, leased premises to B, who afterwards assigned the lease to C:—A assented to the assignment, and agreed, by parol, to accept C as his tenant, and to look to him for the rent. *Held*, that there had been a sufficient surrender of the lease by operation of law, to satisfy R. L. 1833, § 9; and that A could not afterwards maintain covenant against B, for the rent.

Error to Jackson Circuit Court. The cause came into that court on appeal from a justice of the peace. The action was covenant, brought by Anderson, to recover rent due on an agreement under seal, dated 16th June, 1838, whereby he agreed to lease to Logan certain premises for one year from the 1st June following; and Logan agreed to pay him one dollar a week by way of rent.

Logan proved in defence an assignment, endorsed on the back of the lease in the following words: "For a valuable consideration I hereby assign to G. H. Gorham all my right and interest to the within lease. Jackson, July 19, 1838." (Signed,) "*G. W. Logan*:"—and Gorham, being introduced as a witness on his behalf, testified that Anderson was present when this assignment was made; "that he assented to it, and *to a change of tenants*, and

agreed to accept the witness *as his tenant in the place of Logan;* and also to look to witness for the rent of the premises as the same should fall due," &c.—that he then "said to Logan that he would discharge him from the payment of the rent, and take witness for his tenant and look to him for the rent;—and that he, (witness,) afterwards paid to Anderson the rent up to August, 1838."

It also appeared in evidence that when this assignment was executed, one Grant was in the actual possession of the premises, and that Logan never entered into possession under the lease from Anderson.

By consent of parties, a verdict was taken for the plaintiff below, subject to the opinion of the court; and the circuit court having subsequently declared their opinion that the defence set up was insufficient in law, judgment was rendered upon the verdict. To reverse which this writ of error is prosecuted.

*D. Johnson*, for the plaintiff in error.

*Chapman & Kimball*, for the defendant in error.

WHIPPLE, J. delivered the opinion of the Court.

To warrant the judgment of the circuit court, it must be assumed that the agreement referred to by Gorham was void, under the provisions of R. L. 1833, p. 342, § 9,* which declares "that no leases, &c. shall, at any time hereafter, be assigned, granted, or surrendered, unless it be by deed or note in writing, signed by the parties so assigning, granting, or surrendering the same, or their agents, thereunto lawfully authorized by writing, *or by act and operation of law.*" The only question presented for our consideration, is, whether the lease executed by Anderson was surrendered "by act and operation of law." As the facts were withdrawn from the consideration of the

* *Vide* R. S. 1846, ch. 80, § 6, and R. S. 1838, p. 329, § 6.

jury, if it clearly appears to the court that Anderson accepted Gorham as his tenant, with the assent of Logan, or that Gorham took a new lease from Anderson, with the assent of Logan, who agreed to the substitution, then it is clear, such acceptance of a new lease, though by parol, would operate as a surrender of the former lease by deed.

This construction of the statute of frauds, is fully warranted both by elementary writers, and by adjudged cases of the highest authority. In the case of *Thomas* v. *Cooke*, 2 Stark. R. 407, (S. C. 3 E. C. L. R. 405,) the facts were, that Thomas let the premises to Cooke, and the latter underlet to one Perks. The rent being in arrear, Thomas distrained upon Perks, who gave a bill of exchange for the amount. Thomas then said that he would have nothing more to do with Cooke, and took the bill of exchange in discharge of the rent. After this, Thomas again distrained upon Perks, and then brought an action against Cooke for the rent. The question was, whether Cooke still remained liable as the tenant of Thomas. On the part of the plaintiff it was insisted that the tenancy of Cooke still subsisted, but *Abbott*, J. left it to the jury to say, whether the plaintiff, after the distress, had not accepted Perks as his tenant, with the assent of Cooke. The jury finding in the affirmative, the plaintiff was nonsuited, with leave to move the court to set aside the nonsuit, and enter a verdict for the plaintiff. In the ensuing term, Topping, for plaintiff, moved accordingly; "but the court were of opinion that the circumstances constituted a surrender by operation of law. If a lessee assign, and the lessor accept the assignee of the lessee as his tenant, that, in point of law, puts an end to the privity of estate between the lessor and the lessee." In the same case, the court further remarked that, "a landlord could not have two tenants at the same time; and here the plaintiff had made his election to take Perks as his tenant." In

the case of *Stone* v. *Whiting*, 2 Stark. 235, (3 E. C. L. R. 331,) the facts were, that Whiting, who was then tenant of certain premises, let them to a person of the name of Lockwood, and they afterwards went to Stone to inform him of what they had done, when he agreed to take Lockwood as his tenant from that time, and to discharge Whiting from further liability as tenant. *Holroyd*, J. on the trial of the cause, said, that there was an agreement that one should be substituted for the other as tenant, and he was inclined to think, that this constituted a surrender in law. That the taking a new lease by parol is, by operation of law, a surrender of the old one, is not only fully established by the cases cited, but is also recognized by the King's Bench in the case of *Thomas* v. *Cooke*, 2 B. & Ald. 119. See, also, 2 Stark. Ev. 343; 1 Saun. R. 236; *Harding* v. *Crethorn*, 1 Esp. R. 57.

Applying the principle thus laid down, to the facts as they appeared before the circuit court, we think it clear, that that court erred in rendering a judgment for the plaintiff upon the verdict of the jury. Had the facts been submitted to the jury, as in the case of *Thomas* v. *Cooke*, there can be no doubt that they would have found that Anderson accepted Gorham as his tenant, with the assent of Logan; and as this assent would have the same legal effect as if Logan had actually surrendered the former lease, it is equally clear that their verdict, under proper instructions from the court, must have been for the defendant.

The judgment of the circuit court must be reversed with costs.

*Judgment reversed.*

## KINZIE v. THE FARMERS AND MECHANICS' BANK OF MICHIGAN.

Assumpsit upon a promissory note, endorsed by the defendant, to the plaintiffs, dated at Chicago, Illinois, and payable at St. Joseph, Michigan.—Plea that the note was made, endorsed, and delivered, at Chicago, in the state of Illinois; that, by a statute of that state, particularly set forth, endorsers were discharged from liability, unless the degree of diligence therein specified, was used by the holder, in the institution and prosecution of suit against the maker; and that such diligence had not been used in this case, whereby the defendant was discharged.—Replication, that the note was made and endorsed for the purpose of being discounted, and was discounted, by the plaintiffs, at their banking house, at St. Joseph, in the state of Michigan, and was there delivered to them, by the defendant, for the purpose of being so discounted; *without this*, that it was delivered at Chicago, in the state of Illinois, in manner and form as in the plea alleged.—On general demurrer, *Held*, that the replication was sufficient; for that,

1. The inducement avers, in substance, that the defendant's contract of endorsement was made at St. Joseph, not only by the delivery there of the note endorsed, but by the negotiation of it there, by sale and receipt of the consideration by the defendant.

2. The replication admits merely that the defendant wrote his name on the back of the note at Chicago,—(not that the contract of endorsement was made there,)—and this act alone, the note remaining in his possession, could not render him liable as endorser.

3. The traverse is of the delivery of the note *with the defendant's endorsement upon it*, (and not of the delivery of the note merely,) at Chicago.

4. If too narrow in being of delivery only, the inducement being a sufficient answer to the plea, this defect is aided by general demurrer.

5. *Sed quære*, Whether delivery, or what in legal contemplation amounts to it, is not necessary to consummate the contract of endorsement.

6. The replication would not be sustained by proof of delivery of the note endorsed, to the plaintiff, by some intermediate holder between him and the defendant.

Where the holder of a note, striking out intermediate endorsements declares against a remote endorser as on an endorsement directly to himself, he recovers on the contract of the defendant with his immediate endorsee.

ERROR to Wayne Circuit Court. Assumpsit by the defendants in error against Kinzie, as endorser of a promis-

sory note, made by one Jamison, dated at Chicago, July 22, 1837, and payable to Kinzie's order, ninety days after date, at the Branch Bank of the Farmers and Mechanics' Bank, at St. Joseph, Michigan. The declaration averred, in the usual form, the making of the note by Jamison; Kinzie's endorsement and delivery of it to the plaintiffs below; presentment for payment; non-payment, and notice thereof.

The defendant below interposed a special plea, alleging that the note was *made, endorsed and delivered* at Chicago, in the state of Illinois; and setting forth a statute of that state, which required that due diligence should be used in the institution and prosecution of a suit against the maker of a note, for the recovery of the amount thereof, before the endorser can be made liable, unless in cases where the institution of such suit would have been unavailing, or the maker had absconded and left the state before the note became due; and averring that such diligence had not been used in the institution and prosecution of a suit against Jamison, on the note, although at the time when the note became due, he had not absconded or left the state of Illinois; whereby the defendant was discharged from liability on his endorsement.

To this plea the plaintiffs below replied, that the "note was made and endorsed, for the purpose of being discounted, and was discounted by them, at their banking house, at St. Joseph, in the state of Michigan; and for the purpose of being so discounted by the said plaintiffs, was delivered to them, by the said defendant, at their banking house at St. Joseph, in the state of Michigan aforesaid; *without this*, that the said note was *delivered* at Chicago, in the state of Illinois, in manner and form, as the said defendant hath above in his said plea in that behalf alleged."

To this replication, there was a general demurrer, and joinder therein.

On argument, the court below overruled the demurrer, and gave judgment for the plaintiffs below. To reverse which, this writ of error is prosecuted.

*S. Barstow*, for the plaintiff in error.

1. The plea is a good bar to the action. For, it is well settled, that the liability of a party to a contract is governed by the law of the place where it is made, or is to be performed. Story's Confl. Laws, §§ 242, 244, 266, 270; 2 Kent's Com. 458, 459. And an endorsement is a new contract, not designating on its face any place of performance, and is governed by the law of the place where it is made. 8 Pet. R. 361; Story on Bills, 163; Story's Confl. Laws, §§ 347, 314, 315, 316; 2 Kent's Com. 460, *note;* 1 Metc. R. 82.

2. The replication is bad. Being in the form of a special traverse, the inducement should contain a sufficient answer to the substance of the plea. A bad inducement cannot be helped by the special traverse. Steph. Pl. 180—186; 1 Ch. Pl. 593, 619 to 623; 1 John. R. 316. The material allegation in the plea is, that the note was endorsed at Chicago. The inducement to the replication, does not state any fact inconsistent with this: It therefore admits it. It may be said that the endorsement of a note is not consummated until delivery, and that an allegation that a note was delivered at a certain place, is equivalent to an allegation that it was endorsed there. But this cannot be; for a note endorsed in blank may pass through numerous hands, and the last endorsee may declare against the endorser, and allege delivery directly from such endorser to himself. The law looks upon him as the immediate contracting party with the endorser. He may write a special endorsement over the endorser's signature;

and, if the above position is correct, the place of actual delivery to the last holder must be the place of endorsement. In other words, the doctrine contended for asserts, that if A endorses B's note for B's accommodation, his liability depends, not upon the place of endorsement, but upon the place where B afterwards negotiates it. It alters the very nature of the contract of endorsement, for to *endorse*, means to assign by writing on the bill or note, and the contract may be made before the bill or note is drawn. Story on Bills, 244, '5 ; Ch. on Bills, 240 ; Dougl. 496 ; 7 Cow. 336.

The fact of delivery at St. Joseph, is not inconsistent with the fact of a previous delivery at Chicago. Supposing there had been such previous delivery, would not the contract of endorsement have been complete at Chicago? And yet the defendants in error might have safely alleged delivery to them at St. Joseph, by the plaintiff in error, treating him as a direct contractor with themselves ; (Story on Bills, 229, 230 ; Bayl. on Bills, 148,) and issue could not have been safely taken upon such delivery.

The law of the *place where the endorsement was written*, must govern the contract as a general rule. For, the liability of the endorser of a note is the same with that of the drawer of a bill. 4 Mass. R. 258 ; Chitt. on Bills, 266 ; 3 East. 483 ; 7 Id. 435 ; Story on Bills, 122 ; and it is well established that his liability is governed by the law of the place where he signs the bill, though it may go to a foreign country before it reaches the hands of any person entitled to recover upon it ; and though, when drawn, blanks are left for names and dates. Story on Bills, 30, 31 ; Bayley on Bills, 146 ; 1 Steph. N. P. 797 ; 5 Taunt. 529 ; 1 M. & Selw. 87.

Again : A bill or note endorsed before it is made or drawn, is construed to be a bill or note *by relation*, from the time of *signing or endorsing*. Chitt. on Bills, 240.

The liability in such a case does not, it is true, commence until negotiation, but when it does commence, the contract is held to take effect from the time of signing or endorsing.

From the well established principle before alluded to, that the endorser is held to contract directly with the holder, (1 Steph. N. P. 848, 851; Dougl. 633; 1 Wash. C. C. R. 100, 44,) it follows that the delivery to the last holder completes the contract between him and the endorser; and the law of the place of such delivery must govern that contract, if the principle assumed by the replication be correct. Thus the liability of the endorser would be made to depend upon the place of last negotiation, and would consequently be liable to be varied by each transfer. Such a position cannot be sustained for a moment.

If the above positions are correct, it is clear that the averment in the replication that the note was delivered at St. Joseph, is not equivalent to a denial that it was endorsed at Chicago, and that the replication is, in substance, insufficient.

*S. T. Douglass*, for the defendants in error.

1. The plea was insufficient to bar the plaintiffs' action. Where a contract specifies a place of performance, the law of that place governs. Story's Confl. Laws, § 280; 6 Pet. R. 172, 203. The contract of the defendant below, as endorser, was, that the maker should pay the note at St. Joseph, where it was made payable. St. Joseph was the place of performance, and therefore the law of Michigan governs. Chitt. on Bills, 266; *Rothschild* v. *Currie*, 41 E. C. L. R. 428.

2. Admitting the plea to be good, the replication is a sufficient answer to it. The inducement at least alleges with sufficient certainty, that the note and endorsement were first delivered, by the defendant, to the plaintiffs, at St. Joseph; and is followed by a formal traverse of such

delivery at Chicago, as alleged in the plea. And we contend that the contract of endorsement must be regarded as made, when and where the note is, in legal contemplation, delivered by the endorser to his endorsee. Pothier on Ob. Pt. 1, Ch. 1, § 1, Art. 2; Grotius, Lib. 2, Ch. 2; Chitt. on Contr. 12, (5 Am. from 3 Lon. Ed.;) *Routledge* v. *Grant*, 15 E. C. L. R. 99; *Mactier* v. *Frith*, 6 Wend. 103, 113, 114, 139; *Cox* v. *Tracy*, 7 E. C. L. R. 163; *Adams* v. *Jones*, 40 Id. 189; *Duncan* v. *United States*, 7 Pet. 448, 449; *Bank of Augusta* v. *Earle*, 13 Id. 532, *per Sargeant arguendo.* The ordinary form of a declaration against an endorser shows that delivery is essential to perfect the contract of endorsement, for the allegation in the old forms is, that the defendant "endorsed and delivered" the bill or note; and it was only the decision that "endorsed," included or implied *delivery*, that led to the omission of this allegation of delivery in the recent English forms. Chitt. on Bills, 589; 774 n. d.; 7 T. R. 596; 5 East. 477; 1 Chit. Prec. 76*a*, *note x*; 3 Law Lib. 85, n. 6.

Where the endorser writes his name in one place, and delivers the note in another, the former certainly cannot be regarded as the place of making the contract; for, besides that this would be to maintain that it was made when and where, according to principles universally applicable to all contracts, it had no legal obligation or existence, such a doctrine would open wide the door for fraud, and tend to restrict the circulation of negotiable paper, which it is the policy of the law to promote. No witnesses attest the act of the endorser in writing his name; there is but one party to it; and no holder would have the means of ascertaining where it took place, and, consequently, what law would govern the liability of the endorser.

It is admitted, however, that where an endorsement, or any other contract, having no specified place of perform-

ance, designates on its face some place where it purports to have been made, the law of this place will, in general, govern, without regard to the place of delivery. For the reason why the law of the place of making a contract is held to govern it, is, because it is presumed that this is the place where the parties intend it shall be performed; (Story's Confl. Laws, § 280;) and the designation of a place where a contract is to be regarded as made, is virtually a designation of this, as the place of performance. It is said that the liability of the drawer of an accepted bill, and that of the endorser of a note, are precisely alike; and that it is well established that the drawer's liability is governed by the law of the place where he *draws* the bill. Admitted; but is the place where the bill is *written*, merely, to be regarded as the place where it is *drawn?* Certainly not. But the place where it purports, on its face, to have been drawn, or, if no such place is designated on the face of the instrument, then the place of its first negotiation by the drawer.

There is no foundation for the doctrine that, in ordinary cases, the liability created by the endorsement of a bill or note, although it does not accrue until after negotiation, yet then *relates back* to the time and place where the endorser wrote his name. *Mactier* v. *Frith*, 6 Wend. 111, 112, 113.

It is argued that an endorser promises to pay the note to his immediate endorsee, or to whoever may afterwards become the holder, and that, therefore, where the last holder receives a note which has been negotiated by several successive transfers, *there*, in contemplation of law, it is delivered to him by the first endorser. But it is well established that, in contemplation of law, the note is delivered by the first endorser so as to consummate his contract when and where it is delivered to his immediate endorsee; and not where the last holder receives delivery.

Story's Confl. Laws, §§ 317, 344, 346 to 348, and cases there cited; 16 Mart. (La.) R. 277. This error being exposed, the arguments based upon it fall to the ground.

GOODWIN, J. delivered the opinion of the Court.

It is insisted on the part of the plaintiff in error, that the replication is insufficient, and the judgment should be reversed. On the part of the defendants in error, that it is sufficient, and even if not, that the plea is bad in substance, and insufficient to bar the action.

Is the replication a sufficient answer to the special plea?

The plea alleges, in substance, that the endorsement upon which the suit is brought, was made at Chicago, in Illinois, and that the measures required by the laws of that state had not been taken, to charge the endorser;—assuming the principle that the law of the place of the making of the contract, is to govern as to its legal effect.

The replication consists of a formal traverse, with an inducement. This is a proper mode of pleading when a party sets up, in bar of his adversary's pleading, new facts inconsistent with those alleged by him. After stating the facts which constitute his answer to the previous pleading, he concludes with a formal traverse of one or more of the material facts alleged by his adversary, and which are inconsistent with the truth of his own. By resorting to this course, instead of a general denial of the matter pleaded, or of a material point presented, the facts are placed on the record, and the legal question arises of their sufficiency or insufficiency as an answer to the case made by the pleading to which they are interposed.

As to this mode of pleading, it is a rule that the new matter stated as inducement to the traverse, must appear to be sufficient in substance, to defeat the opposite party's allegation, and if a defective title be shown, the inducement will be bad, though in stating it, so much certainty

does not appear to be requisite as in other parts of pleading, because it is seldom traversable,—the other party being compellable, in his rejoinder, or other pleading, to adhere to his own allegation, which has been traversed. Also, the traverse must not be of immaterial matter, and must not be too large or too narrow. But if defective, or if there be none, it can only be taken advantage of by special demurrer, and is aided on general demurrer, or by pleading over,—the material part of the pleading being the facts which are set up inconsistent with, and in answer to, the opposite pleading. 1 Chit. Pl. 539; 1 Saund. R. 14, n. 2.

Are then the facts set out in the inducement to the replication, inconsistent with those averred in the plea, and in substance a sufficient answer to it?

The material averment of the plea which the replication assumes to answer, is that the indorsement of the note was made at Chicago, in Illinois,—making the place of the contract of indorsement the material point. The replication then alleges that the indorsement (as well as the note) was made for the purpose of being discounted by the plaintiffs, (I mean the plaintiffs below, and for convenience, shall thus designate them hereafter in this opinion,) at their banking house, at St. Joseph; that it was there discounted, and was there delivered to them by the defendant, for the purpose of being thus discounted. In other words, that the note was presented, by the defendant, the endorser, to the plaintiffs, at their banking house, at St. Joseph, for discount; that it was there discounted by them,—that is, the money was advanced and paid to him for the note,—and that concurrently therewith, the note endorsed was by him delivered to the plaintiffs. If this be the true construction of the replication, it seems evident that the contract of endorsement was made at St. Joseph, and not at Chicago; for there is not only the delivery of the note and endorsement to the plaintiff, by the defend-

ant, but the negotiation of it by sale, and receipt of the consideration,—the money paid upon the discount. Upon this view the averments are a sufficient answer to the plea; and upon a close examination of the replication, this seems to be its true construction. It is urged by the counsel for the defendant, that, by the replication, the endorsement at Chicago is admitted, and the other allegations are merely of facts which would be evidence to disprove what is thus admitted. This argument arises from the equivocal use of the word "endorse." It is sometimes used to indicate the contract by which the transfer is made by the endorser, of which the writing the name on the paper is a part and of which it is *prima facie* the evidence, and usually the entire evidence; at other times, it denotes the mere writing of the name on the paper. When used, the context must determine the signification in which it is used. In the plea, the defendant uses the terms endorse and deliver, though a delivery, in the use of the term first mentioned, is involved in the endorsement to the endorsee, and an averment of such endorsement is sufficient without adding an averment of a delivery. In the replication, the word is obviously used to indicate the writing the name on the paper, and the contract is set out. The mere writing the name, with nothing further, the paper remaining in the parties' possession and control, does not create the liability.

It is further insisted that the traverse is too narrow:—First, that it is of the delivery only of the note, and not of the endorsement; but it is of the delivery of the note in manner and form as alleged in the plea, and the delivery there alleged, is, in substance, with the endorsement upon it. Second, that a traverse of the *delivery* is immaterial, and that the endorsement may be consummated and create a liability before an actual delivery. We have already seen, that upon a general demurrer, such defect, if it exist,

is unavailable where the previous inducement is in substance sufficient. But it is urged in support of the replication, that a delivery, or what by legal construction amounts to it, is necessary to consummate the contract of the endorser. In the view above taken of the replication, its sufficiency is not regarded as turning upon the isolated fact of the delivery, inasmuch as the contract is set out in it. I have, however, given the question considerable examination; and, the general principles applicable to contracts, as well as the authorities cited, particularly that of Story in his treatise on Bills, and the cases of *Cox* v. *Tracy*, 7 E. C. L. R. 163, and *Adams* v. *Jones*, 40 E. C. L. R. 94, indicate very strongly that, to consummate the endorsement, there must be a delivery in fact, or what, by legal construction and effect, amounts to a delivery.

It was urged that the averments in the replication would be sustained by proof that the note was delivered by a subsequent holder;—that, by the endorsement, authority is given to him to negotiate it, and the delivery by the authority of the endorser thus given, is his delivery. So far as regards the note, this position is correct. So far as regards the contract of endorsement, the delivery would be *of it, as it was made*, and would no more vary that, than it would that of the note, which had been previously consummated. And the proof of the negotiation and delivery, by a subsequent endorsee, would not be proof of the contract alleged in the replication, between the endorser and the plaintiffs. When blank endorsements are stricken out, and the plaintiff declares on an endorsement directly to himself, he recovers on the contract of the endorser with his immediate endorsee, being substituted for him. So in the case of an accommodation endorser, who delivers the note to the maker, and the maker negotiates it. Such proof, in this case, would not sustain the allegations in this replication. In the case put of negotiation by an agent,

the time and place when and where the legal liability of the endorser arises, must necessarily depend upon the circumstances of each case; showing the period at which it passes from his hands a perfect endorsement in respect to the subsequent holder. In this case, it appears to me the facts stated in the replication would be sustained by proof that the negotiation and delivery alleged, were through the instrumentality of an agent.

It is said by the counsel for the plaintiff in error, that there is no material fact in the replication upon which he could take issue. According to the rules of pleading, I see no difficulty in the way of putting in issue the whole matter of the replication, by taking issue upon the traverse in it, of a material fact contained in the plea, (and such the traverse in this case seems to me to be,) which would be by re-asserting the matter traversed, and concluding to the country; or, if that traverse were immaterial, then by re-asserting the substantive matter of the plea answered by the replication, and traversing the latter, and concluding to the country. Upon the whole, then, we deem the replication a sufficient answer to the plea, and the judgment should therefore be affirmed.

*Judgment affirmed.*

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PEOPLE *ex. rel.* MARKHAM *v.* THE JUDGES OF CASS CIRCUIT COURT.

Under the justice's act of 1841, (S. L. 1841, pp. 112, 113,*) before a *certiorari* to a justice of the peace can regularly issue from the circuit court, the affidavit to procure the allowance thereof, and the allowance of the same endorsed thereon by a judge of this court, must be filed with the clerk of the circuit court; and if issued before such affidavit and allowance are filed, the cause will, on motion, be dismissed by the circuit court for want of jurisdiction.

*N. Bacon*, for relator. *C. Dana*, for defendant.

* See R. S. 1846, ch. 92, § 49.

## FALKNER v. BEERS.

Pleading the general issue to a complaint under the statute of forcible entry and detainer, (R. S. 490, ch. 5, S. L. 1840, p. 83,) is a waiver of irregularities in the summons and venire.

The contents of a notice to quit may be proved by secondary evidence, without notice to produce the original.

A tenant holding over after the expiration of his term, cannot set up title to the premises in a third person, in defence of an action by his landlord to recover the possession.*

CERTIORARI to two justices of the peace. This was a proceeding under the statute of forcible entry and detainer, (R. S. 1838, p. 490, ch. 5,†) and the act amendatory thereto, (S. L. 1840, p. 83,) instituted by Beers, to recover possession of certain premises leased by him to Falkner, and which the latter held over, after the expiration of the term for which they were demised. On complaint filed, a summons was issued and duly served on Falkner, and also a venire, by virtue of which a jury was summoned in the cause. Falkner appeared on the return day, and plead the general issue, accompanied with a notice of special matter to be given in evidence on the trial. But, before proceeding to the trial, he moved to quash the proceedings, on the ground that both the summons and venire, (which appeared, on their face, to have been signed by each of the justices before whom the cause was pending,) were in fact signed and issued by one of them only. This motion was overruled on the ground that it came too late, after plea to the merits, and the cause proceeded to trial.—On the trial, Beers offered to prove the contents of a notice to quit, served upon the defendant, by reading in

* *Vide Byrne* v. *Beeson*, 1 Dougl. Mich. R. 179.
† *Vide* R. S. 1846, ch. 123.

evidence a copy thereof. This evidence was objected to, on the ground that Falkner had not been notified to produce the original. But the objection was overruled, and the copy read in evidence.—Beers then gave in evidence a written instrument, signed by Falkner, dated September 17, 1841, reciting that he, (Falkner,) had hired the premises from Beers, for the term of one year from that date, at a certain rent therein specified; and containing a promise to make punctual payment of the rent, and to surrender the premises at the expiration of the term. And, having proved Falkner in possession after the expiration of the term, he rested his case.—Falkner then offered to prove, in defence, that, as alleged in the notice appended to his plea, Beers had no right or title to the premises, and never had been in possession thereof; but that they were the property of the state of Michigan. This evidence being objected to by Beers, was rejected by the justices.—The jury found a verdict in favor of Beers, on which judgment was rendered and restitution of the premises awarded.

*N. Bacon*, for the plaintiff in error.

*C. Dana*, for the defendant in error. If the summons was irregularly issued, the irregularity was waived by plea to the merits. *Tifft* v. *Culver*, 3 Hill's R. 180; *Durham* v. *Hayden*, 7 John. R. 381; *Willoughby* v. *Carleton*, 9 Id. 136. The evidence offered in defence was properly rejected. *Doe* v. *Pegge*, 1 T. R. 760; *Mackey* v. *Mackreth*, 3 Id. 14; 9 Wend. 147; *Jackson* v. *Stewart*, 6 John. R. 34; Woodfall, 397; 2 Binn. R. 471; 6 Wheel. Am. Com. Law, 380, '2, '3, '4.

Ransom, C. J. delivered the opinion of the Court.

A reversal of the judgment below is claimed by the plaintiff in error, on the ground,—

1. That the justices improperly overruled his motion to quash the summons and venire. We have no doubt, however, that the motion was properly denied. The defendant appeared, plead the general issue, and gave notice of his intention to prove special matter going to the whole merits of the controversy, before he interposed his motion to quash. He thereby waived all irregularities in the issuing of the process. When there has been any irregularity, if the party overlook it, and take subsequent steps in the cause, he cannot afterwards revert back to the irregularity. Grah. Pr. 702; 3 T. R. 7, 10; 2 Taunt. 243; 5 T. R. 464; 5 Taunt. 330; 2 B. & Ald. 373; 10 John. R. 486.

2. It is also objected that the justices erred in permitting a *copy* of the notice to quit, to be read in evidence. It is insisted that notice to produce the original, must have been given, before secondary evidence of its contents could have been received. Such, however, is not the rule. In Tillinghast's Adams on Ejectment, p. 313, it is said—"The contents of the notice to quit, may be proved by a duplicate original, which should be compared with the notice actually served, by the party serving it; but if this precaution is not taken, parol evidence may be given of its contents; and it is not necessary in either case to give the defendant notice to produce the original in his possession."

3. Again, it is contended that this judgment is erroneous, because the justices rejected the evidence offered by the defendant, to show that the plaintiff had no title to the premises, but that the same was vested in the state.

It is said to be an universal rule, that a tenant shall not be permitted to set up any objection to the title of his landlord; and this is not merely a technical rule, but one founded in convenience and policy, and it applies to all kinds of tenancy, whether for years, at will, or at suffer-

ance. 9 Wend. 147; 6 Am. Com. Law, 382; 1 T. R. 760; Till. Adams on Eject. 276, and notes (c.) and 2.

Falkner was the tenant of Beers, and entered into possession under a lease from him; and, having paid rent and enjoyed the premises, he is estopped from setting up a title against him. He could not set up a title in himself subsequently acquired, without first surrendering possession to his landlord; much less could he set up a title in a third party, under whom he claimed no right.

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

*Judgment affirmed.*

* Following is a brief report of a case between landlord and tenant, under the statute of forcible entry and detainer, which was decided at the January Term, 1842, of the Supreme Court—Present, W. A. FLETCHER, *C. J.* and MORELL, WHIPPLE and RANSOM, *Justices.*

CHAMBERLIN *v.* BROWN.

The statute, (R. S. 1838, p. 490, § 6,) requires that a landlord should demand possession of premises, in writing, from his tenant, at least twenty days before summary proceedings, under its provisions, to recover the possession. *Held*, that a demand, *requiring the tenant to quit the premises in ten days*, but which was served twenty days before proceedings instituted, was sufficient.

*Held*, that a suit against a lessee, to recover possession of the demised premises, on account of the non-payment of rent, &c. was properly brought by the lessor in his own name, although he had previously assigned the rents to accrue under the lease, to a third person.

In suits before two justices of the peace, under the statute of forcible entry and detainer, (R. S. 1838, p. 490, ch. 5,) and the act amendatory thereto, (S. L. 1840, p. 83,) the jury are the judges both of the law and the facts. Misdirection of the court to the jury, cannot, therefore, be assigned for error: But it may be assigned for error that the verdict is against the law.

It seems that the jury are the judges of both the law and the facts, in all courts of special and limited jurisdiction, derived from the statute, and whose proceedings are regulated by the statute, and are not according to the course of the common law.

CERTIORARI to two justices of the peace, to reverse a judgment rendered against Chamberlin, in a proceeding under the statute of forcible entry and detainer, (R. S. 1833, p. 490, ch. 5,) and the act amendatory thereto, (S. L. 1840, p. 83,) instituted by Brown, to recover possession of certain premises leased by him to Chamberlin, on account of the non-payment of rent. The facts sufficiently appear in the opinion of the court, delivered by

FLETCHER, C. J. The statute (R. S. 1838, p. 490, § 6,) requires that a landlord should demand possession of the premises in writing, from his tenant, at least twenty days before summary proceedings, under its provisions, to recover possession. It ap-

## People *ex. rel.* Strong *v.* Davidson and others, School Inspectors of the Township of Greenfield.

Under the statute, (S. L. 1840, p. 215, § 25,) empowering the school inspectors of any township, "to divide the township into such number of districts, and to regulate and alter the boundaries of said school districts, as may from time to time be necessary," they may dissolve one organized district and annex it to another.

Motion for a *mandamus*, commanding Davidson and others, school inspectors of the township of Greenfield, county of Wayne, to pay or cause to be paid to school district No. 12, in said township, such sum of money as the district may be entitled to by law, from the common school fund, and from the fund arising from the taxes of the township.

It appeared that, November 22, 1842, the respondents divided district No. 4, in said township, into two districts; the new district being numbered 12;—that on the first day of December following, the organization of the new district, under the statute, was perfected;—and that, on the

pears from the case, that the notice to quit, served upon Chamberlin, required him to quit the premises in *ten* days after service, though it appears also that the proceedings were not in fact instituted until more than twenty days after the notice was served. The plaintiff in error insists that the notice was insufficient; and that the judgment below ought, therefore, to be reversed. I think the time specified in the notice, within which Chamberlin was to quit, does not at all affect his rights, as the twenty days were actually allowed him before suit. It was not necessary to mention the time for quitting, in the notice; and the mention of a shorter time than is specified in the statute, can in no way affect the rights of the lessee, and is therefore quite immaterial.

2. It appeared on the trial, that before the suit was commenced, Brown assigned the rents to become due under the lease to one Stuart, and authorized him to collect and receive the same; and it is insisted that he had, therefore, no right to prosecute this suit in his own name, but that it should have been brought in the name of Stuart. The *lease* was not assigned, and we think that proceedings by Stuart to collect the rent must, therefore, necessarily have been in the name of Brown.

3. It is further insisted, that one of the justices, in charging the jury, committed an error in matter of law. This cannot be alleged for error. The court below was not court of record, having the right and power to enforce the law on the trial before a jury. The jury are sworn to try the cause, according to the law, and the evidence.

13th of the same month, the respondents made an order dissolving the new district, and re-annexing it to district No. 4. The question involved in the case was, whether the respondents had power to make the last mentioned order.

*B. F. H. Witherell*, in support of the motion.

WHIPPLE, J. delivered the opinion of the Court.

The authority of the inspectors thus to dissolve district No. 12, and re-annex it to the old district from which it was severed, must depend upon the construction of the twenty-fifth section of the act entitled "An act to amend the Revised Statutes relative to primary schools," approved April 12, 1840. (S. L. 1840, p. 215.*) By that section the inspectors are authorized "to divide the township into such number of districts, and to regulate and alter the boundaries of said school districts, as may from time to time be necessary."

It will be perceived that the number of districts in any township is to be determined by the school inspectors. This follows necessarily, from the language of the section,

If, in consequence of an erroneous charge, the jury should give a verdict against the law applicable to the case, the party seeking a review must make his case by setting forth so much of the evidence as will show that the verdict is against the law. There is a difference in this respect between the proceedings of a court of record, according to the course of the common law, and proceedings in courts of special and limited jurisdiction, not according to the course of the common law, but specially provided for and regulated by statute. In the former case, if the court give an erroneous charge to the jury, which may have influenced their verdict, exceptions may be taken, and the question may be reviewed in an appellate court. The court has exclusive jurisdiction in questions of law, and the jury of the facts. But in the latter case, the jury are the judges of the law and the facts; and the correctness of their verdict, must be tested by an examination of the merits of the case, as presented by the facts apparent upon the return of the justices. It does not appear from the facts presented in this case, that the verdict is not consistent with the law or the merits of the case.

The judgment below must, therefore, be affirmed.

*Romeyn, Emmons & Backus*, argued the cause for the plaintiff in error; and

*A. D. Fraser*, and *D. Stuart*, for the defendant in error.

* Re-enacted by R. S. 1846, p. 227, § 71.

which confers authority to *divide* the township from time to time into such number of districts as may be necessary. If they may divide the township into twelve districts, why may they not divide it into ten, by enlarging the boundaries of one or more of those in existence, or, which is the same thing, by annexing two or more so as to constitute but one district, as may, from time to time, in the judgment of the inspectors, become necessary? The power could not, perhaps, be derived from the words "regulate and alter the boundaries," &c., but these words, taken in connection with the authority to "*divide*," from time to time, as may be necessary, justified, *legally*, the order made by the inspectors. That order may have been unwise; it may have been an abuse of the discretion with which the inspectors are clothed; but such abuse of discretion cannot authorize the interference of this court. We think it clear, that the authority to determine the number of districts in each township, ought to be lodged in some responsible body. Unless it is conferred upon the inspectors, the power does not exist; and, as the words of the twenty-fifth section justify the construction we have given to it, we feel bound to overrule the motion for a *mandamus*.

*Motion denied.*

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LYNCH *v.* BRUCE.

THE circuit court has no power to grant an order, in an action of replevin, under R. S. 1838, p. 523, ch. 5,* requiring the plaintiff to file a new replevin bond.

* Repealed. Under R. S. 1846, ch. 124, § 19, the court may allow a new bond to be filed in certain cases.

## CAHILL AND SMITH v. THE KALAMAZOO MUTUAL INSURANCE COMPANY.

The circuit court cannot compel a plaintiff to become nonsuit. He has always a right, if he chooses, to go to the jury with his case.

Production of the charter, and proof of acts of *user* under it, is sufficient to establish corporate existence, where the charter confers corporate powers *in presenti*, and unconditionally, and does not make the right to their exercise depend upon any thing to be done *in futuro*. In such cases no proof of organization under the charter is necessary.*

Written applications to an incorporated insurance company for policies, policies issued thereon, and also the official bonds of the officers of the company, are admissible in evidence for the purpose of proving *user*.

One who effects an insurance with an incorporated company, by the terms of whose charter he, by so doing, becomes a member of the corporate body, and, on receiving his policy, gives a premium note in consideration therefor, payable to the company by its corporate name, is estopped from denying the corporate existence of the company, in an action against him on the note. *Semble.*†

Parol evidence is admissible, in such action, to prove that A, who signed the policy as president, was acting president of the company, and that the policy was therefore valid and binding upon the company, and a good consideration for the note.‡

A corporation is bound by the acts of its officers *de facto*; and it need not be shown that they were regularly elected, in order to make their acts binding upon the corporation. *Semble.*

The charter of a corporation empowered the president and directors to make by-laws. *Held*, that the power might be exercised by the president and a majority only of the directors.

There is no variance between an allegation that the president and directors (naming all of them) of a corporation, made certain by-laws, and proof that they were adopted by the president, and a majority only of the directors.

The charter of a mutual insurance company empowered the president and directors to adopt such by-laws and regulations for the transaction of the business of the company as they might deem expedient. In the exercise of this power a by-law was adopted to the effect that, if any person, who had become insured in the com-

* See *Farmers and Mechanics' Bank* v. *Troy City Bank*, 1 Doug. Mich. R. 464.
† See *Owen* v. *Bank of Sandstone*, Post. p. 134, note.
‡ See *Scott* v. *Young Men's Society*, 1 Doug. Mich. R. 119, 152.

pany, and, on receiving a policy for such insurance, had executed and delivered to the company his premium note, promising to pay a certain specified sum, in such portions and at such times as the directors of the company might, agreeably to their act of incorporation, require, and had thereby become liable to pay his portion of all losses by fire, of property insured in the company, and of all expenses of the company, should neglect to pay any sum assessed upon his premium note, for his proportion of such losses and expenses, for the space of thirty days after publication of notice of such assessment, in such case, the directors of the company might sue for and recover the whole amount of such premium note;—the money, when collected, to remain in the treasury of the company, subject to the payment of such losses and expenses as had accrued, or might afterwards accrue, and the balance, if any, to be returned to the insured, on demand, after the expiration of his policy. *Held*, that the directors had power to adopt this by-law, and that it formed a part of the contract of a person effecting insurance with the company, knowing that it was in force.

It seems that a corporation is not dissolved by the omission to elect directors under the charter; but that the old directors continue in office until others are elected in their stead.

In an action by a corporation, the defendant, for the purpose of showing the corporation dissolved, and therefore not competent to maintain the action, offered to prove the continued insolvency of the corporation, and the failure to elect directors under the charter, for a long time previous to the commencement of the suit. *Held*, that the evidence was inadmissible; for that a cause of forfeiture of corporate rights could not be taken advantage of collaterally, but only by a direct proceeding for that purpose against the corporation.

ERROR to Kalamazoo Circuit Court. This was an action of assumpsit, brought by the Kalamazoo Mutual Insurance Company, as a corporation, upon the following instrument, executed by the defendants below, and commonly designated as a premium or deposite note:

$32.04 Kalamazoo, Aug. 14, 1840.

For value received in policy No. 831, dated 14th Aug. 1840, issued by the Kalamazoo Mutual Insurance Company, we promise to pay the company, or their treasurer for the time being, thirty-two dollars and four cents, in such portions, and at such times, as the directors of said company shall, agreeably to their act of incorporation, require.

*Abraham Cahill,*
*Albert A. Smith.*

The declaration alleged that the Kalamazoo Mutual Insurance Company was a body politic and corporate, vested with the power of making contracts for insurance against losses by fire, &c., and also, to adopt, by their president and directors, such by-laws and regulations, for the transaction of the business of the company, as such president and directors might deem expedient;—that, January 24, 1840, Abraham Edwards, the then president, and Luther H. Trask, *and eleven others, (naming them,)* the then directors of the company, adopted certain by-laws and regulations of said company, particularly set forth, and among others, the following, viz:

"Art. II. Sec. 1. Every person who shall become a member of this company by effecting insurance therein, shall, before he receives his policy, deposite his promissory note with surety, to be approved by the directors, for such sum of money as shall be determined by the directors. A part, not exceeding ten per cent of said note, shall be immediately paid, for the purpose of discharging the incidental expenses of the company, and the remainder of said deposite note shall be payable in part, or the whole, at any time when the directors shall deem the same requisite, for the payment of losses or other expenses, to be by them annually assessed: and, at the expiration of the term of insurance, the said note, or such part thereof as shall remain unpaid, after deducting all losses and expenses accruing during said term, shall be relinquished and given up to the signers thereof."

"Art. II. Sec. 2. Every member of this company shall be, and hereby is bound and obliged to pay his portion of all losses and expenses happening and accruing in and to said company: And if any member shall, for the space of thirty days after the publication of notice as herein after directed, neglect or refuse to pay the sum assessed upon him, her, or them, as his, her, or their proportion of any

loss as aforesaid, in such case the directors may sue for and recover the whole amount of his, her, or their deposite note or notes, with costs of suit; and the money thus collected, shall remain in the treasury of said company, subject to the payment of such losses and expenses as have accrued, or may thereafter accrue; and the balance, if any remain, shall be returned to the party from whom it was collected, on demand, after ninety days from the expiration of the term for which assurance was made."

Art. VI, Sec. 1, provided that "notice of assessments should be given by the secretary, by publication, in at least two of the newspapers printed in the state, three weeks successively,—the last publication to be not less than thirty days from the time fixed for the payment."

The declaration then alleged, that on the 14th day of August, 1840, at, &c. Cahill, (one of the defendants below,) well knowing the premises, made application to the company to obtain an insurance against loss or damage by fire, on his dwelling house, which was approved; that he promised to pay to the company, or to the treasurer thereof, in consideration for a policy of insurance on said dwelling house, against loss or damage by fire, for a sum not exceeding $534, and for the term of six years thereafter, the sum of $32.04, in such portions, and at such times as the directors of the company might, agreeably to their act of incorporation, require; that the company then and there executed and delivered to Cahill their policy for such insurance, the contents whereof were particularly set forth; that, in consideration thereof, the defendants then and there executed and delivered to the company, the premium note above set forth; that on the 3d day of March, 1841, it having become necessary for the purpose of paying losses sustained by the company, by the injury and destruction by fire of property insured therein, and also for the purpose of defraying the expenses of the

company, the directors assessed the defendants below to pay on their premium note, the sum of ninety-six cents; that notice of this assessment was duly published in the manner therein particularly set forth, being in accordance with the requirement of section 1, article VI, of the by-laws; and that the defendants neglected and refused, for the space of thirty days after publication of said notice, to pay said assessment: By reason whereof, and by force of the by-laws and regulations of the company, the defendants below became liable to pay to the company, the whole amount of said premium note; and in consideration of such liability, promised, &c.—The declaration also further averred, that, February 2, 1842, the directors of the company assessed the defendants to pay the further sum of $5.60 on said premium note; that notice of such assessment was duly published, and that the defendants below neglected and refused to pay the same for the space of thirty days after the publication of said notice: By reason whereof, &c.

The defendants below plead the general issue, accompanied with a notice of special matter to be introduced in evidence on the trial. The facts alleged in the notice will appear in the statement of the evidence offered in defence on the trial.

The cause was tried at the June term, 1842, of the Circuit Court, before the Hon. E. Ransom, Presiding Judge.

On the trial, the plaintiffs below, to prove their corporate existence, read in evidence their act of incorporation, entitled, "An act to incorporate the Kalamazoo Mutual Insurance Company," approved March 7, 1834, (S. L. 1834, p. 21,) an act amendatory thereto, approved March 25, 1841, (S. L. 1841, p. 50,) and also an act to legalize the acts of said company, approved February 1, 1842, (S. L. 1842, p. 11.) Section one of the first men-

tioned act, declares that James Smith, (and certain other persons named therein,) and their associates, and all such persons as should thereafter have property insured in said company, should be, and thereby were ordained, constituted, and declared to be a body politic and corporate, in fact, and in name, by the name of the Kalamazoo Mutual Insurance Company. Section two empowered the company to make contracts of insurance, &c.; and section three provided that all persons who should be insured in the corporation, should be members of it while they remained insured, and that certain persons named should be the first directors of the company, and should continue in office for one year, or until others were chosen. These several acts, in connexion with proof of *user*, were the only evidence adduced to prove the corporate existence of the plaintiffs below. It was urged on the part of the defendants below on a motion for a nonsuit, and the court were also requested to charge the jury, that this evidence was insufficient; and that the organization of the corporation under their charter should have been shown. But the court refused to nonsuit the plaintiffs below on this ground or to charge the jury as requested.

To prove *user* under their charter, the plaintiffs below offered applications to them for policies, and policies issued by them, from 1835 to the time of trial; and also the official bonds of their officers. It was objected that these were matters of record, and could be proved only by the production of the record. But the court overruled the objection and admitted the evidence.

Preliminary to offering in evidence the policy of insurance issued to the defendants below as the consideration of their premium note, the plaintiffs below offered parol evidence that, at the time it was issued, A. Edwards, by whom it purported to have been signed as President, was the acting President, and that A. T. Prouty, by whom it

purported to have been signed as Secretary, was the acting Secretary, of the company. This evidence was objected to on the ground that the records of the company were the only competent evidence to prove who were its officers; but the objection was overruled by the court and the evidence admitted.

It appeared from the records of the corporation which were offered in evidence for the purpose of showing the adoption of the by-laws above mentioned, that, at the meeting of the directors at which such by-laws were adopted, only the president of the company, and *six* directors, (who constituted a quorum,) were present. The declaration, as appears above, alleged that the by-laws were adopted by the president and *eleven* directors, (naming them,) who constituted the whole board. The defendants objected to the admission of the records for the purpose mentioned, on the ground of variance, and also on the ground that a majority merely of the directors had no power to adopt by-laws. But the objection was overruled, and the evidence admitted.

The defendants below urged on the trial, and requested the court to charge the jury, that section 2, of article II, of the by-laws of the company, (by virtue of which the company claimed the right to recover the whole amount of the premium note on which the suit was brought, in consequence of the failure of the defendants below to pay assessments made thereon as alleged in the declaration,) created a forfeiture; that the company had no power under their charter, to pass such by-law, and it was therefore void, and the company were at most entitled to recover only the amount of the assessments remaining unpaid on the premium note. But the court charged the jury that said by-law, a copy of which it appeared in evidence was printed on the back of the policy issued to the defendants below, was valid; that the company had power

under their charter to adopt it; and that it was a contract to which the defendants below were parties, and was therefore binding upon them; and that the company were entitled to recover the whole amount of the premium note.

In defence of the action, the defendants below offered to prove that, (as alleged in the notice of special matter appended to their plea,) the annual meeting of the plaintiffs below, regularly called for the election of officers, and held January 6, 1841, was adjourned without day, and that no officers were elected, and no other act was done at said meeting; that from that time to the commencement of this suit no legal meeting of the company had been held; and that, during the whole of this period, the company had been wholly insolvent, and had neglected and refused to pay their debts. This evidence, which it was claimed would, if admitted, have shown a dissolution of the corporation, was objected to by the plaintiffs below and rejected by the court.

The jury found a verdict in favor of the plaintiffs below for $28.52 damages, and a judgment for this sum and costs of suit was afterwards rendered. To reverse which this writ of error is prosecuted.

The errors assigned appear in the arguments of counsel and in the opinion of the court.

*Clark & Mower*, for the plaintiffs in error, contended that the court below *erred:* 1. In deciding that no proof of the organization of the plaintiffs below under their charter was necessary, and to this point cited 10 Wend. 266; 1 John. Ca. 319; 21 Wend. 273.—2. In the admission of the evidence adduced to prove *user*.—3. In the admission of parol evidence that Edwards was acting president and Prouty acting secretary of the company, (the plaintiffs below.)—4. In permitting the by-laws of the company to be read in evidence, which appeared to have been adopted

by the President and a quorum only of the directors of the company, whereas it was alleged in the declaration, that they were adopted by all of the directors, naming them.—5. In charging the jury that the company had power to adopt section 2, of article II, of the by-laws, and that the said by-law was valid, and was a contract to which the defendants below were parties, and therefore was binding upon them, and the plaintiffs below were entitled to recover the whole amount of the premium note. 3 Cow. 464; 19 Wend. 37; 9 Wend. 571; 2 Kent's Com. 296, 298; 1 Bac. Abr. 505; 1 T. R. 118.—6. In rejecting the evidence offered in defence. 19 John. R. 456; 8 Cow. 387; 1 Gill & John. 1; Jac. Law Dic. Tit. Corp. 6.

*E. Bradley*, (with whom was *Chas. E. Stuart,)* for the defendants in error. To the point that the evidence offered in defence for the purpose of showing a dissolution of the corporation, was properly rejected, he cited, 3 Burr. 1866; *People* v. *Runkle*, 9 John. R. 147; *Vernon Society* v. *Hills*, 6 Cow. 23; *Slee* v. *Bloom*, 6 John. Ch. R. 366; *Brinkerhoff* v. *Brown*, 7 Id. 217; *Rex* v. *Amory*, 2 T. R. 515; Ang. & Ames on Corp. 378; 8 Cow. 387; 2 Kent's Com. 311. To the point that the corporation (the plaintiffs below) had power to adopt section 2, article II, of the by-laws, he cited Ang. & Ames on Corp. 177, '59; 1 Bl. Com. 476; Kyd on Corp. 69; Bac. Abr. Tit. Corp. D; 10 Coke, 31; Hob. 211; Carth. 482; *Child* v. *Hudson's Bay Co.*, 2 P. Wm's R. 207; Ang. & Ames on Corp. 186, 187; *Stetson* v. *Kempson*, 13 Mass. R. 282; 17 Ves. 322; 5 Serg. & Rawle, 510. And, to the point that the president and a quorum only of the directors of the corporation had power to make by-laws, he cited Ang. & Ames on Corp. 281; Bac. Abr. Tit. Corp. p. 17; Cowp. 249; 2 Burr. 101.

FELCH, J. delivered the opinion of the Court.

1. It is urged as a ground for reversing the judgment below, that the court erred in refusing to nonsuit the plaintiffs below, because there was no sufficient evidence to prove their corporate existence, and in charging the jury that no proof of organization under their charter was necessary.

Whether the evidence adduced to prove corporate existence (which consisted merely in the production of the charter of the corporation, and acts amendatory thereto, and proof of acts of *user*,) was sufficient or not, we are clearly of opinion that there was no error in refusing the nonsuit. This court has already decided, in several cases, that the circuit court cannot compel a plaintiff to become nonsuit. He has always a right, if he chooses, to go to the jury with his case.

But we think the evidence was sufficient. This is a case where corporate powers are given directly and *in presenti* by the act, and not where the right to exercise such powers is made to depend upon something to be done *in futuro*. No condition or pre-requisite to the exercise of corporate powers are annexed to the charter. The most that could be required, would be a showing that the individuals to whom the powers were granted, accepted the charter. This was abundantly shown by the testimony in the case. Besides, the contract declared on was made with the corporation, in their corporate name, and by it the defendants admitted the existence of the corporation under the charter which was given in evidence. One of the defendants below was, moreover, by the very act of effecting an insurance with the company, giving the note declared on, and receiving as a consideration therefor a policy of insurance, issued by the corporation, a member of the corporate body. Such is the express provision of the act of incorporation. The defendants are, under the

circumstances estopped from denying the existence of the corporation.*

* The following case having some bearing upon this point, was decided by this court at the January Term, 1841. Present—WILLIAM A. FLETCHER, *C. J.* and MORELL, RANSOM, and WHIPPLE, *Justices.*

D. W. OWEN AND I. OWEN *v.* THE PRESIDENT, DIRECTORS AND COMPANY OF THE FARMERS' BANK OF SANDSTONE.

On plea of the general issue to an action by a corporation *upon a note made payable to the corporation*, the plaintiffs must prove their corporate existence.

ERROR to Lenawee Circuit Court. Assumpsit by defendants in error, against the plaintiffs in error, upon the following note:

"$700. Sandstone, January 27, 1838.

"Two months after date, we, or either of us, promise to pay the *President, Directors and Company of the Farmers' Bank of Sandstone*, seven hundred dollars, for value received. (Signed) *Derrick W. Owen,*
*Isaac Owen.*"

The defendants below plead the general issue, and gave notice of set off.

On the trial, the plaintiffs below submitted the cause to the jury without offering any evidence to prove their corporate existence. The counsel for the defendants insisted that such evidence was necessary to entitle the plaintiffs to recover, and requested the court so to instruct the jury. The court refused so to do, but charged "that the defendants, by making their note payable to the plaintiffs, by the corporate name assumed in the declaration, had admitted their existence as a corporation, by that name, and were estopped from denying their right to recover as such corporation; and that, therefore, it was not necessary for them to prove their corporate existence." To which charge the defendants excepted, and a verdict having been found, and judgment thereon rendered against them, removed the record into this court, by writ of error and bill of exceptions.

RANSOM, J. delivered the opinion of the Court. We are satisfied that the court below erred in charging the jury that the plaintiffs below need not prove their corporate existence. In the case of the *Bank of Utica* v. *Smalley*, 2 Cow. 778, where the subject received a pretty full consideration upon argument and authorities, it was held by Judge *Sutherland*, delivering the opinion, "that where a corporation sues, they need not set forth by averment in the declaration how they were incorporated, but that, upon the general issue pleaded, they must prove that they are a corporation," and many adjudged cases are cited in support of the position. In the case of *Williams* v. *The Bank of Michigan*, 7 Wend. 540, the doctrine upon this subject was again considered, and thoroughly sifted. There appears to have been some diversity of opinion upon this question, but the preponderance of authorities seems to be greatly in favor of the position, that plaintiffs, suing as a corporation, should prove affirmatively, that they were a corporation having power to make the contract on which their suit is brought. In delivering his opinion in the case last cited, the *Chancellor* remarks, that, "there is no doubt that, by the common law in England, and the settled law of the state of New York, if a suit is brought by a corporation, they must, on the general issue pleaded, show that they are a corporation;" and a number of cases, both English and American, are referred to in support of that position. When the plaintiffs sue as partners, or as an unincorporated association, and declare upon

2. It is also alleged as error that, in proof of *user* by the plaintiffs below, under their charter, the court allowed in evidence applications for policies, and policies issued by them, from 1838 to the time of trial, and also the official bonds of their officers. The objection was, that these should be matters of record, and should be proved by the introduction of the record.

The proof of *user* must necessarily consist of evidence of the acts of the corporation, showing that they are doing business under their charter. Any acts tending to show this, are admissible for that purpose; as keeping open an office; having officers acting in the name, and as the agents of the company, &c. The receiving of applications and issuing policies of insurance,—in other words, doing the very business, and in the very manner pointed out by the statute, and in the name of the corporation, would be direct evidence of *user*.

We have no evidence that the policies, or applications, or official bonds were matters of record. They need not necessarily have been recorded. We are clearly of opinion, therefore, that the evidence was admissible.

3. It is also insisted that the court below erred in admitting parol evidence that, at the date of the execution of the policy of insurance referred to in the premium note of the defendants below, as the consideration for which it was given, Abraham Edwards, by whom the policy purported to have been signed as president, was the acting president, and that A. T. Prouty, by whom it purported to have been signed as secretary, was the acting secretary of the company, (the plaintiffs below.) It is insisted

a contract made by the defendants directly to them, in the name of their firm or association, upon the general issue pleaded, it is clear that they would be bound to prove the existence of their partnership, or association. From analogy it would seem, surely, that the same rule should apply to corporations; more especially to the banking institutions created under our general banking law.

*Judgment reversed.*

that the records of the company were the only competent evidence to prove who were its officers.

The express reference to the policy, in the note declared on, made it a part of the contract as set out in the declaration, and so the policy was admissible in evidence. It was there referred to as the consideration of the obligation of the defendants, and as such, it was competent for the plaintiffs below to give it in evidence for the purpose of showing it valid and binding upon the corporation, and as such a good consideration. But to make it valid as against the corporation, it was not necessary to show that the persons signing it as president and secretary, were chosen to those offices by a regular vote of the corporation, or that their appointments were matters of record. Whether they were or not, does not appear in the case. If they were acting in the capacity in which they had signed the policy of insurance, and were officers *de facto*, the corporation would be as much bound by their contract as if every formality had been taken in their election, and all the proceedings had been spread upon record. In an action against the company on the policy, this would have been all that was necessary to be shown to fix the liability of the company. Ang. & Ames on Corp. 73. And I cannot see why this evidence is not likewise admissible for the purpose of showing that the policy was binding on the company, and therefore a good consideration for the note. The rule of law excluding parol proof, when there is written evidence, does not apply. This was not a case where fraud could be presumed, from the withholding of written evidence, and a resort to that of a secondary character. The very object of the testimony was to show the liability of the party offering it. The policy had been accepted by the defendants below, as the valid obligation of the corporation; it was so admitted by them to be in the note declared on; and the proof

offered and received was the very proof which would have fixed the liability of the corporation in a suit on the policy. There was no error, therefore, in admitting the evidence.

4. It appeared from the records of the corporation offered in evidence for the purpose of proving certain by-laws set out in the declaration, that the meeting of the directors at which they were adopted, was attended only by the president and a quorum of the directors—five of them being absent.—It is now contended, and was urged on the trial, that a mere majority of the board of directors had no power to adopt by-laws. The charter of the corporation authorized the president and directors to adopt by-laws. For the purpose of adopting them, we think that a majority of the directors was sufficient; and, consequently, that those offered in evidence were well adopted and in full force.

The admissibility of these by-laws in evidence was also objected to on the ground of variance,—they being alleged, in the declaration, to have been adopted by the whole board of directors, naming them. But we think this objection was not well taken. The majority, when assembled at a legal meeting, constituted the board of directors, and their act was the act of the whole. The allegation in the declaration that they were adopted by the whole board, naming them, is in legal effect true, although, at the particular meeting when they were adopted, some of the individual members of the board were not present: —the declaration does not allege that they were all present. By the act of the majority in legal meeting assembled, the by-laws became binding on the company in the same manner as though all the directors had been present: it was the act of all, and may well be so alleged in the declaration.

5. It is also contended that the court below erred in

charging the jury that one of the by-laws offered in evidence, viz: Art. II, sec. 2, was valid; that the corporation had power under their charter to adopt it; and that it was a contract to which the defendants below were parties, and was, therefore, binding upon them.

The charter of the corporation empowered the president and directors to "adopt such by-laws and regulations for the transaction of the business of said company, as they might deem expedient," &c. § 13. A copy of the by-law in question, will be found in the preceding statement of the case. It is contended that even under this general language of the charter, the corporation had no power to adopt this by-law, because it created a *forfeiture*. The power of a corporation to enforce its by-laws properly made, by pecuniary penalties competent and proportionable to the offence, will not be doubted. Ang. & Ames on Corp. 200. But it has been decided that they cannot be enforced by a forfeiture of the property or stock of the defaulting corporator. *Kirk* v. *Nowell*, 1 T. R. 125; *Hart* v. *Mayor of Albany*, 9 Wend. R. 571; In the matter of the *Long Island Railroad Company*, 19 Wend. R. 37. A forfeiture implies the loss of an interest in property, or the being deprived of some legal rights belonging to him who violates the by-law, in consequence of such violation. Of what property or rights are the defendants below deprived, by the operation of the by-law in question? What is the thing forfeited? The party is merely compelled to pay his note sooner than he otherwise would be liable to pay it, or a larger amount than might otherwise be required. The by-law does not purport to compel him to pay more than the amount; but to enforce the collection of the whole, to be held in the treasury, for the payment of assessments due and to be thereafter made;—the balance, if any remained after the payment of such assessments, to be returned to him after the policy shall have

expired. But when was the note payable? By its very terms it was payable in such portions and at such times as the directors of the company, agreeably to their act of incorporation, might require. Under the charter the whole premium might have been required in advance. If the directors require the whole amount to be paid at once, in case of delinquency in the payment of any instalment, it seems to me to be precisely in accordance with the terms of the contract; and surely that cannot be deemed a forfeiture which provides for the collection of a sum agreed to be paid, precisely according to the terms of that agreement.

But this suit is not brought to enforce a penalty: it is upon the defendants' written contract to pay money, with the necessary averments to show their liability under it. They stand in the relation of contractors simply in the matter here to be tried, and the law of contracts in other cases must apply.

It was competent for them to contract to pay in instalments, or on a contingency, or absolutely at a specified time. The by-law in question was in force when their note was given, and a copy was printed on the back of the policy executed to them by the company as a consideration for the note. The whole tenor of the transaction shows a full and perfect understanding on their part, that their liability was to be precisely that which is sought to be enforced in this suit.

We are, therefore, of opinion that the by-law was valid; and that the court below properly charged the jury that it was a contract to which the defendants below were parties, and for this reason binding upon them.

6. It is also contended that the court below erred in rejecting the evidence offered in defence of the action. The facts which the defendants below offered to prove, were, that the annual meeting of the stockholders of the corporation, regularly called for purpose of electing officers,

and held January 6, 1841, was adjourned without day, and that no officers were elected, or any other legal business done at said meeting;—that from that time to the commencement of this suit, no legal meeting of the company had been held;—and that, during the whole of this period, the company had been insolvent, and had neglected and refused to pay their debts. The evidence, it is claimed, would have prevented a recovery by showing a dissolution of the corporation.

The charter expressly provides that the first directors of the corporation should remain in office for the period of one year, or until others were chosen. § 3. And also, that if it should at any time happen that an election of directors should not be made on any day when, pursuant to the act, it ought to have been made, the corporation should not, for that cause, be deemed to be dissolved; but it should be lawful, on any other day, to hold and make an election of directors, in such manner as shall be directed by the by-laws of the company. § 5.

In *Slee* v. *Bloom*, 6 John. Ch. R. 366, it was held that a corporation, whose charter contained a provision precisely like the above, was not dissolved by an omission to elect trustees, for more than two years, while the members constituting an integral part of the corporation remained *in esse;* but the old trustees continued in office until others were elected in their stead. And it seems to be the better opinion, that such would be the case, without any such express provision in the charter. Ang. & Ames on Corp. 77; 2 Kent's Com. 295, and cases there cited. This seems to have been the opinion of the court in the *People* v. *Runkle*, 8 John. R. 464. At all events, if, after a failure to elect new directors, the old directors should continue to act, no objection could be taken collaterally, that they were not regularly elected at the proper time, or that the corporation was dissolved by reason thereof. The mem-

bers of the corporation, who are an integral part thereof, may still elect new officers, and continue their business; and, in an action on a contract made with the corporation, such an objection cannot be available to defeat a recovery. The corporate powers must first be declared forfeited by a proper adjudication, in proceedings had for that express purpose. Ang. & Ames on Corp. 77, 510; *Silver Lake Bank* v. *North*, 4 John. Ch. R. 373; *Trustees of Vernon Society* v. *Hills*, 6 Cow. 23.

Applying the principles established by the authorities last cited, it is clear that the evidence offered to prove the insolvency of the corporation, was likewise inadmissible. For, although such insolvency might be a ground for adjudging the corporate rights forfeited, in proceedings against the corporation for that express purpose, yet it cannot be inquired into collaterally, in an action brought by the corporation.

*Judgment affirmed.*

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BRADFORD CAMPBELL, ADMINISTRATOR OF WILLIAM A. CLARK, APPELLANT.

In this state, a widow is entitled to dower in *wild lands*.

Notice to the administrator, of proceedings in the probate court, (under R. S. 1838, ch. 2, p. 262,) for assignment of the widow's dower, is not necessary.

APPEAL from the Probate Court of Livingston county. William A. Clark died intestate, leaving a widow, Jacintha, and heirs, and also property both real and personal. Bradford Campbell was duly appointed administrator of

the estate, and had partially administered upon it, when, July 30, 1844, the widow petitioned the probate court, (under R. S. 1838, ch. 2, p. 262,) to appoint commissioners to set off her dower in all the real estate of which her husband died seized,—her right to dower not being disputed by the heirs, &c. The court thereupon appointed three commissioners for that purpose, who, after having duly qualified, proceeded to set off to the widow, by metes and bounds, dower in all the real estate of the deceased, including a large quantity of *wild and uncultivated lands*. The report of the commissioners having been duly made and filed, the probate court, on the 15th day of August, 1844, ordered and decreed that the real estate therein described, be set off to the said widow, Jacintha, as her dower, &c. Campbell, the administrator, *who had not been notified of these proceedings*, thereupon appealed from this decree of the probate court, for reasons which sufficiently appear in the opinion of the court delivered by

RANSOM, C. J. 1. The first objection urged against the decree of the court of probate is, that by it dower is assigned in wild and uncultivated lands of the deceased. Whether dower should be allowed in wild and uncultivated lands, is a question which has been much mooted in this country, and has been differently settled in different states.

It is held in England, that a widow shall not be endowed of wild lands, because to clear them of their timber would be waste, which is a "permanent injury to the inheritance," and works a forfeiture of the dower. But there is a widely marked distinction between the state of things in England and in this country. In the former, it is said, "every part of every tree will bring cash," and, consequently, it is waste to fell and clear them off the land on which they are growing. But in the latter, lands are al-

most wholly wild and uncultivated, and nearly valueless till cleared of the timber :—hence, many of the American courts have decided, that, inasmuch as the clearing of lands enhances their value, it is beneficial to the owner, and is not waste. It follows, of course, that where, by the established law, it is not waste to clear wild lands, dower shall be allowed in them.

In Pennsylvania, Virginia, Tennessee, North Carolina, and, perhaps, some other of the states, tenants in dower have been allowed to clear wild lands; and in the latter state, it has been held that a dowress may cut timber to make into staves or shingles, if that be the common and only beneficial use of the land. And if we keep in view the object of dower, viz : the support of the wife, and the maintenance and education of the children, that decision will be found perfectly consonant to reason and good sense, and to the dictates of humanity. In Massachusetts, and several other of the older states, a different doctrine prevails. The strict rules of the English law have been adopted, and it is held that there shall be no dower in wild lands, because the clearing of them would be waste, and forfeit the estate. Hilliard's Abr. 71, 171.

The absurdity of applying this rule in the existing condition of this country, will be apparent, when we consider what is the doctrine of the English law relative to waste. By the strict rules of the English common law, it would be waste not only to convert unproductive forests into fruitful fields, flowering meadows, and green pastures, but also to reconvert those fields, meadows, and pastures into forests. To turn arable, meadow, or pasture, into wood land, or to turn arable or wood land into meadow or pasture, are all of them waste, at the common law ; " for, it not only changes the course of the husbandry, but the evidence of the estate," say the English books:—reasons that could have existed only when the true principles of

agriculture were little understood, and when written conveyances and registry laws were wholly unknown. The rotation of crops, which can only be resorted to by changing meadows and pastures into plough-land, and plough-land again into grass land, is the most valuable improvement introduced into modern agriculture, and has, doubtless, doubled the productions of the older sections of our country.

The *reasons* upon which the common law upon this subject is founded, having no existence in our state, the *law* itself should not be adopted; and this court has, on a former occasion, so held. In the case of *Godfroy* v. *Brooks*, decided at the January term, 1841, one point presented was, whether a widow should be endowered in wild lands, and the question was determined in favor of the demandant. "It has been the steady policy of the government," said Justice *Whipple*, who delivered the opinion of the court in that case, "to encourage the sale and cultivation of the vast body of waste land in the west, and this policy has produced results truly wonderful. It has made Ohio, which but a few years since was a wilderness, the abode of more than a million of happy and free people. That same policy has wrought wonders in Indiana and Illinois, and in our own beautiful peninsula. Here the hand of industry has been at work, levelling the forest and reclaiming the wilderness, and it would be difficult to convince a Michigan farmer that a tenant in dower is committing waste, or doing a permanent injury to the *inheritance*, by clearing land of its surplus timber and converting it into a beautiful farm." On a review of this question, I am fully confirmed in the correctness of our decision of it, in the case just cited.

2. Again, it is contended, upon this appeal, that no notice was given to the administrator, or to the creditors, of the proceedings in setting out the dower.

The statute, (R. S. 1838, Pt. 2, Tit. 1, ch. 2, p. 263,) regards the assignment of dower as a matter entirely between the widow and heirs, or other tenants of the land. The third section of the chapter above cited, provides that, "when a widow is entitled to dower in lands of which her husband died seized, and her right to dower is not disputed by the heirs or devisees, or any person claiming under them or either of them, it may be assigned to her, &c. by the judge of probate, on application of the widow, or any other person interested for the lands."*

By the fifth section, "if the dower is not assigned by judge of probate, nor set out within thirty days after demand made by the heir or other tenant of the freehold, the widow may recover the same, by writ of dower, in the courts of common law."†

Section six enacts that "when a widow is entitled to dower in the lands of which her husband died seized, she may continue to occupy the same, with the children or other heirs of the deceased, or to receive one third part of the rents, issues, or profits thereof, so long as the heirs do not object thereto, without having her dower assigned;‡ and whenever the heirs or any of them, shall think proper to hold or occupy their shares, in severalty, the widow may claim her dower, and shall have the same assigned to her," &c.

Other provisions of our statutes, it is true, authorize the sale, by the administrator, of a part or all the real estate of the deceased, for the payment of debts; but these provisions, it is believed, do not affect the widow's right of dower, until a sale for such purpose is actually made.

* Re-enacted substantially by R. S. 1846, ch. 66, § 8, but with the additional provision that notice of such application shall be given to such heirs, devisees, or other persons, in such manner as the judge of probate shall direct.

† Not re-enacted by R. S. 1846.

‡ Re-enacted by R. S. 1846, ch. 66, § 112; remainder of the section as quoted not re-enacted.

The heirs of a deceased insolvent, are entitled to the rents and profits of his real estate, until it is sold for the payment of his debts; for the real estate descends by law to the heirs, and they accordingly may enter immediately, and may remain rightfully in possession, until the administrator, in behalf of the creditors, shall sell it, pursuant to license obtained for that purpose.

The Revised Statutes, 1838, p. 267, ch. 1, § 1, provide that, "When any person shall die, seized of any lands, tenements or hereditaments, or of any right thereto, or entitled to any interest therein, in fee simple, or for the life of another, not having lawfully devised the same, they shall descend, subject to his debts, in manner following,"* &c. By section 12, of the same chapter, it is provided, that nothing therein contained shall affect the title of a widow as tenant in dower.† The statute no where authorizes the administrator to take possession of the real estate to the exclusion of the heirs. If there be heirs, he cannot interfere with the lands any farther than it may be necessary for the purpose of making an inventory and appraisal of the estate, real and personal; for the care and disposition of the personal property; and for the sale of the real estate, when it is found necessary for the payment of debts, &c. We conclude, consequently, that the admeasurement and assignment of dower are proceedings which concern the widow and heirs alone.

Our statute has modified the common law, so far only, as to authorize the judge of probate of the proper county, to assign dower, if the heir or tenant in possession neglect or refuse to do so, instead of driving the widow to her writ of dower.

Our probate act is borrowed from Massachusetts; it is also substantially like that of New York, so far as it re-

* Re-enacted R. S. 1846, ch. 67, § 1. † Re-enacted, Id. § 12.

spects the particular question we are now considering. The statutes of both those states, like our own, do not require notice to be given to administrators, of the application to the judge of probate for the assignment of dower, or of the time of the admeasurement by the commissioners, or of the confirmation, by the probate court, of their return. And I have been unable to find any case in either of the states mentioned, in which such notice was adjudged necessary. Notice to the heirs, however, or the tenant in possession, of all the proceedings, is requisite in both.

In those states, too, the administrator is authorized to sell real estate for the payment of debts, when the personal effects are insufficient, in the same manner as in this state prior to our statute of 1843.

Suppose the heir should set out the dower to the satisfaction of the widow, as he may do, that would be good, certainly, as to all except the creditors, and equally so as to them, until it should be found necessary to sell land for the payment of their debts. The administrator, clearly, would not be entitled to notice of such proceeding: and, the assignment of dower, by the judge of probate, is substituted for setting it out by the heir, when he neglects to do it. Neither affects, in the slightest degree, the rights of creditors.

At common law, the heir can assign dower without resorting to any court; and the right is not impaired by any provisions of the statute for its admeasurement. The proceedings by petition before the courts, for the admeasurement and assignment of dower, cannot affect or prejudice the *right* to dower, or the legal or equitable *bar* to it. Those rights, if litigated, remain open for inspection in the ordinary course of justice. Lambert on Dower, p. 93.

By our statute, (R. S. 1838, pp. 311, '12, '13,) the administrator is authorized to sell a part, or the whole of the

real estate, if necessary, for the payment of debts, upon obtaining license therefor; but no such license shall be granted until fourteen days' notice of the petition, and of the time and place of hearing the same, shall have been given to all persons interested in the estate, that they may appear to show cause why license to sell, should not be granted. The notice here provided for, is for the protection of the rights of the widow and heirs;—and they may prevent the sale, by giving bonds for the payment of the debts, or showing any sufficient cause why the same should not be made. If, however, no bond be given, and no good cause be shown against a sale, the administrator shall be licensed to sell a part or the whole, &c.* Where, after dower has been assigned, there are lands of the deceased remaining sufficient to pay all the debts, creditors can be in no way affected by the assignment of dower. But, where it is found necessary to sell the whole of the real estate, and the whole is inadequate to pay all the debts, as the sale must be made subject to the widow's right of dower, the creditors are, or may be affected by the proceedings assigning dower. And it would seem that the administrator who represents the creditors, ought, in such case, to be notified of such proceedings, upon the general principle that parties to be affected by legal proceedings are entitled to notice.

But as the Revised Statutes, (of 1838,) do not abridge the rights of the widow, or change the mode of enforcing them, except to provide additional facilities therefor, by application to the probate court for the assignment of her dower; and, as they contain no provision for notice to the administrator, I incline to think that none is requisite, even under those statutes.

The probate act of 1840, however, it seems to me, puts

* See R. S. 1846, ch. 77. §§ 1, 5, 10, 12.

this question entirely at rest. That act, after making sundry amendments to the revised statutes in relation to sales of real estate by administrators, goes on to provide, (section 13, p. 63,) that, "the executor or administrator shall, in the first place, pay out of the moneys arising from such sale, the charges and expenses thereof. They shall next satisfy any claim of dower which the widow of the testator or intestate may have upon the land so sold, by the payment of such sum in gross, to be ordered by the judge of probate, as shall be decreed, upon the principles of law applicable to annuities, a reasonable satisfaction for such claim, if the widow shall consent to accept such sum in lieu of her dower," &c.

The next section provides, that "if, after reasonable notice for such purpose, no such consent be given, the judge of probate shall set apart *one-third part* of the purchase money, to satisfy such claim, and the executor or administrator shall invest the same in permanent securities, on annual interest, which interest shall be paid to the widow of the testator or intestate during her life."

Under this law, it was, that the rights of the demandant in this case became fixed; and it is most obvious that, whatever proceedings may have been had, in the setting out or assigning of dower, they could in no way prejudice or affect the rights of creditors, or the administrator; consequently, neither could insist upon notice of such proceedings.

The decree of the Probate Court must be affirmed.

*Peck* argued the cause for the appellant, and *O. Hawkins*, contra.

## Spafford and Tileston v. Beach.

A levy on real estate is not a *prima facie* satisfaction of the debt.

An *alias fi. fa.* issued on return of a previous execution levied upon real estate which remained unsold for want of bidders, is irregular merely, but not void.

So, also, non-compliance by the sheriff with the requirements of the statute in regard to the levy, advertisement, or sale of real estate, is mere irregularity.

And such irregularities must be complained of in due time, by motion, or they will be waived.

A motion to set aside an execution and proceedings under it for irregularity merely, made five years after sale of real estate by virtue of the execution, is too late.

The title of a purchaser of real estate sold on execution, is not affected by the insufficiency of the sheriff's return to the execution. The sheriff's certificate of sale and deed, and not his return, are the evidence of such title.

Case reserved from Oakland Circuit Court. Spafford and Tileston obtained a judgment in the circuit court against Beach, on which a *fi. fa.* was issued November 14, 1837; and, at the May term, 1838, the *fi. fa.* was returned levied upon real estate of the defendant, which had been advertised for sale, and remained unsold for want of bidders. In October, 1839, an *alias fi. fa.* was issued on the same judgment, by virtue of which other real estate of the defendant was levied upon, and, in March, 1840, sold to the plaintiffs. The sheriff made return of his proceedings on the *alias*; but it did not appear therefrom, whether notice of the levy was given to the defendant, or to the person in possession of the property; —when or what manner notice of sale of the property was given;—whether notice was given of postponements of the sale which appeared to have been made;—or where the sale took place:—and it appeared that the property consisted of several distinct parcels which were sold together

for a gross sum, and not separately. The return also omitted to state that there were no goods and chattels of the defendant whereon to levy.

In January, 1845, the defendant moved the circuit court to set aside the *alias fi. fa.* and all the proceedings under it, and in support of the motion,

*A. D. Fraser*, (with whom was *Geo. W. Wisner,)* contended that the *alias fi. fa.* was irregular and *void* for the following reasons:

1. Because it was issued while there was a subsisting levy undisposed of, by virtue of a former execution on the same judgment. 1 Ohio R. 214; 2 Id. 224; Cro. Eliz. 237; 1 Blackf. R. 289; 1 Salk. 322; 2 Ld. Raym. 1072; 4 Mass. 403; 1 John. R. 290; 7 Id. 428; 12 Id. 207; 6 Mod. 297, 300; 2 Tidd's Pr. 937; 2 Bac. Abr. 720; 5 Hill's R. 572; 7 Cow. 14; 16 Mass. 63; 3 Cow. 30; 9 Mass. 142; Grah. Pr. 405, '6; 1 Arch. Pr. 296; R. L. 1833, p. 424, §§ 2, 16.

2. Because it was issued more than a year and a day after the return day of the original *fi. fa.* without revival of the judgment, or order of the court. 1 Arch. Pr. 282; 2 Id. 88; 2 Tidd's Pr. 1102, '3; 11 Mass. 396; 2 How. R. 614; 8 Wend. 661; 8 Am. Com. Law, 150; 12 Wend. 490; 19 Law Lib. 49.

3. The proceedings under the *alias fi. fa.* were irregular and void, because it does not appear from the sheriff's return that the requirements of the statute were complied with in levying, advertising, and selling the property. 5 Am. Com. Law, 196, 206, 207; 9 Mass. 236; 1 B. & A. 40; R. S. 1838, pp. 323, '4. And also, because it does not appear therefrom that there were no goods and chattels of the defendant whereon to levy. 9 Cow. 274; 1 Wheat. 213; R. S. 1838, pp. 452, '3, §§ 11, 16.

The *alias fi. fa.* was not merely *voidable*, but void; 1

Ohio R. 218; 6 Id. 2; 7 Cow. 70, 735; 5 Wheel. Am. C. L. 208, 190; and defects which render proceedings *void* are not waived by delay in taking advantage of them. Grah. Pr. 705.

The plaintiffs are not to be regarded as *bona fide* purchasers, but are chargeable with notice of all defects in the proceedings. 2 Caine's R. 61; 1 Cow. 641, 645, 622; 2 Hill's R. 629.

*S. T. Douglass* and *O. D. Richardson*, contra. The levy under the *fi. fa.* was lost by lapse of time and failure of the plaintiffs to enforce it before the *alias* issued. 7 N. Hamp. R. 584, '5; R. L. 1833, 424, § 2; S. L. 1841, p. 46, § 5, p. 152, § 5. At all events, it was competent for the plaintiffs at any time to release that levy, and the taking out the *alias* was a release of it. *Burnham* v. *Coffin*, 8 N. Hamp. R. 130, and cases next cited. The levy under the *fi. fa.* being upon real estate, was no *satisfaction* of the judgment, and did not affect the plaintiffs' right to further execution thereon. *Gregory* v. *Stark*, 3 Scam. (Ill.) R. 611, and the following cases, which assert that a plea to debt on judgment, alleging execution issued and levied or extended upon real estate, is no bar to the action. *Ladd* v. *Blunt*, 4 Mass. R. 403; 14 Mass. R. 378; *Shepherd* v. *Rowe*, 14 Wend. 260; *Taylor* v. *Ranney*, 4 Hill, 619; *Tate* v. *Anderson*, 9 Mass. R. 89; *Burnham* v. *Coffin*, supra. The *alias* is not irregular, merely because when it issued, a return had not been made to the original execution, showing that it had been completely executed. The court will look at the facts, and if there has been no oppression, will sustain the *alias*. *Dicas* v. *Warne*, 25 E. C. L. R. 158; *Green* v. *Elgie*, 3 B. & Ad. 437; 2 Tidd's Pr. 1073. At most, the *alias fi. fa.* is merely erroneous and voidable, and proceedings under it before it is set aside are valid. *Woodcock* v. *Bennett*, 1 Cow. 734;

*Mitchell* v. *Evans*, 5 How. (Miss.) R. 551; *Scull* v. *Godbolt*, 4 Alab. R. 324; *Patrick* v. *Johnson*, 3 Lev. 404; *Sherley* v. *Wright*, 1 Salk. 273; 2 Ld. Raym. 775.

The *alias* is not irregular because issued more than a year and a day after the return of the original *fi. fa.* without renewal of the judgment. R. S. 1838, 451, § 6; *Thorp*, v. *Fowler*, 5 Cow. 446; Tidd's Pr. 1103; *Mayor* v. *Evertson*, 1 Cow. 36; *Lampelt* v. *Whitney*, 2 Scam. (Ill.) R. 441; 1 Harr. (Del.) R. 18; *Scull* v. *Gadbolt*, 4 Alab. 326.

As to the alleged defects in the sheriff's return. The plaintiffs' title cannot be affected by the sheriff's *non-compliance* even, with all the specific requirements of the statute respecting the advertisement and sale: at all events, it in no wise depends upon the sheriff's return, or is affected by its insufficiency; but upon the sheriff's certificate of sale and deed. *Jackson* v. *Steinburgh*, 1 John. Ca. 153. The cases cited from England and the New England states are entirely inapplicable, as there, lands are extended, and the writ, with the return endorsed, is recorded, and constitutes the only evidence of title.

This motion being to set aside proceedings for irregularity merely, should have been made at the first opportunity; it comes too late.

Goodwin, J. delivered the opinion of the Court.

A levy on real estate is not, as is a levy on personal property, a *prima facie* satisfaction.* *Shepherd* v. *Rowe*, 14 Wend. 260; *Taylor* v. *Ranney*, 4 Hill's R. 619. In the latter, the sheriff takes possession of the property; in the former not, and, even after sale and conveyance, ejectment must be resorted to by the purchaser in order to obtain possession. The issuing of the *alias fi. fa.*, while there was a levy by virtue of a former execution, on real

*As to how far a levy on personal property is to be deemed a satisfaction of the debt, see *Farmers and Mechanics' Bank* v. *Kingsley*, post.

estate, which remained undisposed of, was, therefore, a a mere irregularity. So, also, of the sheriff's supposed non-compliance with the law, in the particulars mentioned in his proceedings under the *alias*, appearing from his return. These were mere irregularities; and the return is not, under the statuate, the evidence of title, but there must be a certificate and deed.

The errors complained of being mere irregularities, should have been taken advantage of in due time by motion. Here the motion was made in January, 1845; the sale was in 1840. The motion comes too late.

*Motion denied.*

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JACKSON *v.* SHELDON AND OTHERS.—*In Error.*

THE justices' act of 1841, (S. L. 1841, p. 81,) did not authorize the renewal of an execution on a justice's judgment returned unsatisfied for want of goods and chattels, but provided that a further execution might thereupon be issued, (§ 80;) and it repealed the statute previously in force authorizing such renewals, (R. S. 1838, p. 395, § 20,) with this saving clause: "The repeal shall not affect any act done, or any right accruing or accrued, or established, or any suit or proceeding commenced, in any civil case, but the proceedings in every such case shall be conformed, when necessary, to the provisions of this act." (§ 173.) *Held*, that, notwithstanding this saving clause, an execution issued before the act took effect, could not be *renewed* after that time.

# CASES

ARGUED AND DETERMINED

IN THE

# SUPREME COURT

OF THE

# STATE OF MICHIGAN,

In July Term, 1845.

PRESENT:

HON. EPAPHRODITUS RANSOM, CHIEF JUSTICE.
HON. CHARLES W. WHIPPLE, }
HON. ALPHEUS FELCH, } JUSTICES.
HON. DANIEL GOODWIN, }

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## HIRAM SMITH, ADNA LEWIS AND ELISHA THORNTON, v. SAMUEL BARSTOW.

A contract, the consideration or object of which is in violation of law, is void, and a court of justice will not lend its aid to enforce it.*

But a subsequent contract, if unconnected with the illegal act, and for a new consideration, is valid and will be enforced, although it may have grown out of the illegal transaction, and the party to whom the promise was made may have had a knowledge of it.

Assumpsit upon a promissory note for $1,000, made by the defendants and payable to the plaintiff. The origin and consideration of the note were as follows: The Farmers' Bank of Homer, an institution organized under the general banking law of this state, (S. L. 1837, p. 76,) drew certain drafts, on one W., to the amount of $12,000, payable four months after date, which drafts W. was induced to accept for the accommodation of the bank, by its depositing with him $15,000 of its own bills, to secure and indemnify him for such acceptances. The drafts were negotiated, and, the bank failing to provide for their payment at maturity, were dishonored. Afterwards, the defendants, (who, with others, were directors of the bank where

* See *Bank of Michigan* v. *Niles*, 1 Doug. Mich. R. 401.

the drafts were drawn, and as such individually liable for its debts, according to the terms of the general banking law,) in consideration of the delivery to them by W. of the $15,000 of bills of the bank deposited with him as above mentioned, made and delivered to the plaintiff the note in question, and also assigned to him certain other securities, upon the *trust*, that he should collect the moneys due and to become due thereon, and apply the same to the payment of the drafts drawn upon W., and in indemnifying W. against his acceptances thereof, &c. *Held*, that, admitting the unconstitutionality of the general banking law, in so far as it purports to confer corporate powers, and the consequent illegality of the drafts and bills, yet, that the note and trust were untainted by such illegality, but were a new and separate transaction based upon the fact, that the holder of the drafts had advanced a full consideration for them, which in justice and equity ought to be paid to him; and that the consideration of the note, viz: the delivery by W. to the defendants of the bills of the bank, and the object of the note and trust, viz: to provide for the payment of the drafts, were legal and valid.

*Held*, also, (affirming *Rice* v. *Wheelock*, 1 Doug. Mich. R. 267,) that the plaintiff was entitled to recover on the note, without showing that W. had been damnified by reason of his acceptances of the drafts.

ERROR to Calhoun Circuit Court. Assumpsit. Barstow was the plaintiff below, and declared against Smith, Lewis and Thornton, as makers of a promissory note for $1,000, dated April 15, 1841, and payable to him, with interest, on the first day of March, 1842, at the Farmers and Mechanics' Bank of Michigan. Plea, the general issue.

In defence of the action, the defendants below gave in evidence a certain declaration of trust, executed to them by Barstow, on the day of the date of the note, which recites that on the 5th day of August, 1838, Asahel Finch, Jr. being cashier of the Farmers' Bank of Homer, in this state, as such cashier, made two drafts or bills of exchange of $6,000 each, on John A. Welles, then cashier of the Farmers and Mechanics' Bank of Michigan at Detroit, payable at the Troy City Bank, *four months after date;* that the Farmers' Bank of Homer having no funds in the hands of Welles, or of the bank of which he was cashier, Finch applied to Welles to accept the drafts,

promising to provide for their payment, and, to secure and indemnify him for such acceptances, deposited with him $15,000, nominal value, of the bills of the Farmers' Bank of Homer; that, thereupon, Welles accepted the drafts for the accommodation of said bank; that the drafts were not provided for or paid, but were dishonored, and were then in the hands of the attorneys of the Troy City Bank, the holders, for collection; that Smith, Lewis and Thornton, (the defendants below,) were, with other persons, directors of the Farmers' Bank of Homer, when the drafts were drawn; that Welles had, on the day of the date of the instrument, delivered to them the bills of said bank deposited with him; and that, in consideration thereof, they had, on the day of the execution of the instrument, assigned to Barstow certain mortgages, and had also executed to him certain other securities, of which the note in question was one. The instrument then proceeds to declare the trusts upon which such securities were delivered to and held by Barstow, viz:

1. To collect and receive the moneys due and to become due upon said securities:

2. To apply the money collected or received thereon, in payment of the two drafts, and in indemnifying Welles against his acceptances thereof:

3. To assign the securities to Welles for his own use, whenever he should pay or take up the drafts, so that neither the Farmers' Bank of Homer, nor the defendants, as directors or stockholders thereof, should be longer liable; or, to the Troy City Bank, whenever that bank should accept them in payment.

The instrument further provides that the defendants, with the written consent of Welles, might modify the trusts in any way not inconsistent with their main object, which is stated to be to indemnify Welles against his acceptances.

It was admitted on the trial that the Farmers' Bank of Homer was an institution organized under the general banking law of this state, (S. L. 1837, p. 76;) that the drafts had never been paid; and that a suit had been brought upon them by the Troy City Bank, and was then pending in this court.

Upon this evidence, the counsel for the defendants below requested the court below to charge the jury, that the plaintiff was not entitled to recover on the note,

1. Because it was given for an illegal consideration and object, viz: to provide means for the payment of bills or notes issued by the Farmers' Bank of Homer, an institution which had no legal existence, the law under which it was organized being unconstitutional and void.

2. That if the bank had a legal and constitutional existence, the drafts were illegal, in not being payable on demand without interest.

3. That the note was made and delivered, and the other securities were assigned to the plaintiff below, for the purpose of indemnifying Welles, and, unless the jury believed that he had been damnified by reason of the acceptances, the plaintiff below was not entitled to recover.

The court refused so to instruct the jury, but charged against the defendants below on the several points presented. The defendants below excepted, and a bill of exceptions having been signed, removed the cause into this court by writ of error.

*T. Romeyn*, for the plaintiffs in error.

*S. Barstow*, in person.

Goodwin, J. delivered the opinion of the Court.

Upon the exception taken to the refusal of the court below to charge the jury as requested on the first point, the plaintiffs in error now insist—

First: That the consideration of the note was the delivery to them by Welles of the bills of the Farmers' Bank of Homer, deposited with him to secure and indemnify him against his acceptances, and that the bills being illegal by reason of the unconstitutionality of the general banking law, such consideration was illegal, and the note was therefore void.

Secondly: That the drafts were illegal for the same reason; and that the object for which the note was made and the trust created, was to provide for the payment of the drafts, and that the trust was illegal and the note therefore void.

The counsel for the defendant in error insists, that the first question is not raised by the exception, because the charge sought from the court was, that the note having been given to provide means for the *payment of bills or notes* issued by an institution having no legal existence, was, therefore, void; and that the note was not given to provide for the payment of the bank bills delivered.

The office of a bill of exceptions is to bring before the court legal propositions decided, which do not appear on the record; and enough of the facts upon which the propositions arise should be given, to show their materiality. At the same time, no question which might arise on the facts, will be noticed by the court of review, that is not presented or embraced in the exception. When a proposition is presented, the party is not bound by the reasons urged in argument in its favor. But when the proposition is itself restricted by the party to a single point arising in the case to which it is applicable, it may well be doubted whether the party should be permitted to extend it to another, which he has excluded, and to which, from the facts of the case to which he applies it, it has no relation. Here the drafts were the instruments for which the means of payment were provided; and not the bank bills surrender-

ed to the plaintiffs in error. As, however, the first clause of that part of the charge would embrace the point, and the counsel seems to consider the restriction only as one of several reasons that might be urged under the broad language of that clause, it will be considered.

The drafts, and the bills which were delivered by Welles to the plaintiffs in error, are alleged to be illegal,—(1.) For the reason that the Farmers' Bank of Homer had no corporate existence, under the decision of this court in *Green* v. *Graves*, (1 Doug. Mich. R. 351,) declaring the general banking law of this state under which it was organized unconstitutional, in so far as it purported to confer corporate powers, and was, consequently, illegally assuming corporate functions, in drawing and issuing them: and (2.) It is also alleged that they were in violation of the act restraining private banking, and were therefore also illegal and void. These positions are met by denying them as conclusions resulting from the absence of corporate powers, and the invalidity of the act assuming to confer them; and it is also further contended, that even if they were just conclusions, and the transaction of the making and acceptance of the drafts, and the deposit of the bills, was illegal, yet, that the subsequent transaction was not affected by it, and the trustee may nevertheless recover. As this transaction appears from the bill of exceptions, it is proper first to consider the view last suggested; for, if it be correct, a consideration of the others becomes immaterial. Assuming that the conclusions resulting from the unconstitutionality of the law under which the Farmers' Bank of Homer was organized are correct, as to bills and drafts in question, was the note given for an illegal consideration and object? In other words, was the trust created in the plaintiff below, invalid for the reasons alleged? Or, was this transaction free from the supposed illegal taint?

The principle is not controverted that contracts of which the consideration or object are in violation of law, will not be enforced. Courts of justice will not aid the parties to such contracts to carry them into effect. They are held void; and it is a settled maxim that *ex turpi causa actio non oritur*. At the same time, it is also laid down in the elementary works, in regard to subsequent contracts, that if they be unconnected with the illegal act, and for a new consideration, they are valid, and will be enforced, although they may have grown out of the illegal transaction, and the party to whom the promise was made, may have had a knowledge of it. The cases are somewhat numerous on this subject, and the line of demarkation between those which are held tainted with the illegality of the original transaction, and those which are not, does not seem very distinctly defined. In the case of *Armstrong* v. *Toler*, 6 Pet. Cond. R. 298, the subject was much considered, and Chief Justice *Marshall*, in giving the decision of the court, after stating the general principle as to contracts, the consideration of which is illegal, remarks: "How far this principle is to affect subsequent, or collateral contracts, the direct and immediate consideration of which is not immoral or illegal, is a question of considerable intricacy, on which many controversies have arisen, and many decisions been made." He reviews many of the cases on the subject, and the general distinction is recognized between contracts which are directly and those which are not directly connected with the illegal act. The case came before the court on exceptions to a charge of the circuit court; and the charge, which stated this distinction clearly and applied it in the case then before the court, is sustained.

In the case of *Faikney* v. *Reynous*, 4 Burr. 2069, the plaintiff and one Richardson had been engaged jointly in transactions in violation of the act of Parliament to pre-

vent stock jobbing, and the plaintiff had paid £3,000 losses incurred in those transactions, and which, under the act, could not have been recovered: a bond was given, at the procurement of Richardson, for the one half of this amount, upon which the suit was brought. Upon a plea setting up the facts, it was insisted that the bond was illegal and void, being for money paid in violation of the act. The plea was overruled;—the court holding that the payment of money for the use of another, although it was upon a transaction *malum prohibitum*, was a good consideration for the bond, and that the fact that it was applied to that use, was immaterial.

In *Petrie et al. Executors of Keeble* v. *Hannay*, 4 T. R. 418, Keeble and the defendant had been jointly engaged in stock jobbing transactions, and, in them, incurred a liability to their broker, for a part of which Keeble made a draft on the defendant, which he accepted, but which, not being paid by him, was afterwards paid by the executors of Keeble, the deceased partner, and an action brought against the defendant, the acceptor, for the money. The case of *Faikney* v. *Reynous* was relied on and the action sustained. The money was paid on an illegal transaction, but the new security, the acceptance, was equivalent to a subsequent request to pay the money, and an express promise to repay it.

These cases are cited by Chief Justice *Marshall*, as of authority, in the case of *Armstrong* v. *Toler*, above referred to.

In *Tenant* v. *Elliot*, 1 Bos. & Pull. 3, the defendant, as an insurance broker, procured an insurance for the plaintiff, of his vessel, for an illegal voyage. The vessel was lost, and the broker recovered the money on the policy. Upon being sued for it by the plaintiff, he set up as a defence the illegality of the plaintiff's contract upon which the money was recovered; but this was held to be no bar.

In the case of *Farmer* v. *Russell*, 1 Bos. & Pull. 295, the same doctrine was held. B. and C. were engaged in an illegal transaction, upon which B. paid to A. for C. and to be paid to him, a sum of money, which A. not paying, C. sued him, and it was held that he should recover, and that A.'s contract, though for the money which had been paid by B. on the illegal transaction, yet arose from the money paid him, and was unconnected with, and not tainted by the illegality. In this case those of *Tenant* v. *Elliot* and *Faikney* v. *Reynous*, are both cited as authority. This is also cited by Chief Justice *Marshall*, in the opinion above referred to.

These cases, while they sustain, illustrate the rule laid down in the elementary writers, and in *Armstrong* v. *Toler*.

There is another class of cases in which, although money may have been paid on an illegal contract, as its consideration, yet a new contract to repay it is held valid. Thus, where money is lent or advanced on a security which is declared void by the provision of law, yet a new security for the money paid, or a new promise to pay it, is sustained. The most familiar of this class is where there has been a usurious loan, and a security taken, which is void in consequence of the usury. A subsequent security for, or verbal promise to pay the money lent, excluding the usury, is valid, and will sustain an action. The money is regarded as due in equity and good conscience, although having been paid in a transaction of which courts will take no cognizance; and a subsequent promise to pay it is deemed valid. The doctrine upon this subject is reviewed, and the cases collected in *Early* v. *Mahan*, 19 John. R. 147.

There is another class of cases which involve the same principle. I refer to that class in which it is held that an obligation or promise to indemnify against a previous ille-

gal act, from which the party has derived benefit, is valid. Any agreement with a sheriff or other officer, to indemnify him against a prospective or contemplated illegal act, is held void. Yet, if a party in custody of a sheriff for a debt, is permitted by him to escape, and the sheriff is compelled to pay the debt, and the party afterwards promise to repay it, this promise is valid, notwithstanding the illegal act to which both were parties.

In all these cases it is to be observed that the new and distinct contract in no manner tended to further or promote the illegal transaction, or the violation of the law. The great principle upon which all such contracts are held invalid and not to be supported in courts of justice is, that violations of law will not be aided or promoted by courts; and agreements which have that object or tendency, will not be countenanced by them.

Let us, then, proceed to consider the questions here presented in connection with the rule as established and illustrated by the cases.

First: Was the consideration of the note, or the trust created in the hands of the plaintiff, illegal? In the declaration of trust this is stated to be the delivery to the defendants below, of the bills of the Farmers' Bank of Homer, which had been deposited with Welles. These, says the counsel, were illegal, because issued in the usurped exercise of corporate powers. They were delivered to the defendants below, not in the ordinary course of business as a circulating medium, but under a special agreement. For what purpose were they delivered to them? It is assumed that it was for the purpose of circulation. This, however, does not appear. It does appear that they were the directors of the association by which the bills were made and put into the hands of Welles: and, if directors, they had the management, (either themselves or conjointly with others,) of the affairs of the association,

and were the actors in doing it. Now, if the bills were illegal, will the law presume that the agents who issued them reclaimed them for illegal objects? And, should the court assume this as a fact, without its being submitted to the action of the jury? I apprehend not, and that the presumption should be, both by court and jury, that the bills were reclaimed and redelivered, for a lawful, rather than an unlawful purpose, viz: that of preventing their circulation, or, perhaps, as the act under which the association was organized, rendered the directors personally liable for its indebtedness, for the purpose of anticipating and obviating such liability. (For, a decision that the act is invalid, as far as it purports to grant corporate powers, does not decide any question in relation to their individual liability under it, or for acts done under color of its authority. And, when the trust was created, no judicial decision had pronounced the act unconstitutional in respect to its grant of corporate powers.) It is, however, urged that the making and delivery of the bills was by the corporation, and the redelivery was to the defendants below as individuals. This argument appears to me suicidal. It assumes, for the purpose of declaring the bills illegal, that there was no corporation, the act being void, and that the agents issuing them were usurping unauthorized powers, and then, for the purpose of making the defendants culpable in receiving them back, that they were well issued in the exercise of corporate powers, and not by them as individual persons. Now, both these propositions cannot be true. If the defendants were corporators in issuing the paper, then the argument as to its illegality has no foundation. If they acted as individuals in doing so, they were doing well in reclaiming them. I do not see any force, in respect to their situation, in the position of counsel, that the association was a corporation *de facto*, if it could be deemed correct. It does not change

the character of the act, or the presumption as to its legality. If they wrongfully delivered the bills, they were right in withdrawing them.

In the second place it was said that the object of the note and trust was illegal.

The bills were held by Welles for indemnity. Upon their surrender, the securities were assigned, and the note in question made. In the declaration of trust, the object secondly stated, is, to apply the moneys collected in payment of the drafts, and indemnify Welles for his acceptances. Assuming that the drafts were themselves illegal for the reasons assigned, is this object of the new agreement and trust illegal? The drafts, it is to be observed, had passed their maturity; they were in the hands of an attorney for collection. Their circulation had ceased. It was not the object of the trust to further or aid this. Nothing of this kind is apparent. The great reason of the rule as to illegal paper, has no application. In construing an instrument, every part is to be viewed, as well as the situation of the parties, and the thing or subject to which it relates. Upon such a view of this instrument, is not the trust in this second provision, for the payment of the money for which these drafts were held, and which had been advanced or paid for them? This would seem to be the better construction, and the legal effect. Such certainly would seem to have been the intent of the parties, and the object in the construction of written instruments is to ascertain the intent and to carry it into effect. *Qui haeret in litera, haeret in cortice.* And, if this be the true view of this trust, then it is within the rule above referred to, and especially within the principle of that class of cases, in which, where upon an illegal contract money has been advanced, a contract to refund it, is valid. If the money had been actually paid to the trustee, it would be literally within the cases cited from Bosanquet & Puller;

and if, in the declaration of trust, the repayment of the consideration of the drafts had been mentioned as the object for the application of the trust moneys, no doubt could have been entertained upon the whole transaction; although the drafts are mentioned, it is the same in substance and legal effect. And, giving the language of the trust its literal construction, it seems to me the result would be the same. The drafts having passed maturity, and been dishonored, and indeed placed in process of collection by legal measures, and in the hands of an attorney for that purpose, it was not either the tendency or the object of the trust to promote their circulation, for that had ceased in fact as well as in legal contemplation; much less could its tendency or object have been to have aided, or induced the original alleged making and issuing of them. And, as it respects Welles, I cannot perceive that, at the time when the trust was created, it was an illegal object to indemnify him, rather than compel him to defend against the drafts. If they were illegally made and issued originally, as contended, yet, it was indemifying against a past illegal transaction, by means of which the parties creating the trust had been benefitted, and in no manner induced or tended to further or promote that transaction, and is within the principle of the cases above referred to on that point.

We have thus considered the two propositions separately, to wit, the consideration and object of the note and trust. But they were one transaction, and should, properly, be considered together. Assuming the bills and drafts to have been illegal paper, the case is this: The defendants procure the accommodation acceptances of Welles to the drafts, and, for security, deposit with him the bills. The drafts are dishonored, and suit is threatened. The defendants and Welles, then having notice, in view of the law, (as the counsel insists and we assume,) that the drafts

and bills were illegal, make a new arrangement, and provide the trust set out in this case for payment to the holders of the drafts, of the amount of them, and indemnity of Welles; and receive back the bills. As to the alleged illegality, they are silent, or waive it, and place the securities in the hands of a trustee unconnected with the original transaction. This is a new and separate transaction, based upon the fact that the holder of the paper provided for, has advanced for it a full consideration, which in justice and equity ought to be paid; and I see nothing to taint it with illegality, although the bills and drafts might originally have been illegal from having been made in the usurpation and illegal exercise of corporate and banking powers. It is insisted, however, that if the drafts were illegal, the presumption which usually attaches by law to negotiable paper, viz: that the holder has paid a valuable and full consideration, does not exist. Whether it does or does not, is immaterial in the case. The defendants below, having provided for payment, to the holders, of their full amount, admit, in effect, that such was the fact. And, in the face of this fact, neither court nor jury could presume to the contrary in the absence of further evidence on this point.

This disposes of the first exception. The second is not insisted on, and I do not see how it could be, if the Farmer's Bank of Homer were no corporation. It is however disposed of in disposing of the first.

It is further contended that the court below erred in refusing to charge the jury that the trust was created for indemnity, and the plaintiff was not entitled to recover, unless they believed that Welles had been damnified. The second provision of the trust is to *collect* and *pay*, and indemnify. It is not to indemnify merely. The trustee is required to collect and pay, and this is the mode in which the indemnity is to be effected. Consequently, he was au-

thorised and required to sue the notes for the objects of the trust, immediately upon default of payment. The case of *Rice* v. *Wheelock*, 1 Doug. Mich. R. 267, is in point, and decides this question in favor of the plaintiff below.

There is then no error in the judgment of the Circuit Court of the county of Calhoun, and it must be affirmed.

*Judgment affirmed.*

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JOHN H. BAILEY AND GEORGE B. STORM, APPELLEES, *v.* JOHN I. DE GRAFF, APPELLANT, IMPLEADED WITH SEBA MURPHY AND OTHERS.

Upon an appeal from chancery, the jurisdiction of this court is confined to an examination of the errors found in the transcript; and the court cannot assume, as part of the case, facts not appearing in the transcript, though assumed by counsel in the argument, and though, in virtue of a parol admission, they were treated as a part of the case in the court below.

APPEAL from Chancery. (For a report of the case in that court, see Walk. Ch. R. 424.) The facts appear in the opinion of the court.

*T. Romeyn*, for the appellant.

*A. D. Fraser*, for the appellees.

WHIPPLE, J., delivered the opinion of the Court.

The object of the bill in this case, was to foreclose a mortgage executed by Murphy and wife, to the President, Directors and Company of the Bank of River Raisin, and which, by assignment, became the property of the complainants. The bill contains the following, among other averments: "And your orators further show, that they

have caused examinations to be made of the records of deeds and mortgages in the office of the register of the county of Monroe, where the mortgaged premises are situated, and from which said examination it appears, and your orators expressly charge the fact to be, that John I. De Graff, of the city and county of Schenectady, in the state of New York, and Dan B. Miller, of the city of Monroe, and state of Michigan, have, or claim to have some rights or interest in the premises described in said indenture of mortgage, or in some part or parts thereof, as subsequent purchasers, incumbrancers, or otherwise." The bill was taken *pro confesso* against all the defendants except De Graff, who demurred generally. Upon the argument of the demurrer, it was assumed by counsel, that Murphy and wife, subsequent to the execution of the mortgage to the bank, had executed another mortgage to De Graff, conveying the same premises. Upon this state of facts, it was insisted by De Graff that the first mortgage executed to the bank was void, more than six per cent having been reserved by way of interest. This, in fact, was the great question discussed by counsel and decided by the Chancellor. The demurrer having been overruled by the Chancellor, De Graff appealed to this court. An intimation was given to the counsel, after the transcript was read, that the important question they proposed to argue did not arise upon the pleadings before us. Nevertheless, the argument proceeded as though the point had been fully and distinctly raised, in consequence of an understanding between the counsel, that they would interpose no obstacle to a full discussion of the question, which both seemed desirous this court should determine.

A more important question has seldom been presented for our decision; but we are constrained to withhold the expression of any opinion upon the merits of that question, for the obvious reason that it is not, and cannot properly

arise, upon the transcript sent up from the Court of Chancery. In respect to equity jurisdiction, the powers of this court are strictly appellate. We are confined by the statute conferring jurisdiction on this court in chancery cases, to an examination of the errors that may be assigned or found in the transcript. To *assume* facts which do not thus appear, would be to exercise *original* as well as appellate jurisdiction. This the statute never intended to confer upon this court. In our review of cases brought here by appeal, we are as much bound to confine ourselves to the questions arising upon the transcript, as we would be to confine ourselves to the record, in causes removed to this court by writ of error to the circuit. We must, therefore, disclaim all power over the question so ably and learnedly argued by counsel, unless that question can be legitimately and properly raised by inspection of the transcript. It appears very clear, that the facts necessary to give this court authority to pass on the question discussed by counsel, do not appear in the transcript, and cannot, therefore, be assigned as error. By consent, the question was argued in the court below, and decided by the Chancellor. But a valid stipulation thus made by the parties in a court of *original* jurisdiction, with a view to a decision of a question, can have no binding force here; indeed, we could not, if we would, *assume* the facts to exist as admitted by counsel, without changing the aspect of the case as it appears of record, and exercising a jurisdiction not warranted by law. This would introduce a practice at once illegal and dangerous. No error appearing in the decree of the Chancellor, it must, therefore, be affirmed.

*Decree affirmed.*

## WILLARD v. LONGSTREET.

The provision of the act of 1841, (S. L. 1841, p. 45, §§1, 2.) prohibiting the sale of property on execution, unless it will bring two thirds of its value, as appraised by three disinterested freeholders, so far as it applies to the remedy to enforce pre-existing contracts, is unconstitutional and void.

But where an appraisal and sale of real estate was made under the provisions of this act, by virtue of an execution on a judgment upon contract rendered before the act took effect, and the plaintiff in the execution participated in the appraisal, and purchased the premises on the sale, at a sum exceeding two thirds their appraised value, *Held*, that the plaintiff's rights not being affected by the appraisal, the sale was valid, and conveyed a good title.

A sheriff will not incur the penalty under R. S. 1838, p. 324, §5, for selling real estate without giving the notice required by law, if the sale be void in consequence of the unconstitutionality of the law under which it was made.

CASE reserved from Kalamazoo Circuit Court. This was an action of debt, brought by Willard to recover from Longstreet the penalty of $1000, for which R. S. 1838, p. 324, §5, provides that any sheriff, who sells real estate under execution, without giving notice of the sale in the manner required by the statute, shall be liable. The case was this:—By virtue of an execution issued out of the Supreme Court, Sept. 2, 1840, on a judgment in favor of Isaac W. Skinner and others, against Willard, the plaintiff in this suit, and one Gremps, and directed to the sheriff of Van Buren county, Longstreet, the defendant, as such sheriff, on the ninth day of December, 1840, levied upon certain lands of Willard, and advertised that they would be sold at a certain time and place, by virtue of the execution, but posted up notices of the sale, in only *one* public place in the township where the lands were situated and were to be sold, whereas the statute, (R. S. 1838, p. 323, §2,) required that such notices should be posted up in *three* public places in such township.

Under the statutes in force when the execution was is-

sued and the levy made, the sheriff was required to sell real as well as personal property levied upon, to the highest bidder, however much less than its value might be bid for it; and, on sale of real estate, he was required to execute to the purchaser a certificate of sale. This certificate entitled the purchaser to a deed, at any time after the expiration of the period within which the judgment debtor was permitted to redeem, which was two years. R. S. 1838, p. 323, ch. 3. S. L. 1839, p. 220, §15.

But before the sale took place, the acts of 1841, relative to the sale of real and personal estate on execution, were passed and took effect. These acts, while they left in force that portion of the former statute on the same subject which regulated the manner of giving notice of the sale of real estate, (R. S. 1838, p. 323, ch. 3,) provided that no sheriff should make sale of any real or personal estate upon any execution, until the same was appraised by disinterested freeholders, in the manner therein provided; and prohibited the sale of any such real or personal estate, for any sum less than two thirds of its appraised value. These acts also provided that a deed of real estate sold on execution should be executed by the sheriff to the purchaser immediately after the sale, and limited the time within which the judgment debtor was permitted to redeem premises sold, to six months. S. L. 1841, pp. 45, 150.

By direction of Skinner and others, the plaintiffs in the execution, the lands levied upon as above mentioned, were appraised and sold, in pursuance of the provisions contained in the acts of 1841 last cited. The sale took place December 4, 1841. Skinner and others were the purchasers of the premises, having bid for the same twenty-five cents more than two-thirds of their appraised value; and, on the completion of the sale, Longstreet, as sheriff, executed to them a deed, which was recorded July 20, 1843.

Upon these facts which appeared on the trial, the court

below directed a non-suit. A motion to set aside the non-suit was afterwards made, and the following questions arising thereon, were reserved by the Presiding Judge for the opinion of this court.

1. Can the defendant avail himself, in defence of this action, of the unconstitutionality of the acts of 1841, under which the sale was made?

2. The plaintiffs in the execution, having participated in the appraisal and sale, and having bid off the premises, and accepted and recorded the deed of the same, did not the title pass to them by the sale, notwithstanding the unconstitutionality of the acts of 1841; and so the defendant become liable for the penalty, to recover which this action is brought?

3. Was it necessary that the title to the premises should have passed by the appraisal, sale and deed, in order that the defendant should have become liable for such penalty?

4. The premises having been sold for twenty-five cents more than two-thirds of their appraised value, was the sale in any manner affected by the acts of 1841?

*Chas. E. Stuart* and *S. Clark*, for the plaintiff.

*Chipman*, for the defendant.

GOODWIN, J., delivered the opinion of the Court.

The main question arising upon the case, and presented for our opinion and decision, is, whether the proceedings of the sheriff in selling the property were void, and the defendant, consequently, relieved from the penalty provided for not giving the notice required by the statute. It is insisted that the proceedings were invalid in consequence of the acts of 1841, relative to sales upon executions, being, as alleged, unconstitutional and void.

It is to be observed that the acts of 1841 do not repeal the provisions of the Revised Statutes of 1838, in regard

to the advertisement and sale, but are merely amendatory of them; providing for an appraisement of the property, and inhibiting any sale for less than two thirds of the appraised value. These several statutes are *in pari materia*, and to be construed together. The acts of 1841 are not absolutely and entirely null and void. So far as they conflict with the clause of the constitution of the United States, inhibiting State Legislatures from passing laws impairing the obligation of contracts, they are invalid and inoperative.

In the case of *McCracken* v. *Hayward*, 2 Howard, 608, and *Bronson* v. *Kinzie*, 1 Howard, 311, it was held that, in respect to previous contracts, they are invalid, inasmuch as they deprive the creditor of the remedy, for violation of the contract, which existed when the contract was entered into; and of the rights possessed under the then existing law. By the provision of the constitution, as interpreted by those decisions, the plaintiffs in the execution might have insisted upon an absolute sale of the property seized upon the execution, without regard to the acts of 1841, or any appraisement under them. In this case, it appears that an appraisement was had, and the plaintiffs became the purchasers, at a sum exceeding two thirds of the appraised value of the premises. The effect is as if there had been no appraisement, and they having become the purchasers, can make no complaint. They, in fact, directed the proceedings. If there had been no sale, or bid for two thirds the amount at which the premises were valued, they might have insisted that the property should be sold absolutely, to the highest bidder, irrespective of the appraisement; and if the sheriff had refused so to sell, have applied to the Court for an order upon him to do so, as was done in the case of *McCracken* v. *Hayward*. But, having bid off the property, their rights have not been impaired by the appraisement, nor is the title affected by it.

This view of the principal question is an answer to the

two first and fourth questions presented to us in the case, in favor of the plaintiff; and renders it unnecessary to decide the third. Upon that, however, which is, whether, to subject the sheriff to the penalty, it is necessary that the title should pass by the sale, I would add that it seems to me very obvious that if the sale were void, so that no title could pass by it, it was the same as if there were no sale, and no penalty could attach. It should be remarked, however, that the questions presented in respect to the title, only relate to it so far as it may be affected by the appraisal, and the acts under which it was made; and to them our answer is confined. The first and fourth questions proposed to us, then, should be answered in the negative, and the second and third, in the affirmative; and it should be so certified to the Circuit Court for the county of Kalamazoo.

*Ordered certified accordingly.*

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GEORGE BUCK v. BENJAMIN SHERMAN, ELIAS B. SHERMAN AND JAMES SHERMAN, JR.

No man's rights can be affected by legal proceedings without notice of them, actual or constructive. *Semble.*

The "Act to provide for the transfer of real estate on execution, and for other purposes," approved February 17, 1842, (S. L. 1842, p. 135,) does not authorise an appraisal and set off of mortgaged premises in satisfaction of the mortgage, without previous proceedings to foreclose, either in equity or by advertisement.

Fraud in fact, or an express intent to commit fraud, is not necessary in order to render a conveyance fraudulent as against creditors. It is sufficient, if the effect of the conveyance is to delay or hinder creditors in the collection of their debts.

A, who had recovered a judgment against B for $2,672.79, in an action upon contract, and had issued execution thereon, and levied the same upon real estate of B, which was encumbered by a mortgage executed by B to C, during the pendency of

Buck v. Sherman.

A's suit against B, and conditioned for the payment of $6,556.67, in two years, with interest, filed a bill in chancery against B and C, to set aside the mortgage as fraudulent and void as against him. On the hearing, which was upon bill and answers, it appeared that, at the time of the execution of the mortgage, C was ignorant of B's indebtedness to A, and of the pendency of the suit for the recovery thereof; and that the consideration of the mortgage was C's execution of his five promissory notes, payable to B's order, in one and two years, to the amount, in all, of the sum secured by the mortgage, and his delivery thereof to B, for the purpose of enabling B to raise money by their negotiation: whether the notes had in fact been negotiated by B, did not appear; and, both B and C denied all fraudulent intent in executing the mortgage. *Held*, that the facts did not sufficiently establish the fraud, to authorize the court to decree a release of the mortgage.

Fraud will not be presumed upon slight circumstances: the proof should be so clear and conclusive as to leave no rational doubt on the mind as to its existence.

APPEAL from Chancery. The object of the bill in this case was to remove a cloud upon the title of premises levied upon by virtue of an execution in favor of Buck, the complainant, against Benjamin Sherman. The cause was heard upon the bill, supplemental bill, answers of the defendants, and replications thereto.

The case was substantially as follows: The complainant, holding the promissory notes of Benjamin Sherman, to the amount of about $2,500, which were due and unpaid, on the 1st May, 1840, instituted a suit against him in St. Joseph Circuit Court, for the recovery thereof, and such proceedings were thereupon had, that, September 22d, 1841, he recovered a judgment against said Benjamin, in said suit, for $2,647.17 damages, and $25.80 costs; on which judgment, execution was issued to the sheriff of St. Joseph county, and, on the 24th day of September, 1841, levied upon certain real estate of said Benjamin, situated in said county.

While the above suit against Benjamin Sherman was pending, viz. March 13, 1841, he executed to his brother, Elias B. Sherman, (both said Benjamin and said Elias B. being at the time residents in St. Joseph county,) a mortgage upon the same premises levied upon by virtue of the

execution in favor of the complainant, conditioned to secure the payment of $8,000, in the manner following, viz: The sum of $1,443.43, with interest, on the 14th day of March, 1842, (being the balance of a note given by said Benjamin to James Sherman, Jr., dated November 14, 1836, and payable two months after date;) and also, the further sum of $6,556.57, and interest, within two years from the date of the mortgage, according to the condition of a certain bond executed by said Benjamin to said Elias B. bearing even date therewith. The mortgage was duly recorded March 16, 1841.

The complainant's bill charged that this mortgage was a mere voluntary security, given without consideration, in fraud of the complainant, and with a view to hinder, delay and prevent the collection of complainant's debt against Benjamin Sherman; and alleging that it was a cloud upon the title of the premises, and prevented the sale thereof on the execution in favor of the complainant, prayed that Elias B. Sherman might be decreed to release the premises from the operation of the mortgage.

The defendants in their answer severally denied the fraud charged in the bill. Elias B. and James Sherman, Jr. both denied that at the time of the execution of the mortgage, they had any knowledge of the indebtedness of Benjamin Sherman to complainant, or of the suit pending in favor of complainant for the recovery thereof. It appeared from the answers that, as to the first instalment of $1,443.43, the mortgage was executed to and held by Elias B. as trustee for James Sherman, Jr., who resided in Cayuga county, New York, for the purpose of securing payment of this sum actually due from Benjamin to James for money lent; and that, as to this sum, the mortgage was executed in good faith and for a valuable consideration. But it further appeared that the sole consideration for securing by the mortgage the payment of the remaining

$6,550.57, the second and last instalment named in the condition thereof, was the execution by Elias B. Sherman of his five several promissory notes, amounting in all to the sum secured by said last mentioned instalment, payable to Benjamin Sherman, some of them in one and others in two years from date, and the delivery thereof to said Benjamin for the purpose of enabling him to raise money by negotiating them. It did not appear in the case whether or not these notes had ever been in fact negotiated.

As appeared from the supplemental bill and answer thereto, after the original bill was filed, to wit: on the 6th day of March, 1843, Elias B. Sherman, with the aid of the sheriff of St. Joseph county, pretending to proceed under "an act to provide for the transfer of real estate on execution and for other purposes," approved February 17, 1842, (S. L. 1842, p. 135,) summoned three appraisers, who, having entered upon and examined the premises described in the mortgage, appraised the same, and set off to said Elias B., by metes and bounds, such portion thereof as was sufficient to amount, at two-thirds of its appraised value, to the sum then due on the first instalment of the mortgage, and the costs of appraisal. The premises so set off were accepted by Elias B. in full satisfaction of said first instalment; and a certificate of such appraisal was made out and signed by the appraisers, which, with the acceptance of Elias B. endorsed thereon, was duly filed in the office of the register of St. Joseph county. No notice of these proceedings was ever given to the complainant, and they were had without any previous proceedings to foreclose either in equity or by advertisement. The object of the supplemental bill was to vacate and set aside these proceedings as irregular and void.

On the hearing in the court below, the Chancellor made a decree dismissing the bill generally. To reverse which decree the complainant appealed to this court.

*C. Dana* and *L. F. Stevens*, for complainant.

*Stuart & Miller*, *J. S. Chipman* and *N. Bacon*, for defendants.

WHIPPLE, J., delivered the opinion of the Court.

The complainant having acquired a specific lien on the real estate described in the bill, his right to invoke the aid of a court of chancery to set aside the mortgage executed by Benjamin to Elias B. Sherman, is unquestionable, if, from the facts disclosed on the hearing, it shall be apparent that the mortgage was executed with a view to defraud creditors. Such a mortgage constitutes a cloud on the title, to remove which the complainant has a right to appeal to the powers with which courts of equity are armed, and which are liberally and beneficially exercised in a large class of cases. Was, then, the mortgage in question a device by which the rights of creditors were delayed, hindered or defrauded? If so, it must be adjudged void. The solution of this question decides the case. In that class of cases within the range of which the present one falls, it is to be observed, that it is not required by the complainant, that fraud in fact, or an express intent to commit a fraud, was contemplated. It is sufficient if it appears from the whole case that the effect of the acts of the defendants was to delay or hinder creditors in the collection of their just debts. The determination of the question before us is involved in some difficulty, growing out of the somewhat peculiar and complicated character of the transactions disclosed by the bill and answers. So far as the mortgage was intended to secure James Sherman, Jr., the transaction is stripped of all doubt and difficulty. The answers of all the defendants so far as they are responsive to the allegations contained in the bill, must be taken as true, and these answers show

a *bona fide* debt due from Benjamin to James, at the time of the execution of the mortgage.

But can the set-off of the real estate to James in satisfaction of this debt be sustained? It appears that no proceedings were had to foreclose the mortgage, either in chancery or by advertisement, but that the whole proceeding was had between Elias B. and Benjamin Sherman, the former representing his brother James. It seems also, that the set-off was made after the levy by the complainant and the filing of the original bill. This feature of the case is open to animadversion: it bears on its face an unfavorable aspect. No notice was given to the complainant of the proceeding, although he was interested in the real estate under the levy. It was proper that his rights, if any he had, should be respected. The principles of natural justice, and the law of the land will not sanction such a proceeding. No man's right can be legally affected without notice, actual or constructive. But was it competent, in a legal point of view, for the parties to dispose of the real estate named in the mortgage? In other words: Does the statute under which the proceeding was conducted, authorize the set-off of real estate which is covered by a mortgage, without first proceeding to foreclose, either in equity or by advertisement? I think it does not. It is not to be disguised that the provisions of the act under which the parties proceeded, are involved in some mystery. It bears on its face some of the strong features by which the legislation of that day was characterized; but we think that a comparison of the first and sixth sections evidently contemplate a foreclosure of a mortgage, before the provisions of the second section can become operative. Where a statute admits of two constructions, one reasonable and sensible, and the other unreasonable and insensible, the duty of courts is obvious. That construction which is consistent with good sense and

sound reason must be adopted. We think, therefore, that all the proceedings had under the provisions of the act in question, must be set aside, and held for nought. The effect of this decision will be to leave the parties in the same plight they were in before such proceedings were instituted.

The next question to be considered is, whether the mortgage is fraudulent so far as it purports to secure Elias B. Sherman against the several promissory notes mentioned in the pleadings. Without expressing any opinion as to whether the transaction in this respect was fraudulent *in fact*, on the part of Benjamin, we cannot *presume*, under the aspect which the case now assumes, that a fraud was perpetrated by Elias B. The complainant chose to rely upon the case made by the bill and answer; by that case he must abide. The answers leave the notes in the hands of Benjamin. Whether he has negotiated them or not, does not appear. If he has, then Elias B. ought to be protected against eventual liability upon them. If not, the complainant has an appropriate remedy by which to prevent their negotiation. In order to authorize us to declare the mortgage void so far as it was intended to indemnify Elias B. Sherman, it must appear that the transaction was fraudulent on the part of both Elias B. and Benjamin.

While the stern principles by which courts of equity are guided, will be applied in all their strictness to cases of fraudulent conveyances, where the fraud is clearly established, yet we cannot *presume* that fraud actually exists upon slight circumstances. The proof should be so clear and conclusive as to leave no rational doubt upon the mind as to its existence. It is not our purpose to express any opinion upon this part of the case, as respects the motives or intentions of Benjamin; but we are not permitted to declare that the conduct of Elias B. was

fraudulent. All doubt as to the true character of the transaction could have been easily explained, had the parties thought proper to have shed more light upon the notes in question. If the notes were intended for the purpose stated in the answers, it would have been more natural that Elias B. should have stood in the relation to them of an endorser, rather than a maker. But, above all, it is somewhat unaccountable that the parties observe a studied silence respecting the disposition made of them. It would have been more satisfactory to us, had the defendants, in their answers, disclosed the fact that the notes had been used for the purposes stated in those answers. They having failed to do so, it was incumbent, under the circumstances, that the complainant, in order to show the transaction fraudulent on the part of Elias B. to have proved that they had never been negotiated, or other facts or circumstances tending to show that the notes and mortgage were intended to protect the real estate of Benjamin from execution.

Upon the whole, we are of opinion, that the decree of the Chancellor, dismissing the bill generally, must be reversed: And we order and decree further, that the proceedings had under the provisions of the act entitled "An act to provide for the transfer of real estate on execution, and for other purposes," approved February 17, 1842, be vacated and held for nought.

The effect of this decree will be simply to vacate the proceedings had under the act of 17th February, 1842, and to withhold all other relief under existing circumstances. This will enable the complainant to institute such further proceedings as he shall deem proper, with a view to the satisfaction of his judgment.

*Decree reversed.*

## JOHN AND FRANCIS STOUT *v.* DANFORTH KEYES.

Under the justices' act of 1841, (S. L. 1841, p. 81, §§1, 39, 43,) a justice of the peace has no power to try a cause in which it appears by the pleadings that a question of title to real estate is involved, and the title is *disputed;* but where the title is *admitted*, as by demurrer to a declaration alleging it, the justice has jurisdiction.

A purchaser of real estate at a mortgage sale, acquires an inchoate title, subject to be defeated by redemption.

When his title becomes absolute by the failure to redeem, it relates back to the time of the purchase.

And he may, therefore, after his title is thus perfected, maintain an action for injury done to the estate, maliciously, and with knowledge of his rights, by the cutting and carrying away growing timber after the purchase, before the expiration of the time for redemption.

Case is the proper common law remedy for such injury.

The common law is in force in this state, except so far as it is repugnant to, or inconsistent with, our constitution or statutes.

ERROR to Lenawee Circuit Court. This was a special action on the case brought by Keyes against John and Francis Stout, before a justice of the peace.

The declaration alleged in substance that Keyes was the assignee of a mortgage executed by Francis Stout; that default having been made in the payment of the money secured by the mortgage, he instituted proceedings under the acts of 1841, (S. L. 1841, pp. 45, 150,) for foreclosure and sale of the mortgaged premises; that the premises were sold on such foreclosure, October 1, 1841, and that he, the said Keyes, became the purchaser, for the sum of $466.67; that the premises were not redeemed within the six months after the sale allowed by the statute for redemption; and that, after the expiration of that period he entered into possession. The declaration then

further averred, that between the time of sale and the expiration of the time for redemption, the defendants, John and Francis Stout, with the knowledge of the plaintiff's rights, and the intent to injure and prejudice him in his estate, cut down and carried away a large quanty of timber growing upon the premises.

To this declaration the defendants below demurred.

The justice overruled the demurrer and gave judgment in favor of the plaintiff below for $100, damages and costs. The defendants below thereupon removed the cause by *certiorari* to the circuit court, where the judgment of the justice was affirmed.

*P. Morey*, for the plaintiffs in error.

*F. C. Beaman*, for the defendant in error.

GOODWIN, J. delivered the opinion of the Court.

1. It is first insisted that it appeared upon the face of the declaration that the title to real estate came in question, and that, therefore, under the justices act of 1841, (S. L. 1841, p. 81,) the justice had no jurisdiction.

The first section of that act excepts from his jurisdiction actions in which the title of real estate shall come in question; and if there was nothing further, probably the jurisdiction would be excluded. But there are other sections which show how the title must come in question to exclude jurisdiction, and the whole must be construed together. Sec. 39* provides that in every action where the title to land shall in any wise come in question, the defendant, at the time he is required to join issue, may plead specially, any plea showing that the title will come in question, or may give notice to that effect under the general issue;" that these shall be written and signed by the

*Re-enacted by R. S. 1846, p. 396, §§ 52 to 56.

defendant or his attorney, and countersigned by the justice, and then, upon the giving, by him, of a bond to defend, &c., in the circuit court, and payment of the costs, the suit shall be discontinued. This course was not pursued. Section 43* provides that if it appears on the trial from the plaintiff's own showing, *that the title to land is in question, and which title is disputed* by the defendant, the justice shall dismiss the cause, and the plaintiff pay the costs.

The plea of the general issue would, in this case, have put the title set up in the declaration in issue; and unless the plaintiff admitted it on the trial, the jurisdiction would have been taken away.

From the sections referred to, it appears that the *trial* of questions of title is what is inhibited, when they arise in the actions of which jurisdiction is given. The term trial is usually applied to the investigation of facts in question or dispute between the parties to a cause. By demurring, the defendant admitted the facts set out in the declaration, and raised the question of law as to their sufficiency to maintain the action. The plaintiff's title as he set it out—the facts constituting it which he alleged as the foundation of the suit—were conceded. True, he assigned as a cause of demurrer the want of jurisdiction. To take it away, however, he should have resorted to another course, and one which would have put the title in dispute. The statute evidently intended to take away the power to hear evidence and determine upon the various intricate and complex questions which might arise upon the trial of a disputed title. Where upon a demurrer to the declaration, a mere question of law arises, a review of any decision made is easily and without difficulty had under the provisions of the statute.

2. It is insisted in the second place, that the action on

*Re-enacted, R. S. 1846, p. 396, § 57.

the case would not lie upon the facts alleged in the declaration.

It is a general principle of the common law, that whenever the law gives a right, or prohibits an injury, it also gives a remedy by action; and, where no specific remedy is given for an injury complained of, a remedy may be had by special action on the case. This action, says Blackstone, is an universal remedy, given for all personal wrongs and injuries without force. 3 Bl. Com. 122; p. 1 Chit. Pl. 83, '4.

In the case of *Yates* v. *Joyce*, 11 John, 136, A., being the assignee of a judgment against B., had taken out an execution and levied upon a lot of land upon which the judgment was a lien; and C., knowing the premises, and, as charged in the declaration, with intent to injure the plaintiff, removed buildings from the said lot, and in consequence thereof, the amount for which the lot sold was diminished, and the plaintiff, the defendant having no other property, was thus far deprived of the benefit of his judgment. Upon a demurrer to the declaration stating these facts in substance, the action was sustained, upon the principle above referred to.

In this case, the plaintiff, by his purchase, had acquired an inchoate right to the land, subject to be defeated by payment, by the mortgagor, or of the purchase money, with ten per cent interest, in six months. If not so redeemed, he had a right to have the estate which he purchased, his title to which would then be consummated. The trees growing on the land were a part of that estate, being a part of the realty. The acts are charged to have been done wrongfully, and with intent to injure the plaintiff, and the action, it seems to me, was well brought.

The deed while it was in the register's hands, between the time of the sale and the expiration of the time for redemption, was in the nature of an escrow; and, if not de-

feated by redemption, related back to the time of the purchase, at which, under the statute referred to, it bore date. 4 Cru. Dig. 31; 3 Rep. 35; Swift's Dig. 123, '4, 179; 4 Day's R. 66.

If a deed is delivered on condition, and the grantee dies before the performance of the condition, yet upon its performance, the estate becomes vested. "For there was *traditio inchoata* in the life time of the parties, *et postea consummatio existens* by the performance of the condition."

In the state of New York, the doctrine of relation has been carried much farther than this, as will be found in the case of *Jackson* v. *Ramsey*, 3 Cow. R. 75, and cases there cited. In *Heath* v. *Ross*, 12 John. 140, between the date of a patent, and its passing the proper office, a quantity of timber was cut on the premises granted by the patent, and trover brought by the patentee and sustained—the grant being held to relate back to the date of the patent. In this case the doctrine is clearly applicable, and as the purchaser was not in the possession, that being held by one of the defendants, the action was properly case.

3. But it is said, that if the action would lie at the common law, that law is not in force in this state as a means of civil remedy. This is a somewhat startling proposition to be seriously urged at this time, when this court, as well as the circuit courts, have been adjudicating common law actions, upon common law rules and principles, since their organization under the state government; and also, the territorial courts had done so previously, from the organization of the territorial government under the acts of Congress and the ordinance of 1787. It can require but a few moments consideration.

It is contended, first, that the state constitution abrogated the common law, which it is conceded was previously in force. There is no provision in the constitution to that effect; but, on the contrary, in the second section of the

schedule annexed to the constitution, the laws in force are retained until they should expire by their own limitations, or be altered or repealed by the legislature. And it is a general principle, that, upon a change of government, laws in force continue until changed or abrogated. But, it is said, that if not repealed by the constitution, it is by the Revised Statutes of 1838. Not so. In the repealing acts therein contained, *the statutes* of which the subjects are revised or re-enacted, or which are repugnant to the provisions of the revised statutes, are repealed. And so far as the constitution and the government established by it, or the provisions of statutes, are inconsistent with, or repugnant to the common law, they supersede it. In almost every part of the Revised Statutes of 1838, relating to rights and remedies, the common law is incidentally or otherwise recognised; and more especially is it, in the chapters relative to the circuit and supreme courts, particularly section 4, of the former, (p. 381,) and sections, 2, 3, and 4, of the latter (pp. 357, '8.) I am of opinion then, that there is no error in the judgment of the court below, and that the same should be affirmed.

*Judgment affirmed.*

# CASES

## ARGUED AND DETERMINED

IN THE

# SUPREME COURT

OF THE

# STATE OF MICHIGAN,

## In January Term, 1846.

PRESENT:

HON. EPAPHRODITUS RANSOM, CHIEF JUSTICE.
HON. CHARLES W. WHIPPLE,
HON. DANIEL GOODWIN,
HON. WARNER WING,
} JUSTICES.

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MEMORANDUM: The Hon. ALPHEUS FELCH, late Associate Justice of the Supreme Court, and Judge of the Second Circuit, on his election to the office of Governor of the State, in the fall of 1845, resigned his seat upon the Bench, and the Hon. WARNER WING was thereupon appointed to fill the vacancy occasioned by his resignation.

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## HURLBUT *v.* BRITAIN & WHEELER.

Where the complainant takes issue upon the defendant's plea, and on the hearing the plea is not found to be true, he will be entitled only to the same decree as if the bill had been taken as confessed. If the allegations in the bill do not entitle him to any relief whatever, the bill will be dismissed.

And this even on hearing in this court, on appeal from a decree of the chancellor dismissing the bill on the ground that the plea was sustained by the proof.

The general banking law, (S. L. 1837, p. 76,) being unconstitutional and void, in so far as it purports to confer corporate powers, (*Green* v. *Graves*, 1 Dougl. Mich. R. 351.) no foreclosure can be maintained upon a mortgage executed to a bank organized under its provisions.

In a bill to foreclose a mortgage executed to the Detroit City Bank, June 20, 1839, it was alleged that the bank was a body politic and corporate, in &c.; that

in March, 1839, the bank commissioners of the state filed a bill in chancery against the bank, charging insolvency and a violation of the law under which it was organized, whereupon receivers were appointed to take charge of the effects of the bank, &c., and that said receivers assigned the mortgage to the complainant. *Held*, that, upon these allegations, and the laws of this state of which the court were bound to take judicial notice, the court would assume that the bank was organized under the provisions of the general banking law.

APPEAL from Chancery. (See Walk. Ch. R. 454.) The bill was filed to foreclose a mortgage executed by the defendant, Britain, to the Detroit City Bank, June 20, 1839, and by Julius Eldred and others, receivers of the bank, appointed by the court of chancery, assigned to the complainant.

Britain plead in bar that the mortgage was delivered to one Cullen Brown as an *escrow* and was never, in fact, delivered to the mortgagee by his authority. The complainant filed a replication taking issue upon this plea.

Wheeler answered setting up title to the mortgaged premises in himself, by purchase on a sale of the same for taxes; and the complainant also filed a replication taking issue upon this answer.

Proofs were taken upon each issue; and the cause having been heard by the Chancellor upon the pleadings and proofs, the bill was dismissed with costs. From this decree of the Chancellor the complainant appealed to this court.

*A. D. Fraser & A. Davidson* for the appellant.

*S. Barstow*, for the defendants.

GOODWIN, J. delivered the opinion of the Court.

The cause has been argued in this court on the part of the respective defendants, upon the plea and answer, and also a point is taken and insisted upon by each, that even if the the plea and answer are respectively unsustained by proof, and therefore, not sufficient to bar the complainant's

bill, yet the bill itself is insufficient to authorise any relief, and does not present a case upon which a decree for the complainant could be founded.

Upon the part of the complainant it is insisted that the plea of Britain is not sustained by the proofs, and that the answer of Wheeler, with the proofs in support of it, presents no sufficient bar to relief as against him; and the complainant further insists, that the matters alleged in the bill are sufficient to entitle him to relief, and that, at all events, it is now incompetent for the defendants to make any questions in regard to their sufficiency.

It becomes then material to consider, in the first place, whether it is now competent for the defendants to avail themselves of the alleged objection to the case made by the bill. It is laid down, that when a plea is interposed, and the complainant replies to and takes issue upon it, the truth of the plea is the only subject of question, *so far as the plea extends*; and its sufficiency is admitted: that the defendant must prove the facts alleged in it; and that if he fails in this, so that, at the hearing of the cause, the plea is held no bar, and it extends to the discovery sought by the bill, the plaintiff is not to lose the benefit of the discovery sought, but the court will order the defendant to be examined on interrogatories to supply the defect. Mitf. Pl. 302, and cases there cited; Bea. Eq. Pl. 325; 2 Ves. Sen. 247; 6 Madd. R. 63.

It follows then that the complainant is, in such case, entitled to relief according to the case made by the bill; and if a discovery is necessary to give him the full benefit of the relief sought, that may be obtained upon interrogatories. But if the bill contains no case upon which he would be entitled to any relief whatever, how can the court afford him any? Suppose the bill is taken as confessed: if the complainant has made no case in his bill which would entitle him to any remedy whatever, can he

obtain a decree? Certainly not. And how can he be in a better situation upon a plea being found false, and consequently the whole bill taken as true. In *Dows* v. *Mc Michael*, 2 Paige 345, the Chancellor of New York states the doctrine very clearly and concisely, and confirms this view. Where the complainant takes issue on the plea, he remarks, if at the hearing the plea is found to be true, the bill must be dismissed; but if the plea is untrue, the complainant will be entitled to a decree against the defendant *in the same manner as if the several matters charged in the bill had been confessed or admitted*; and he then goes on to state, that the complainant may still obtain a discovery, if requisite to the relief sought. This rule is certainly based upon good sense, and appears to be supported by authority. So also, where an answer is put in, the defendant is still at liberty to urge that the complainant has made no case by his bill. He will not be permitted to urge any objection of form merely; nor generally that the case is not a proper subject for the jurisdiction of a court of equity, but only of a remedy of law. Such objections must, in general, be made by demurrer, at an earlier stage of the cause, and come too late upon the hearing upon an issue, either upon plea or answer. But further, this cause is before us upon an appeal from the decree of the chancellor dismissing the bill generally. The order is general. Suppose the decree had been in favor of the complainant. Could not the defendants have appealed and assigned for error that there was no case in the bill? Most certainly they could, for the statute (R. S. 1838 p. 378, §125) declares, that upon an appeal, this Court shall examine all errors that may be assigned or found in the order or decree appealed from. If then, they could have done so, on the other hand can they not where the bill is dismissed on the alleged ground that the plea is proved, insist that it was rightly dismissed for want of any case

being presented by it which would warrant the court in making any decree whatever in behalf of the complainant? Most assuredly they can. In this case it does not appear from the decree upon what ground the bill was dismissed.

If I am right in the views above expressed, then the case of *Green* v. *Graves*, 1 Dougl. Mich. R. 351, is decisive of this case. It was in that case held that the general banking law was unconstitutional, and that a receiver appointed by the court of chancery, of the effects of one of the banks organized under its provisions, could not maintain an action on a note executed to the bank.

It is alleged in the bill in this case, that the bond and mortgage which are the foundation of the suit, were, Jan. 20, 1839, executed to the Detroit City Bank, a body corporate and politic, in the city of Detroit, in the state of Michigan; that, in March, 1839, the bank commissioners of the state filed a bill of complaint in the court of chancery, against the said Detroit City Bank, charging the insolvency of said bank, and a violation of the law under which the same was organized, and praying an injunction, and a receiver to take charge of its property and effects; that by an order of that court in December of the same year, Julius Eldred and others were named and duly appointed receivers, and authorised to take charge of its property and effects, and do all other necessary things appertaining to their office as such receivers, pursuant to the laws in such case provided. The bill then sets out an assignment of the bond and mortgage, by the receivers, to the complainant.

What law was it under which the bank was organised, the provisions of which were thus charged to have been violated by the bank in the bill filed by the bank commissioners? It could have been no other than the general banking law. By our statute, acts of incorporation

are public acts; this Court must ex-officio take notice of them; and there is no special act of the Legislature incorporating the Detroit City Bank. It was only under the general banking law that it could have been organized and have claimed corporate powers, and that the bank commissioners could have, in their bill, charged the violations of law upon which the receivers were appointed. This is so palpable upon the bill that it is impossible for us to shut our eyes to it, without also closing them to the public statutes in the statute book.

Upon the plea itself, and proofs relating to it, it might be doubtful whether the bill should have been dismissed. The facts proved did not show a performance of the condition upon which the bond and mortgage appeared to have been delivered. But upon the cross-examination of the main witness by the defendant's counsel, testimony was given tending pretty strongly to show an assent to the delivery, after a full knowledge of the facts which were insisted on by the complainants as a compliance with the conditions.

Upon the ground before considered, however, the decree must be affirmed.

*Decree affirmed.*

## Rockwell *v.* Hubbell's Administrators.

The act of 1842 (S. L. 1842 p. 70,) exempting from execution property not exempted by previous statutes, operates upon the remedy to enforce contracts made before it took effect.

It does not, in so far as it is thus retrospective, *impair the obligation of contracts.*

Case reserved from Oakland Circuit Court. Replevin brought by Rockwell against Hubbell for one yoke of oxen. Hubbell having died before issue joined, his administrators were permitted to appear and defend the action, and plead, that at the November term, 1840, of Oakland circuit court, the administrators of one Green, recovered a judgment against Rockwell and another for $85; that an execution was issued thereon, July 31, 1844, and delivered to Hubbell, who was then a deputy sheriff of Oakland county; and that on the 5th day of August following, he levied upon the oxen in controversy by virtue of this execution. Replication, that at the time of the levy Rockwell was a practical farmer, and the yoke of cattle levied upon was the only team he had, and was, therefore, exempted from execution by the provisions of the exemption law of 1842. S. L. 1842 p. 70 § 1. To this replication there was a general demurrer and joinder therein.

*C. C. Parks*, in support of the demurrer.

*Geo. W., and Moses Wisner*, contra.

Ransom, C. J. delivered the opinion of the Court. The demurrer presents two questions:—

1. Whether the exemption law of 1842 (S. L. 1842 p. 70) applies to executions for the collection of debts contracted before it took effect; and, if it does, then,

2. Whether, in so far as it is thus retrospective, it impairs the obligation of contracts, and is therefore unconstitutional and void.

We entertain no doubt as to how the former of these questions should be answered.

The first section of the act provides, that, "to each practical farmer, one yoke of cattle" "shall be, and the same are hereby exempted from execution or sale, for any debt, damages, fine or amercement, whatever."

By the third section it is declared, that "all acts and parts of acts heretofore passed and now in force, for the exemption of property from execution or sale, for any debt, damage, fine, or amercement, are hereby repealed." It can hardly be supposed that the legislature intended to repeal all exemption laws then in force, and leave the whole debtor class entirely at the mercy of creditors—not even securing to them or their families, their necessary clothing or cooking utensils.

It will be borne in mind, that at the time of the passage of the act of 1842, there was an unprecedented amount of indebtedness pressing upon the business community, arising out of the extravagant speculation and overtrading of previous years. We cannot conclude, that at such a juncture, the legislature would take away *all* protection from debtors, whose liabilities, in *most* instances, had been incurred in the improvident purchase of property at exorbitant prices, and in many, for that which was utterly worthless, and at the same time provide a greatly enlarged exemption, for the benefit of those who might thereafter become indebted.

The act enumerates all the articles exempted from execution by the then existing laws, and adds thereto many others, and declares that the whole shall be and are exempted from execution.

Keeping in view the fact that exemption laws had al-

ways formed a part of the legislative policy of our own state, and, indeed, of all the states of this union, we cannot doubt but the legislature intended to embrace by its provisions, existing cases, as well as those that should thereafter arise.

2. We will proceed, then, to consider the second and more important question, viz:—Whether the law, in so far as it applies to executions for the collection of debts contracted before its passage, impairs the obligation of contracts, and is therefore unconstitutional and void.

The case of *Bronson* v. *Kinzie*, 1 How. 311, and *Mc Cracken* v. *Hayward*, 2 Id. 608, are principally relied upon by the defendant's counsel, to establish the unconstitutionality of the act. But to my mind, neither of those cases sustains the position he assumes. The first involves only the question of the constitutionality of the appraisal laws of Illinois, as applicable to sales made under pre-existing mortgages. The second, (*McCracken* v. *Hayward*,) extends the principle decided by the former, to sales upon execution. Although, in deciding those cases, the court used very broad and comprehensive language, still the only question before them, which they properly *could* or which they *did* decide, was, that the laws of Illinois providing for the valuation of property prior to its sale upon mortgage foreclosure, and executions upon pre-existing contracts, came within that clause of the 10th section of the first article of the constitution of the United States, which prohibits a state from passing any law impairing the obligation of contracts, and were therefore inoperative and void.

So far, however, as those adjudications bear in express terms, upon the case at bar, they tend to sustain our exemption law.

In *Bronson* v. *Kinzie*, Chief Justice *Taney*, alluding to the contract of Kinzie, and the valuation laws of Illinois,

says: "If the laws of the state, passed afterwards, (that is, after the making of the contract,) had done nothing more than change the remedy upon contracts, they would be liable to no constitutional objection; for undoubtedly, a state may regulate at pleasure, the modes of proceedings in its courts, in relation to past contracts as well as future. It may, for example, shorten the period of time within which claims shall be barred by the statute of limitations. It may, if it thinks proper, direct, that the *necessary impliments* of agriculture, or the tools of the mechanic, or articles of necessity in household furniture, shall, like wearing apparel, not be liable to execution on judgments. Regulations of this description have always been considered, in every civilized community, as properly belonging to the remedy, to be exercised or not, by every sovereignty, according to its own views of policy and humanity. It must reside in every state, to enable it to secure its citizens from unjust and harassing litigation, and to protect them in those pursuits which are necessary to the existence and well being of every community." If, as is thus conceded, a state legislature may exempt from seizure, upon execution, necessary *implements* of agriculture, may it not also exempt necessary teams to render those implements available? To hold the contrary, would seem to me to be absurd.

Would such exemption impair the obligation of the debtor's contract? Not in the slightest degree, that I can perceive. The obligation of a contract, within the meaning of the constitution, is that which binds the party making the contract, to a performance of the promises and covenants which it contains. Does a law which reserves to a party his plow, his cart, or his team, release him from the performance of such promises or covenants? Not at all. His obligation remains in full force, not dissolved, or any manner weakened or impaired.

I am aware, that in the case of *McCracken* v. *Hayward*, Judge *Baldwin* said, that the laws of Illinois relating to judgments and executions, existing at the time the defendant's contract was entered into, were as perfectly binding upon him, and as much a part of his contract, as if they had been set forth in its stipulations, in the very words of those laws; and, had the court then been considering the validity of our exemption law or a similar one of any other state, their decision, undoubtedly, must have settled the rights of the parties here. But the precise question presented by *this* case, we have seen, was not before the court, in the case referred to; and, doubting as I do, (most deferentially to be sure,) the soundness of the positions assumed by Mr. Justice *Baldwin*, in *McCracken* v. *Hayward*, I am unwilling to extend the principle of that case a single line beyond the limits prescribed by its *own facts*. And so, in effect, held Chief Justice *Gibson*, commenting upon the above cases in *Moore* v. *Chadwick*, decided in the Supreme Court of Pennsylvania, in September, 1844. 6 Law Reporter, 433.

Can it be maintained that an exemption law, existing at the time a contract is made, enters into and forms an essential part of it? To me, such a doctrine seems at war with all the settled principles and analogies of the law. I cannot see on what ground it can be defended. Would it not lead to consequences altogether absurd? If an exemption law, in force at the time a contract is made, forms one of its essential elements, the law must, in the quaint language of the older books, "go with, and attend upon the contract." Suppose a contract was made in the state of New York, and that there was no exemption law at the time in force in that state. Suppose further, that such contract were subsequently sent here to be enforced. Can there be a doubt as to whether our exemption law would control an execution issued to collect a judgment upon

that contract? None whatever.—Suppose again, that a contract were made in a state by the laws of which the property of execution debtors was exempted from levy or sale, to the amount of $1000, and that the contract were sought to be enforced in another state, where no exemption law existed. Would not the *whole* of the debtor's property be liable to seizure and sale, for the satisfaction of his debt? Unquestionably it would.—Let us put another case: Suppose a promissory note is made in a State where the remedy by assumpsit is expressly taken away by statute, and the party is confined to the action of debt alone. Will it be pretended that the payee or other holder of such note could not follow the maker into this state, and enforce its payment by the usual remedy here,—the action of assumpsit? Not for a moment.—Suppose, again, a note made where all the usual remedies upon such contracts exist, and that the maker goes into a jurisdiction, where the action of debt only is given in such case. Can the holder of the note there bring assumpsit upon it? Certainly not. And yet, if co-existing remedies form an essential part of a contract, he may do so most clearly.

The doctrine that the remedy constitutes a part of the contract, Judge *McLean* has said, "is a mere abstraction, which cannot be carried into practical operation." 1 How. R. 328. And is it not so? If the remedy is a part of the contract, it must remain so until the contract is performed or rescinded by the parties. No change of the forms of actions, or other proceedings, can affect existing contracts: and, if judicial action be necessary to enforce a contract, enquiry must be made, *not* as to what remedies exist at the time of commencing suit, but what were the remedies existing at the time the contract was entered into, and the latter, and no others, must be resorted to. Such a rule would lead to endless confusion and difficulty, and could not be applied. The cases are numerous, in which

principles, strongly analogous to those relied upon in this case to sustain the plaintiffs' replication, are recognised as settled law.

It was adjudged by this court, at the last term, in the case of *Bronson* v. *Newberry*, (ante. p. 38,) that the act of our legislature, passed in 1839, abolishing imprisonment for debt, extended to pre-existing as well as future contracts, and yet, that it was not within the inhibiting clause of the constitution.

So in *Sturges* v. *Crowninshield*, 4 Wheat. 200, Chief Justice *Marshall* says, expressly, that imprisonment is no part of the contract, and simply to release the prisoner does not impair its obligation. *Mason* v. *Haile*, 12 Wheat. 370; *Beers* v. *Haughton*, 9 Pet. R. 359; and 3 Story on Const. 250, are to the same effect.

It has also been repeatedly determined, that recording acts, and statutes of limitation, although made to affect existing contracts, were not, therefore, unconstitutional and void.

And the courts have all based their decisions on the ground that such legislation acted *on the remedy only*, without impinging at all on the obligation of contracts.

If non-imprisonment and limitation acts may be made to act upon existing contracts, why may not exemption laws? Can any definable line of distinction be drawn between them? I confess I can discover none.

We are, then, of opinion, that the replication in this case is sufficient, and the demurrer thereto should be overruled.

*Ordered certified accordingly.*

## LATIMER AND RANDALL v. LOVETT.

A treasurer's deed in consummation of a sale of land for taxes, under the act of 1827, (R. L. 1838. p. 96,) is evidence of the regularity of the *sale* only; and a party claiming title under it, must show affirmatively that all the proceedings, anterior to the sale, in the assessment and return of the taxes, have been had in conformity to the statute. This point decided in *Scott* v. *Detroit Young Men's Society*, 1 Dougl. Mich. R. 121, re-affirmed.

ERROR to Lenawee Circuit Court. Ejectment by Latimer and Randall against Lovett. The plaintiffs claimed as the grantees of one Hoeg. The only evidence of Hoeg's title which they adduced on the trial, was a deed of the premises, executed to him by the treasurer of Lenawee county, in consummation of a sale of the same for taxes. It appeared from the recitals in the deed, that the sale was made March 3, 1836, for taxes assessed for the year 1832. The plaintiffs did not offer any evidence to show that the taxes for which the premises were sold, were legally assessed and returned, or that the proceedings anterior to the sale had been in conformity to the statute.

On the submission of the cause to the jury the court charged, "that, under the statute applicable to the case, (R. L. 1827, p. 378, and R. L. 1833, p. 96 §15*) the plaintiffs, in order to have established a good title in Hoeg un- the treasurers deed, should have proved to the jury the existence and regular assessment of the tax for the non-payment of which the premises were sold, and that the same had been returned as uncollected by the officer to

*This statute provided that the county treasurer's deed should vest in the person to whom it was given, an absolute estate in fee simple, subject to all the claims which the territory of Michigan should have thereon, and should be *conclusive evidence that the sale was regular* according to the provisions of the act. For subsequent statutes on this subject, see R. S. 1838, p. 98, §20; S. L. 1842, p. 98, §53; S. L. 1843, p. 58, and R. S. 1846, p. 114, §82. See, also, 1 Dougl. Mich. R., 121 note.

whom the tax list was committed for collection; that without the assessment of such tax, and the non-payment of the same, the treasurer would have had no power to make the sale; that the *onus* was on the plaintiffs claiming title through such treasurer's deed, to prove all those facts upon which the power of the treasurer to make the deed depended; that under the statute the treasurer's deed was not even *prima facie* evidence of such proceedings anterior to the action of the treasurer in advertising and selling the land, as authorized him to sell the same; but was evidence of the regularity of the *sale* only; and that without evidence of such proceedings, the jury would not be authorized to find a verdict for the plaintiffs." Under this charge, to which the plaintiffs excepted, the jury found a verdict for the defendant, on which judgment was rendered. The plaintiffs now claim a reversal of the judgment on the ground that the charge was erroneous.

*A. Backus* for the plaintiffs.

*A. H. Tiffany* for the defendant, cited *Sharp* v. *Spier*, 4 Hill, 78, 84, 86; *Williams* v. *Peyton*, 4 Wheat. 77; *Rankendorf* v. *Taylor*, 4 Peters, 349; *Jackson* v. *Shepherd*, 7 Cowen, 88; 8 Wheat., 682; *Jackson* v. *Morse*, 18 Johns., 441; *Rowland* v. *Doty*, Harr. Ch. R. 1, 10; R. L. 1833, p. 96, §15, 16.*

WING, J. delivered the opinion of the court. We think that the decision of this court in *Scott* v. *The Detroit Young Men's Society*, 1 Dougl. Mich. R., 121, fully sustains the charge given by the court below; and we are satisfied with the doctrine laid down in that case. The whole scope also of the decision in *Rowland* v. *Doty*, Harr. Ch. R. 1, and the authorities cited by the Chancellor in delivering his opin-

*When this cause came on for argument *Scott* v. *Detroit Young Men's Society* had not been reported, and counsel were, therefore, ignorant of it, until attention was called to it by the court after the argument had commenced.

ion, tend to establish the same doctrine; although, as remarked by the Chancellor, it was not necessary in that case to decide whether it was incumbent on the party claiming title under the treasurer's deed, to show affirmatively the regularity of all the proceedings, and that all the prerequisites to the sale had been complied with.

The judgment below must, therefore, be affirmed.

*Judgment affirmed.*

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## Atwood *vs.* Gillett & Desnoyers.

The bankruptcy of partners dissolves the partnership.

And if, after the bankruptcy, the partners continue the same kind of business, under the same partnership name, it is a new partnership.

A dissolution of partnership puts an end to the authority of one partner to bind the other.

Accordingly, where, after the bankruptcy of a firm, the partners continued the same kind of business, under the same partnership name, and one of them, in the name of the firm, executed a written acknowledgment of a partnership debt discharged by the bankruptcy, *it was held*, that the other partner was not bound by the acknowledgment.

*Held*, that parol contemporaneous evidence was admissible, to show that the defendant's written acknowledgement of a debt from which he had been discharged by bankruptcy, was avowedly obtained by the plaintiff, and in fact executed and delivered by the defendant, for the purpose of facilitating the proof of the debt against the defendant's estate in bankruptcy; and not with a view to its revival against the defendant. Such evidence would not contradict or vary the terms of a *valid* written instrument, but would show that the instrument never was *delivered*, and, therefore, never had any legal existence, or binding force *as a contract*.

Case reserved from Wayne Circuit Court. This was an action of assumpsit, brought by Atwood against Gillett and Desnoyers, upon the following instrument:

"This may certify that there is due S. F. Atwood on settlement of accounts, thirteen hundred and ten 18-100 dollars. *Gillett & Desnoyers.*

"Detroit, July 7, 1843."

The declaration contained the common money counts and an account stated; and for particulars of his demand under these counts, the plaintiff furnished a copy of the above instrument.

The defendants plead—1. The general issue—2. Their discharge in bankruptcy, April 24, 1843, in proceedings instituted under the act of Congress approved August 19, 1841.

To the second plea, the plaintiff replied a new promise in writing after the discharge.

And the defendants rejoined, taking issue upon this replication.

The cause was tried at the May term, 1845, of the circuit court, before the Hon. D. Goodwin, Presiding Judge.

On the trial the plaintiffs, to prove the partnership of the defendants, introduced several witnesses who testified that the defendants had been partners in business, as forwarding and commission merchants, for several years prior to 1843, and that they continued to do business, as such partners, up to July of that year. The witnesses further testified that they had never heard of a dissolution of the partnership.

The plaintiff then proved that the instrument described in his bill of particulars was written and signed by the defendant Gillett, and read the same in evidence to the jury.

On the part of the defence, one Ives, being introduced as a witness, testified to sundry conversations between

the plaintiff and the defendent Gillett, had before and at the time of the execution and delivery of the instrument above mentioned, tending to prove that it was avowedly obtained by the plaintiff, and was in fact executed and delivered by Gillett, for the sole purpose of being used as evidence, by the plaintiff, to prove his claim against Gillett and Desnoyers before Z. Platt, commissioner in bankruptcy, in order that he might obtain thereon the dividend to which he might be entitled in the distribution of their assets as bankrupts; and not for the purpose of furnishing the plaintiff with evidence of an acknowledged and subsisting debt against the defendants, or a promise of payment of the same.

The same witness also testified that Desnoyers was not present at any of these conversations, and knew nothing of the transaction to which they related, until informed of it by the witness, some time after the instrument above mentioned was executed and delivered by Gillett to the plaintiff.

The evidence being closed, the counsel for the defendants requested the court to charge the jury, that the bankruptcy of the defendants dissolved the partnership previously existing between them; that after such dissolution the acknowledgment or agreement of one of the partners could not bind the other; and that, therefore, the plaintiff was not entitled to a verdict, unless they were satisfied that both of the defendants executed the instrument relied upon as evidence of an acknowledgment or new promise, or expressly consented to its execution.

On this point the court instructed the jury that the plaintiff was not entitled to recover upon the instrument unless they were satisfied from the evidence, that both of the defendendants executed it, or sanctioned its being executed; that, should they be of opinion that it was executed and delivered by Gillett alone, without the

knowledge or consent of Desnoyers, the latter would not be bound by it. And this further instruction was given, that if the partnership of the defendants *in fact* continued, notwithstanding the bankruptcy, and *involved the old business*, then the act of one was the act of both, and it was competent for Gillett to execute and deliver the instrument in the partnership name, and thereby bind both himself and Desnoyers.

The court also further charged the jury, that it was not competent, for the purpose of avoiding the instrument upon which a recovery was sought, to show by parol that it was applied for by the plaintiff, and was executed and delivered by the defendants, for the purpose of being filed with the commissioner in bankruptcy, to facilitate the proving of the plaintiff's claim against the estate of the defendants in bankruptcy; or in any other way to contradict, or change or destroy the legal effect of the instrument by parol evidence, showing what was said when it was executed, or that it was designed for any other purpose than that which appeared upon its face. That it was a general rule of law that parol evidence was not admissible to contradict a written instrument, or to vary its legal effect. And the court, for these reasons, withdrew from the jury so much of the testimony of Ives as related to the conversations between the plaintiff and Gillett, before and at the time of the execution and delivery of the instrument.

Under this charge the jury found a verdict for the plaintiff. The defendants thereupon moved the circuit court that the verdict be set aside and a new trial granted, on the ground of misdirection to the jury; which motion the Presiding Judge reserved and certified to this court.

*Van Dyke & Emmons*, and *A. D. Frazer*, in support of the motion.

1. The court erred in the instruction to the jury as to the power of Gillett to bind the firm of Gillett & Desnoyers. The partnership was dissolved by the bankruptcy, and neither partner *alone* had the power to revive a pre-existing debt, by a new promise or acknowledgement, in the partnership name. Story on Part. 193, 4, 460, 1, 2; 3 Kent's Com. 50; *Hackley* v. *Patrick*, 3 Johns. 356; *Walden* v. *Sherburne*, 15 Id. 424; *Bell* v. *Morrison*, 1 Pet. R. 360, 367 to 374; Ang. on Lim. 277; *Gleason* v. *Clark*, 9 Cow. 57; *Baker* v. *Stackpole*, Ib. 420; 5 Esp. R. 198 note.

2. The testimony of Ives was competent evidence and was improperly withdrawn from the jury.

The rule is admitted that parol contemporaneous evidence is inadmissible to contradict or vary the terms of a *valid* written instrument; but it applies only to instruments admitted to be valid, or which have had a legal existence; and not to questions concerning their validity. 2 Ev. Poth. on Ob., 171; Greenl. Ev. § 284; 2 Starkie Ev. 555; 1 Phil. Ev. 552, 555; 9 Cow. 310; Cow. & Hill's notes to Phill. Ev. 1445.

The rule does not apply to contracts implied by operation of law. The instrument in evidence was not an express promise. Admit that it was one from which the law would imply a promise to pay; the evidence in question went merely to repel this legal inference or implication. It was in harmony with the terms of the instrument, and was admissible. *Susquehannah Bridge and Bank Co.* v. *Evans*, 4 Wash. C. C. R. 480; *Stackpole* v. *Arnold*, 11 Mass. R. 32; 2 Wash. C. C. R. 219, 233; *Pike* v. *Street*, 22 Eng. C. L. R. 299; *Hill* v. *Ely*, 5 Serg. & Rawle, 363; 1 Cox's R. 90; *Barker* v. *Prentiss*, 6 Mass. R, 433; 6 Conn. R. 224; 1 H. Bl. 602; Cow. & H. notes to Phill. Ev. 1473.

The evidence withdrawn from the jury was admissible, also, on the ground that it merely went to show that the

instrument was never delivered, except for a special purpose, viz: for the purpose of enabling the plaintiff to prove his claim before the commissioner in bankruptcy. Cow. and Hill's notes to Phill. Ev. 1450, '8, '9, 1464; *Jeffries* v. *Austin*, 1 Strange, 644; *Jackson* v. *Roberts*, 1 Wend. 485; *Lovett* v. *Adams*, 3 Id. 325, 381.

It was also admissible for the purpose of showing a misapplication of the instrument. 1 B. & Ad. 528; 9 Wend. 170; 8 Id. 437; 10 John. 267; 15 Id. 270, 231; 5 Wend. 566; 6 Id. 615; 1 Blackf. R. 315.

Also to show that the instrument was obtained by fraud and imposition. 1 Greenl. Ev. 322; 4 Am. C. L. R. 33; *Tallman* v. *Gibson*, 1 Hall's R. 308; 2 Camp. R. 574; 2 T. R. 766; 10 Johns. R. 459; 18 Id. 403; 1 Edw. Ch. 467; 1 Ev. Poth. on Ob. 15; 1 Story's Eq. Jur. 196, '7; 14 Wend. 195; *Jackson* v. *Myers*, 11 Wend. 536; *Foster* v. *Charles*, 19 Eng. C. L. R. 115; 20 Id. 65; *Polhill* v. *Walter*, 23 Id. 38; *Wilson* v. *Fuller*, 43 Id. 635; 3 Camp. R. 506; *Clark* v. *Gifford*, 10 Wend. 212; 2 Wils. R. 310; 16 Serg. & Rawle, 346; 8 Pick. 459; 21 Wend. 500; 1 Hill's R. 517; *Chandler* v. *Ford*, 30 Eng. C. L. R. 173.

Also to explain and apply the instrument. *Smith* v. *Doeden*, 6 Eng. C. L. R. 262; 1 Phil. Ev. 562; 2 Cow. & Hill's notes to Phill. Ev. 1359, '60, 1388, '89, '92, '93, 1467; 1 Stark. Ev. 36, '7, '8, 47; 1 Greenl. Ev. 120, 316, 324; *Crary* v. *Sprague*, 12 Wend. 44; 13 Pet. R. 89, 96, '7, '8; *Schuyler* v. *Russ*, 2 Caines' R. 202; *Beach* v. *Depeyster*, 4 Camp. 385; *Ely* v. *Adams*, 19 John. 313; *King* v. *Laindon*, 8 T. R. 379; Poth. on Ob. 161; 1 Mason's R. 10, 11; 1 Dall. 426; 5 Day's R. 395; 5 Burr. R. 2804.

*T. Romeyn* and *J. S. Abbott*, contra. The instrument offered in evidence, unless impeached, was sufficient to sustain the action. It was in effect a promissory note. 2 Cow. 536; 10 Wend. 675; 1 Hill's R. 256. And if not, it

was valid as an acknowledgement of a subsisting debt, sufficient to support the count in the declaration on an account stated. 1 John. 34; Chitt. on Contr. 648, '9, and cases there cited; Chitt. on Bills, (Ed. 1842,) 526 and notes. It was entirely free from ambiguity, and parol evidence was inadmissible to vary it. 1 Greenl. Ev. 315, 319, 321, 325; Chitt. on Contr. 99; 2 Wigr. on Wills, 333 and notes; 1 Hill's R. 608; 6 Id. 219; Cow. & Hill's notes to Ph. Ev. 1432. Such evidence was not admissible for the purpose of showing that the instrument was *delivered* on some understanding or condition inconsistent with its tenor and legal effect. See authorities above cited, and Chitt. on Bills 142 and notes. Nor was the testimony of Ives admissible in this case for the purpose of showing fraud, for it did not show *legal fraud*. 18 Wend. 608; 12 East 636. The instrument was the contract of both defendants, and binding upon both. Story on Part. 445, '6, 458, 460, '1; 3 Kent's Com. 53, 63; Collyer on Part. 233; Gow on Part. 80, '1, 213, '15.

Ransom, C. J. delivered the opinion of the court.

It is shown by the pleadings in this case, that proceedings were instituted against the defendants by certain of their creditors, as involuntary bankrupts; that they were duly declared such bankrupts on the 16th of January, 1843; and that upon petition by them filed for that purpose, they were, on the 24th day of April, 1843, duly discharged from all their debts, then existing.

The fourth section of the bankrupt law of 1841, provides, that every bankrupt, upon a compliance with the requisitions of the act, shall be entitled to a full discharge from all his debts.

The debt then, the payment of which the plaintiff now seeks to enforce, was extinguished and gone, as essentially as though it had been fully paid, unless revived and again

brought into life, by a renewed undertaking of the defendants to pay it.

The debt being extinguished, a new promise of payment, to bind the bankrupt, must be express, distinct and unequivocal; for, although the debt thus discharged, but unpaid in fact, furnishes a sufficient consideration for a promise when expressly made, yet it affords no ground for the implication of a promise to pay. 1 Stark. R. 37; 5 Esp. R. 198. The only proof of a new promise adduced by the plaintiff, was the certificate made by Gillett alone. It is unnecessary to stop here to consider whether that instrument is sufficient to revive the debt against Gillett. If we admit it to be so, the enquiry still remains, whether it should bind Desnoyers also. The plaintiff's counsel maintain that it should, on the ground that the defendants jointly contracted the original debt as partners; and although they had been discharged in bankruptcy, yet that they continued their partnership relation, carrying on the same business, in which they had been previously engaged, up to, and at the time, Gillett gave to the plaintiff the certificate in question.

The position here taken for the plaintiff would be impregnable, if the partnership of the defendants could be said to have *continued*, unaffected and uninterrupted by the bankruptcy. But that the partnership was dissolved by the proceedings in bankruptcy, there can be no question. That relation, upon their being declared bankrupts, was as effectually terminated, as it could have been by the most solemn agreement of the parties.

The fourteenth section of the bankrupt law of 1841, prescribes the mode of proceeding where two or more persons, who are partners in trade, are sought to be declared bankrupts; and after providing for placing all the property of the partners, joint and separate, under the control of the assignees, and for the payment of the joint debts,

this further provision is made—"And if there shall be any balance of the joint stock, after the payment of the joint debts, such balance shall be divided and appropriated to and among the separate estates of the several partners, according to their respective rights and interests therein, and as it would have been, if the partnership had been dissolved, *without any bankruptcy.*" But independently of this provision in the act of Congress, the result would be the same. The Roman law, the common law, and the modern foreign law, all, says Judge Story, concur in the same general result—that bankruptcy, or insolvency, is, of itself, by mere operation of law, a complete dissolution of the partnership. Story on Part. 446.

But, it is said again, the partnership did *in fact* continue and involved the "*old business.*" The defendants, it is true, were the same persons, carried on the same *kind* of business, perhaps with the same customers, and for ought we know, in the same place, *before* and *subsequently* to their discharge under the bankrupt act. Yet how could the latter business involve the former? What remained of their "*old business?*" We have already seen that they were forever discharged from their debts; and the third section of the act, provides that "all the property and rights of property, of every name and nature, and whether real, personal or mixed, of every bankrupt, except," &c., (referring to household furniture and other necessary articles which are reserved,) "who shall, by a decree of the proper court, be declared to be a bankrupt within this act, shall, by *mere operation of law, ipso facto,* from the time of such decree, be deemed to be divested out of such bankrupt, without any other act, assignment, or any other conveyance whatsoever, and the same shall vest in the assignee." And now, I ask again, what was there left of the "*old business,*" to be involved in the new? The partnership was dissolved at the instant the decree passed; every

vestige of their property divested out of them, in the language of the act, and their debts for ever discharged. I confess I am unable to perceive anything remaining of the "*old business*," that could, in any way, be connected with the *new*.

Suppose the defendants, immediately upon their bankruptcy, under the style of their former partnership, and in the same building they previously occupied, had established themselves in a retail business, of dry goods, for instance: will it be contended that, from such relation, a mutual agency would be presumed, authorizing each partner to bind the other, to the payment of their former debts? I presume not. Can it vary the case in any degree, that instead of such a business as I have supposed, they resumed and continued the same kind of business, that they had pursued prior to their bankruptcy? Really, it seems to me, none whatever. The business of the several periods was entirely distinct and separate, the one from the other. The decree in bankruptcy placed a partition wall between them, which never could be broken down, except by the positive acts or express declarations of *both* the parties.

But further discussion on this point must be unnecessary It is, after all, resolvable into the single question, whether or or not the partnership was dissolved by the bankruptcy proceedings; and that it was, is not denied.

That the defendants may have, immediately after the dissolution by bankruptcy — *eo instanti*, as the plaintiff's counsel contend, entered into and continued to carry on, *similar* business, can make no difference. Whether they did so, in one hour, a day, a week, or a year after the dissolution is unimportant. The business which should succeed the bankruptcy, could have no relation to that which preceded it.

We will now proceed to inquire whether one partner, by

his acts, acknowledgements or agreements, can bind his copartners, without their assent, *after* a dissolution.

This question has most frequently arisen in cases where it has been sought to revive partnership debts, which were barred by the statute of limitations. It was long held in the English courts, that the acknowledgments or agreements of *one* partner were sufficient to take a case out of the statute. The rule was apparently founded, says Judge *Story*, upon a mere unreasoned decision in the time of Lord *Mansfield*; and so manifest was its injustice, that it was overturned by an act of Parliament. Story on Part. 461. In our own country, although the English rule was followed, formerly, in most of the states, yet it may now be said, that the weight of authority greatly preponderates against it. It certainly cannot be defended upon the familiar principle, which, in relation to existing partnerships, makes the acts and declarations of one partner binding upon the others; because, on the termination of that relation, the supposed confidence created, and agency conferred by it, are necessarily withdrawn. *Bell* v. *Morrison*, 1 Pet. R. 373.

*Bell* v. *Morrison* is a leading case upon this point. Many of the previous cases, English and American, are there reviewed; and the rule laid down in *Hackley* v. *Patrick*, 3 Johns. R. 537, is adopted,—that after a dissolution of a copartnership the power of one partner to bind the others wholly ceases. This doctrine is affirmed in Ang. on Lim. 277; *Baker* v. *Stackpole*, 9 Cow. 420; *Walden* v. *Sherburne* 15 Johns. R. 409; and 3 Kent's Com. 50.

Our conclusion, then, upon this branch of the case is, that by the evidence adduced upon the trial, under the rules of law applicable thereto, Gillett had no power or authority to bind Desnoyers, by the certificate which he made and delivered to the plaintiff; and consequently, that no recovery can be legally had thereon, in this action against the defendants jointly.

For the determination of the present case, it is unnecessary to consider the other points made by the defendant's motion; but as the question is properly before us, and that further litigation may be prevented, we propose to consider briefly, whether, for any of the proposes for which it was offered by the defendants, the testimony of Eardly Ives should have been left with the jury and considered by them, and whether it was erroneously withdrawn after it had been submitted.

I remark, before proceeding further, that we do not intend to trench at all upon the well settled rule, that parol evidence is inadmissible to contradict, vary, or explain a written instrument, capable of explanation by its own terms. That rule is founded in a sound and wise policy, and should be adhered to with unrelaxing tenacity. Its effect is essentially that of a statute of frauds and perjuries, and it largely tends to promote the ends of justice, as well as to prevent hard and unconscionable swearing.

The defendants insist that the testimony of Ives, if believed, proved conclusively, that the certificate never was delivered to the plaintiff,—that is, in a technical, legal sense; that it was in fact placed in his hands for the sole purpose heretofore mentioned, and never was designed by Gillett to become operative as a contract; and that the plaintiff well knew such to be Gillett's understanding of the transaction, and *professedly* acted upon that understanding himself, in obtaining possession of the instrument. Was such proof competent? The circuit court, as we have seen, adjudged it incompetent, as falling within the rule just alluded to which excludes parol evidence. But does it so? That rule is based upon the presumption, that where parties reduce a contract to writing, they place their *whole* contract, as finally settled and agreed to between them, in that form;—that all the conversations and propositions, had and made, on one side or the other, pending the

negotiation, and not found in the instrument adopted as the evidence of their agreement, were rejected. But it is to be kept in mind that the rule applies only to instruments which have a legal existence. 1 Greenl. Ev. 322. Hence, it has never been deemed an infraction of it, to show that an instrument, though full and complete in its terms, and although found in the hands of the obligee or payee named therein, was never delivered; or that it was obtained by fraud; or that it was delivered as an escrow; or to take effect on a contingency, which has not happened. Cow. & Hill's notes to Ph. Ev. 1450; *Roberts* ads. *Jackson*, 1 Wend. 485; 1 Greenl. Ev. 322. So it has been held competent to show that a contract was obtained in an unwarrantable manner. In *Roberts* ads *Jackson*, Chief Justice *Savage* says that it is always competent to show that a deed was delivered as an escrow, or that the grantee obtained possession of it in an improper manner. This must of necessity, he adds, be shown by parol: and this species of evidence has never been considered as coming within the rule which rejects parol proof, when offered to contradict a deed. The proof in all these cases is received, not for the purpose of contradicting or varying the effect of an instrument in writing, but to show that it is entirely void, or that it is not of binding force. And here, undoubtedly, lies the line of distinction. Where parol evidence is offered to show that the written contract is void, or not of binding force, it is admissible; but if the object be to prove that it was intended to mean something different from what its language imports, it is inadmissible. As for instance, that a contract on its face payable in money, was meant to be payable in some commodity; that a note made payable in six months, was to be paid in a year; that a note for $1,000 was intended to be for $500 only; or that a note bearing interest on its face should not carry interest and the like.

In the case at bar, the effect of the testimony submitted to the jury and subsequently withdrawn was, not to contradict, or in any respect to vary or explain the terms of the instrument, but to show that it never was designed to be an operative contract to any extent or purpose whatever; that it was not made or delivered by Gillett with that view, and not so received by Atwood. Was not the evidence admissible for that purpose? Did it not show that the certificate had no legal existence, *as a contract?*—that it had no binding force? If it be said that the parol proof *contradicted* the writing, it may be replied, just so would proof that it never was delivered at all, or that it was obtained by fraud, or delivered as an escrow; and yet no one doubts the admissibility of proof of those facts.

Suppose Platt, the commissioner in bankruptcy, had requested the plaintiff to call on the defendants for such a certificate, for the purpose stated by Ives, and that he had done so, communicated the request, and received from the defendants the certificate, and that instead of delivering it to Platt, he had commenced a suit upon it? Would not evidence of the facts supposed have been admissable in defence of such suit? Most clearly. For although there would have been an *actual physical* delivery of the instrument to the payee named, yet there would have been no *such* delivery as is requisite to give legal vitality to a written instrument, *as a contract.* But again, for illustration, let us suppose that it had been agreed by the parties, that Gillett should make such a certificate as he did, and for a like purpose, and that the plaintiff's *clerk* should take it to Platt; that it should be delivered to such clerk by Gillett, with the expectation that he would take it to the commissioner; but instead of doing this he should carry it to the plaintiff, and the plaintiff should put it in suit. Could not the defendants prove such facts, and upon them successfully defend the action? They could be-

yond question. Well, the case supposed is an exact parallel to the one before us. That the plaintiff's *agent* should receive the paper instead of the *plaintiff himself* could make no difference. There still would be no delivery to the plaintiff in a *legal* sense,—in either case the plaintiff or his clerk, would be but the bare medium or channel through which the instrument was to be transmitted to the commissioner in bankruptcy.

We may apply another test to this case, which I think places the question under discussion beyond controversy. Suppose instead of saying to Gillett that he wanted the certificate to use before the commissioner, the plaintiff had told the defendants that he wished to obtain from them a renewal of their indebtedness to him, and wanted their certificate or other writing, to that effect. Can it be believed, with the evidence we have before us, that Gillett would have delivered it? Certainly not. How then can it be a contract as against the defendants? It lacks the very first element of a contract—the agreement, the consent of the party to be bound by it. The minds of the parties never met upon it, as a contract.

The idea of a new promise to revive the discharged debt, seems never even to have been hinted at; on the contrary, the plaintiff, as Ives testified, told Gillett expressly, that the certificate could not "hurt *him* any how:" the whole negotiation, from beginning to end, through all their several conversations, seems to have been confined to a single object—the furnishing to the plaintiff convenient proof, to enable him to receive his dividend from the assignee in bankruptcy.

The very form of the instrument which was drawn up by Gillett, strongly fortifies the presumption that this was the only purpose for which the paper was made and delivered:—"This may certify that there is due," &c. Can it be credited that a practical business man, a mer-

chant, having adjusted accounts with his creditor, and found due the large sum of $1,300, and being about to furnish him with the evidence of his debt, would draw such an instrument as was given by Gillett to Atwood? Would Atwood have accepted such a paper? If it had been understood between them, that the defendants were renewing their liability to pay the debt, would not Atwood have been likely to insist upon an instrument that was usual among mercantile and other business men? Would not a promissory note have been the form of the contract? Would not Gillett, voluntarily, without anything being said on the subject, have written a note, in common form, if he had intended to bind himself to pay the debt? To have done otherwise would have been extraordinary, to say the least. But if the only object of the instrument was as stated by Ives, to apprise Mr. Platt of the amount of the plaintiff's claim against the defendants, the form adopted was perfectly appropriate.

I am not now speaking of the *construction* of the instrument. If it were a contract at all the construction given it by the circuit court, was, probably, the correct one. I allude to the peculiar phraseology used, only as it bears upon the question of delivery.

The case of *Howell* v. *Baker*, decided by this court at a former term, was cited by the counsel for the plaintiff and relied upon for our guidance in this. But I think there is a clear and well defined distinction between that case and the one at bar. There was no pretence in that case that the note was not delivered by the maker to the payee, as a valid and binding contract; but it was sought to show by parol, that at the time the note was made, it was agreed by the parties that the maker should have the right to return the money or bank notes for which it was given, by the next Monday morning, or pay it according to its terms, in one year from date with interest. I

need not recur to the facts of this case, to show the marked difference between it and the one just referred to.

We have given this case a very full and careful examination; every authority to which we have been referred, by the counsel on either side, has been closely scanned and, we think, received its just weight.

The thorough and extended research of authorities by the counsel of both parties, as well as their clear, elaborate and forcible argument of the case at the bar, has relieved us of much labor that, otherwise, we must have encountered, and has greatly facilitated our progress in arriving at what we believe to be a legal and just conclusion, from the facts presented by the case for our consideration.

It has been with great satisfaction, that in a case so important as the present one, we have found the opinion of the court entirely harmonious, upon the points decided; and the opinion, which we direct to be certified to the circuit court for the county of Wayne, in answer to the questions reserved by that court, is, that the testimony of Ives was admissible, and the certificate in question, under the facts testified to by him, was wholly inoperative and void, as a contract between the plaintiff and the defendants, or either of them; and that the verdict, therefore, should be set aside, and a new trial granted.

*Ordered certified accordingly.*

## LATHROP v. HICKS.

*It seems* that this Court will not relieve a plaintiff in error against the consequences of his neglect to cause the transcript of the record of the court below to be filed within the time required by the eleventh rule, unless the neglect is fully explained and excused.

Even upon affidavit of his attorney, that, in his opinion, there was good and legal ground for suing out the writ of error; and that, if the case should be heard on its merits, the judgment below would be reversed.

And that it is no sufficient excuse of the neglect, that, when the writ of error was served, the clerk of the court below promised to make out the transcript and deliver it to the attorney, within the time required by the rule; that the attorney relied upon this promise, and the neglect occurred in consequence of the clerk's failure to perform it.

Motion for such relief, founded upon such affidavit of merits and of facts to excuse the neglect. A counter affidavit was offered, showing that the error relied upon for reversal of the judgment, did not go to the merits of the original action, and that the party making the motion had withdrawn his plea in the court below, suffered the judgment to be thereupon entered against him by default, and stipulated for and obtained, stay of execution, without pointing out the error to the opposite party, who was ignorant of it. *Held*, that the counter affidavit might be read, as it merely went to show that it would be against good faith for the party to avail himself of the error, and did not deny the legal merits sworn to in support of the motion.

And upon the whole case made by both the parties, the court denied the motion, and ordered the cause docketed and dismissed.

Counter affidavits may be read in opposition to a motion, without having been served.

HICKS, as endorsee, brought assumpsit against Lathrop, as maker, of a promissory note; but omitted to describe the note in the declaration, as containing words of negotiability. Lathrop plead the general issue. The cause was noticed for trial at the May term, 1844, of the circuit court. At that term the parties, by their respective attornies, entered into a written stipulation, to the effect that Lathrop should withdraw his plea, and, in consideration

thereof, Hicks agreed that no execution should issue on any judgment which might be rendered in the cause, until the November term (then next) of the circuit court. The plea was thereupon withdrawn; judgment on default was entered in favor of Hicks for the amount of the note; and no execution was issued thereon, until after the time specified in the stipulation.

On the 26th day of April, 1845, Lathrop sued out a writ of error to reverse the judgment, returnable into this court on the first day of the present term. The writ was duly served on the day it issued; but no transcript of the record of the court below having been filed in this court, and the time allowed by the eleventh rule for filing the same having elapsed,

*J. M. Howard*, for the plaintiff in error, now moved for leave to file the transcript; and

*S. T. Douglass*, for the defendant in error, moved that the cause be docketted and dismissed. These motions were heard together.

It appeared from the affidavit of Mr. *Howard*, in support of the first motion, that he was the attorney for Lathrop in the court below, and served the writ of error; that at the time of the service, he requested the clerk of the circuit court to make out and deliver to him the transcript, within the time required by the eleventh rule of this court; which the clerk or his deputy promised should be promptly done; and also promised to inform the deponent when the transcript was ready; that deponent relied upon this promise, and supposed the transcript had been filed, until a short time previous to the present term; and that, in the opinion of deponent, the plaintiff had good and legal grounds for suing out his writ of error, and, if the cause was heard on its merits, the judgment below would be reversed.

In opposition to this motion, the counter affidavit of Mr. *Douglass*, the attorney for Hicks in the court below, was read, setting forth the facts above stated relative to the proceedings in the court below, and also that the deponent was ignorant of the omission of the declaration to describe the note upon which the action was brought, as containing words of negotiability, until after the writ of error was issued in this cause.

It was admitted on the argument that this omission was the error relied upon for reversal of the judgment below.

WING, J. delivered the opinion of the Court.

The statute allows a writ of error to be brought at any time within two years after judgment. R. S. 1838, p. 522, § 10. And the rules of this court require the plaintiff in error to cause a transcript of the record or proceedings in the court below, to be filed in the office of the clerk of this court, within forty days after such writ of error shall have been issued, if so many days intervene before the first day of the succeeding term of this court; Rule 11: and to file a special assignment of errors within ten days after the expiration of said forty days, and serve a copy on the attorney of the defendant in error. Rule 12. A compliance with the statute, and these rules, seems to be necessary to place the plaintiff well in court. The transcript in this case should have been filed by the 6th, and errors have been assigned by the 16th, of June last. This not having been done, the plaintiff in error now asks the court to grant him special leave to file the transcript, and to proceed in the cause.

This court undoubtedly has power, in the exercise of a sound discretion, so to mould and govern the operation of their rules as to prevent injurious effects in cases of accident, or even of neglect, where such accident is account-

ed for, and such neglect is fully explained and excused. It was formerly the practice of the courts of New York to set aside a regular default, on an affidavit of merits, only where the defendant could show some excuse for his default; although they do not seem to have been strict in examining the sufficiency of the excuse. Afterwards it appears to have been fully settled, that where no trial has been lost, the court would set aside a default, upon terms, on an affidavit of merits only. Grah. Pr. 788. More recently, however, the supreme court of that state have returned to the old rule, and the practice now appears to be settled, that a default for not pleading, will not be opened, unless excused. 6 Wend. 517, 1 Hall's R. 54. In Dowl. Pr. Cas. 134, it is said, in reference to judgment of non-pros, that if the default be regular, the court will not set it aside of course, but will require an excuse, and will impose costs as a condition of opening the judgment. Courts will be less liberal in relieving against this than against ordinary default, because writs of error ought not to be encouraged, and because the court can impose no terms upon the party, unless it be to assign errors instanter. It has very little analogy to a default for want of plea, but more nearly resembles a non-suit or non-pros of a plaintiff, which is never set aside unless upon some good excuse shown.

The merits sworn to in support of this motion are mere *legal* merits. The affidavit of Mr. Howard, who was the attorney, for Lathrop in the court below, does not disclose what is the error complained of, or that there was any defence to the merits of the action in the court below, but merely that, in the opinion of the deponent, Lathrop had good and legal grounds for suing out the writ of error; and that if the cause was heard on its merits, the judgment below would be reversed. This would embrace every ground for suing out the writ of error, on which

the judgment might be reversed, however technical, and however inequitable it might be for the party to insist upon it.

As to the excuse shown for the neglect to file the transcript within the time required, we think it can hardly be received. No excuse could be much less reasonable than that offered. The attorney appears merely to have served the writ of error upon the clerk of the circuit court, and to have obtained the clerk's promise to make out the transcript promptly, and to deliver it to him within the forty days allowed for filing it, and also to inform him when it was ready. But did the duty of the attorney end here? Did the undertaking of the clerk relieve him from the necessity imposed upon him by the rule, of seeing to it that the transcript was actually made out and filed in this court within the forty days? The promise of the clerk was doubtless made in good faith; and, for any thing that appears in the case, he may have made the transcript promptly; but, as the rule did not impose upon him the duty of filing it, the attorney was bound to obtain and file it himself.

Were there no other facts in the case, except those which appear in Mr. Howard's affidavit, we should feel strongly inclined to deny the motion of the plaintiff in error, on the ground of the insufficiency of the excuse shown for the neglect to file the transcript. But we do not choose to rest our decision on this ground solely. Further facts appear in the counter affidavit of Mr. Douglass, the attorney for the plaintiff below.

On the hearing, it was insisted, that as merits were sworn to in support of the motion, this counter affidavit could not be received. It is true that, on a motion to open an ordinary default, affidavits in opposition to an affidavit of merits are inadmissible. *Hanford* v. *McNair*, 2 Wend. 286. Anon. 1 John. R. 313.

But the affidavit of Mr. Douglass does not deny the merits sworn to. It expressly admits that there is error in the record. Its purpose is to show such a state of facts, as renders it bad faith for the defendant below, to take advantage of the error. We think the affidavit should be received. Such an affidavit was received for a similar purpose, in *Quinn* v. *Riley*, 3 John. R. 248.

The reading of this affidavit was further objected to, on the ground that no copy of it had been served on the attorney for the plaintiff in error. But we are of opinion that no service was necessary: counter affidavits, in opposition to a motion, may be read without having been served. *Strong* v. *Planter*, 5 Cowen, 21; *Campbell* v. *Grove*, 2 John. Cas. 105.

It appears from this counter affidavit, that there is a defect in the record of the court below, consisting in the omission of the declaration to describe the note as payable to order, or bearer—(which defect, Mr. Howard admitted on the argument, was the one relied upon for reversal of the judgment)—but that, while the cause stood at issue, and ready for trial in the court below, a written stipulation was entered into between the parties, by their respective attorneys, whereby Lathrop withdrew his plea, and Hicks, in consideration thereof, agreed that execution should be stayed, on any judgment which might be rendered in the cause, until the then next term of the circuit court; that judgment was thereupon entered against Lathrop by default, on which execution was stayed according to the stipulation. The affidavit further states, that the deponent was ignorant of the defect, until this writ of error was sued out. Now, it is well settled that the court will not relieve a defendant against a default, where he lies by and allows an inquest to be taken, supposing the plaintiff's proceedings to be irregular. Grah. Pr. 294, 1 Wend. 284; 8 Bing. 144. Again, it is said, that as it

is wholly in the discretion of the court to open a default, or not, they will not set aside a regular judgment in order to give a defendant an advantage of any nicety of pleading. Grah. Pr. 788; 2 Strange 1242. Nor will they do so in cases where there is an implied want of good faith. *Cave* v. *Mosey*, 10 Eng. C. L. R. 218. In this case, the defect relied upon for reversal of the judgment, does not go to the substantial merits of the action; and we think that after entering into the stipulation by which he withdrew his plea, and obtained stay of execution, after silently, and without objection, suffering judgment by default to be rendered against him, it is at least against good faith, for Lathrop to avail himself of such a defect, on error. Upon the whole case, then, we are of opinion that the ends of justice would not be promoted by granting leave to the plaintiff in error, to file the transcript. We therefore refuse to grant his motion, and order that the cause be docketed and dismissed.

## Joseph Orr v. David Lacey.

In assumpsit, by the first endorsee, against the endorser of a bill of exchange, *it was held*, that the acceptor, for whose accommodation the bill was drawn and endorsed, and who first negotiated it to the plaintiff, was a competent witness for the defendant, to prove facts which would render the bill void.

A corporation possesses only those powers conferred upon it by its charter.

The contract of a corporation, unauthorized by, or in violation of its charter, is void.* And so will be a new contract growing out of it, and not founded upon a new consideration.†

If, therefore, a bank, on discounting a bill of exchange, corruptly reserves greater interest than it is authorized by its charter to receive, the bill will be void. And so, also, will be a new bill given in renewal of the balance due on such previous illegal one.

Where the transaction, on its face imports the reservation of excessive interest, there is no room left for presumption: the intent is apparent. Where however, it is fair on its face, the law will not infer an intent, or a corrupt agreement, to take illegal interest, in violation of the charter; but this must be clearly established. And the question of intent, is, in such cases, a question for the jury.

Our courts will not lend their aid to enforce a contract made with a corporation of another state, in violation of its charter.

Motion, by the defendant, for a new trial, reserved from Berrien circuit court. The facts are fully stated in the opinion.

*J. S. Chipman*, in support of the motion.

*N. Bacon, and J. B. Niles*, contra.

Whipple, J. delivered the opinion of the Court.

This was an action of assumpsit, upon the following bill of exchange, endorsed by the defendant, and accepted by Obed P. Lacey:

* See *Bank of Michigan* v. *Niles*, 1. Doug. Mich. R. 401. *Hurlbut* v. *Britain* *Ante*. 191. † See *Smith* v. *Barstow*, *Ante*. 155.

"$3,842.00. Niles, Michigan, Sept. 21, 1840.

Six months after date, please pay to the order of *David Lacey*, at the City Bank, New York, three thousand, eight hundred and forty two dollars, and charge the same to the acc't of Your ob't. serv't.,

To *Obed P. Lacey, Esq.* *Elijah Lacey.*"

It was admitted on the trial, that the action was brought for the benefit of the Branch of the Indiana State Bank, at Michigan City, the real holders of the bill.

After the evidence on the part of the plaintiff had been closed, the defendant offered Elijah Lacey, the drawer of the bill, as a witness: he was objected to by the plaintiff, as incompetent; but the objection was overruled, and he thereupon proceeded to testify, in substance, that the bill on which this action was brought, was drawn and endorsed for the accommodation of the acceptor, Obed P. Lacey, to be used for the renewal of the balance due on two other bills of the following tenor:

"$3,000.00. Niles, Michigan, Feb. 1, 1840.

Five months after date, please pay to the order of *Wm. B. Beeson & Co.*, three thousand dollars at the Bank of America, New York City, and charge the same to the acc't. of Your ob't. serv't.,

To *Elijah Lacey, Esq.* *O. P. Lacey.*"

The other bill was like the above, except that it was dated the 14th April, 1840, was for $2,000, and was payable ninety days after date. Both bills were endorsed by the payees, and accepted by Elijah Lacey. The witness further testified that they were accepted, and endorsed, for the sole benefit of Obed P. Lacey, for the purpose of enabling him, by procuring them to be discounted in the ordinary manner, to raise money to stock a mill which he was then carrying on.

The deposition of D. G. Collamer, was then read in evidence, by which it was shown that he was the cashier

of the Michigan City Branch of the State Bank of Indiana, on the days when these two bills respectively bear date; and that the one bearing date the 1st February 1840, was negotiated by the said Branch Bank, by authority of the exchange committee: *that the consideration was Indiana Bank notes, less the regular rate of interest.*

Obed P. Lacey, was then introduced as a witness, (having been released by the defendant,) and was objected to by the plaintiff on the ground of incompetency: the objection was overruled by the court, and the witness was then sworn, and testified in substance, that the Michigan City Branch Bank negotiated for him the bill dated 1st February, 1840; that he received the sum of $3000, less the discount of 6 per cent. in the bills of various Branches of the State Bank of Indiana: that he afterwards negotiated the bill dated April 14, 1840, at the same Branch, and received therefor the like funds, after deducting six per cent. The witness further stated that after the bills were protested, he gave to the Bank a draft of $1500, upon Eli Hart & Co., of New York, which was paid on the 15th Aug. 1840: The witness here introduced a letter dated July 31st, 1840, from A. P. Andrews, cashier, to him, in which Andrews proposed, in behalf of the board of directors, that by his renewing the balance due on the bills, including exchange, after deducting the $1500, no damages would be charged on them.

Another letter from the cashier to the witness, was then produced, dated Sept. 10, 1840, as follows: "Yours of the 6th instant is received, and has been laid before the board. They have authorized me to say to you that the time you ask (6 months) will be extended to you, by your giving your acceptance, with your two brothers, one as drawer, and the other as endorser, payable at New York, your paying or including in said bill the *damages* on the

present protested paper, to the amount of $3,500, and the interest for 6 months." Another letter from the cashier to the witness was then introduced, dated 17th Sept. 1840, stating in substance that the bearer of the letter, Mr. Daniel Brown, was one of the directors of the Bank, and entrusted with the adjustment of the claims of the Bank against him. The witness then proceeded further to testify, that he proposed to Brown to give the Bank a promissory note for the amount due, with sufficient sureties, payable at the counter of the Bank; that Brown declined the proposition, insisting on a bill payable in the City of New York, alleging as a reason, that the Bank could not afford to lay out of her money for six per cent. interest. That in reply, witness stated that, as the damages on a protested bill were ten per cent., renewing the bill every ninety days, would subject him to forty per cent. interest in one year; to which Brown replied that the law of Indiana allowed only five per cent. damages: That finally, Brown consented to take a bill at six months, so that it could be returned but twice in one year. The witness further testified that the bill declared on included the principal and interest due on the old bills, five per cent. damages, and interest at six per cent. during the time the new bill had to run; and that interest was calculated on the gross amount, inclusive of damages. It also appeared in testimony by the witness, that on giving to Brown the bill declared on, the old bills were surrendered.

John H. Porter, a witness on behalf of the defendant, testified that the bills of the Branches of the State Bank of Indiana, were, in 1840, at a discount of from eight to ten per cent., and that the difference of exchange between Niles, Michigan, and New York, was from eight to ten per cent.: he testified, further, *that Indiana money was then at par in business transactions, and that some preferred Indiana to Michigan funds.*

Rodney C. Payne, cashier of the Branch of the Farmers and Mechanics' Bank of Michigan, at Niles, corroborated the testimony of Porter, and, in addition, stated that Indiana money was good and safe, and at par in business transactions, and that he received it in payment of debts due the Farmers and Mechanics' Bank, but seldom paid it out.

Ezekiel Morrison testified that, in the spring of 1840, he paid five per cent., as the difference between specie and Indiana notes, and that the common rate was six per cent.: that the Indiana Banks suspended specie payment in July 1840, and that their notes were at a discount of from eight to ten per cent. until March 1841, but were at par in ordinary business transactions, and constituted the principal circulating medium of the country. The witness further testified that he was, in the spring of 1840, a director of the Michigan City Branch Bank, and never knew the Branch to pay out or receive Indiana Bank notes at a discount.

The laws of New York, and Indiana, as well as the charter of the Bank, were by stipulation admitted as part of the evidence in the cause.

Upon the evidence the court charged the jury as follows:

1st. That the contract declared on and proved, was to be governed by the laws of Michigan, and that if they found it usurious, they must render a verdict for the plaintiff for the whole amount of principal and interest due on the bill, less three times the excessive interest:

2d. That if the jury believed from the evidence, that O. P. Lacey applied to the bank for a loan of money on the bills of the date of 1st February, and April 14, 1840, and that said bills were made for the purpose of discount merely, and had no real existence prior to their negotiation at the Bank, and that the Bank discounted said bills

by paying to Lacey the amount specified therein, less the discount of six per cent. in the notes of other Branches of the State Bank of Indiana, which were at a discount in Michigan City, and did not offer Lacey, for whose benefit the bills were discounted, specie or its equivalent; and that the Bank resorted to this mode of discounting the bills, for the purpose of evading the law against usury, then the contract was usurious.

A verdict was rendered for the plaintiff for the sum of $4,313,60; from which, as was stated upon the argument, it was clear that the jury found the contract declared on usurious, and gave a verdict for the whole amount of principal and interest, less three times the excessive interest, according to the laws of this State.

A motion was made for a new trial, by the defendant, on the alleged grounds:

1st. That the court erred in admitting Obed P. Lacey to be sworn as a witness in the case; and

2d. That the contract declared on, is governed by the laws of New York, or Indiana, which declare all contracts infected with usury, absolutely void, and that, therefore, the charge of the court, which declares that the contract was to be governed by the laws of Michigan, was erroneous.

Before entering upon the discussion of the first question, it becomes necessary to recur to the facts, in order that there may be no misapprehension as to the extent or application of the rule to be laid down, respecting the admissibility as a witness, of a party to a negotiable instrument. From the evidence before us, it appears that the present action is by the Bank, the endorsee of the bill, against the drawer; and that the acceptor of the bill, for whose benefit the bills of February 1st, and April 14th, 1840, were discounted, was the person introduced as a wit-

ness in behalf of the defendant, to show a defence under the plea of the statute of usury.

If that part of the charge of the court which asserts that the contract declared on, was a Michigan contract and governed by the laws of Michigan, be correct, it is not perceived that any legal objection to the competency of O. P. Lacey as a witness could be taken, inasmuch as by the laws of Michigan, the contract could not be *void*, although tainted with usury. But as we entertain an opinion upon this point different from that expressed by the court below, and have come to the conclusion, that if the contract was founded upon a usurious consideration, it was *originally void*, we are necessarily led to consider the question, whether in this view of the case, O. P. Lacey was a competent witness. It is to be observed, also, that the bill in question was not negotiated, until actually delivered by O. P. Lacey, the acceptor, to Brown, who was the agent of the Bank; and the same remark will apply to the bills of February 1st, and April 14th, which were never actually negotiated, until delivered by O. P. Lacey to the Bank, for the purpose of discount. The question, then, upon which we are to pronounce a judgment, may in short, be thus stated: In an action on a bill of exchange, brought by the first endorsee, against the drawer, is the acceptor a competent witness to show it *void*; the bill having been originally negotiated by the acceptor, and for his sole benefit, by delivering it to the endorsee for the purpose of discount? The general question, respecting the competency of a party to a negotiable instrument, to be admitted as a witness to prove it void at its inception, has been discussed with great ability both in England and in this country, and has been the subject of careful examination and repeated decision by many of the ablest judges who have adorned the bench at home and abroad. These decisions show that

courts distinguished for their learning have divided in opinion upon the question. Under these circumstances, we must adopt such a rule, as, from a critical review of the cases, appears most just and reasonable, and in accordance with those principles, by which the competency of witnesses is usually tested.

It is not to be expected that all the cases upon this vexed question will be noticed. I shall content myself with an examination of such as have come under my observation, and which develope, most fully, the reasoning adopted by judges in favor of and against the admission of a witness under the circumstances, and for the purpose stated.

The first case to be found in the English reports, and that to which almost all others refer, is that of *Walton and others, Assignees of Sutton* v. *Shelley*, 1 *T. R.* 296. That was an action on a bond given by the defendant to Sutton, to which there was a plea of *non est factum*, and another of the statute of usury. It was proved by one witness for the defendant, that the bond was given in consideration of the delivery up of two promissory notes made by a Mrs. Perry, payable to one Birch or order: the one endorsed by Birch and Davenport Sedley, the other by Birch, Corbin and Davenport Sedley, to Sutton. Davenport Sedley was then called by the defendant to prove that the consideration of the notes was usurious. But the evidence was objected to on two grounds; 1st. That he was called to invalidate a security which he had given; and that an endorser of a note, independently of any question of interest, could not be permitted to prove a note void, that he himself had endorsed: 2dly. That he was interested in the question which was meant to be put to him. Mr. Justice *Buller*, before whom the cause was tried rejected the witness, and upon a motion to set aside the verdict and grant a new trial, Lord *Mansfield*,

Chief Justice, in delivering his opinion, said: "In this case, it seems to me that the witness had no interest in the present question, for either way he is discharged. If the bond be good, it puts an end to the notes; if bad, the same ground that vacates the bond, vacates the notes: therefore, in point of *interest*, I think there is no objection to his competency. But what strikes me is the rule of law founded on public policy, which I take to be this; that no party who has signed a paper or deed, shall ever be permitted to invalidate that instrument which he hath signed; and there is a sound reason for it: for a party who has signed a paper gives a credit to it. It is of consequence to mankind that no person should hang out false colors to deceive them, by first affixing his signature to a paper, and afterwards giving testimony to invalidate it. And therefore, when a man signs those instruments, (notes) he is always understood to say, that, to his knowledge, there is no legal objection whatever to them." *Willis, J.* after re-stating the ground assumed by Lord *Mansfield*, concluded his opinion by saying, that "the present case falls within the general rule, that no man shall be permitted to allege his own turpitude in having given credit to a false and illegal security." The same course of reasoning was adopted by *Ashurst* and *Buller*, Justices, in pronouncing their judgments.

This decision was subsequently reviewed in the King's Bench, in the case of *Jordaine* v. *Lashbrooke*, 7 *T. R.* 599; and although the question was argued with distinguished ability by eminent counsel, who invoked the great name of Lord *Mansfield* in support of the doctrine laid down in the case of *Walton* v. *Shelley*, the court nevertheless overruled the authority of that case, and decided, that, in an action by an endorsee of a bill of exchange, against the acceptor, the latter may call the payee as a witness to prove that the bill was void in its creation.

The opinion of Lord *Kenyon*, C. J. shows that the question was not new to him, having arisen before him at *nisi prius*, where he had invariably expressed an opinion opposed to that of Lord *Mansfield* in the case of *Walton* v. *Shelley*. His opinion in the case of *Jordaine* v. *Lashbrooke*, is distinguished by a force and clearness of reasoning, well calculated to shake the foundation upon which the authority of the case of *Walton* v. *Shelley*, rests. In the course of his opinion, Lord *Kenyon* says, "The proposition attempted to be established by the plaintiff is this; that for some technical reason, or for some reasons of policy, a court of justice must shut its ears and not suffer facts to be disclosed, which may be laid before them by a witness who is not infamous in his character, and who has no interest in the cause. If the law be so, there is some novelty in it. I have always understood the rule to be that where a witness is infamous, and his record of conviction is produced, or where he is interested in the event of a cause, he cannot be received: but to carry the rule beyond that would be extending it further than policy, morality, or the interests of the public require." Mr. Justice *Ashurst*, who participated in the decision of the case of *Walton* v. *Shelley*, adhered to the views expressed by him in that case, but the other justices, *Grose and Lawrence*, delivered opinions coinciding with that of the Chief Justice. In the course of his opinion Mr. Justice *Ashurst* made use of the following language: "The great source of the flourishing state of the kingdom is its trade and commerce; and paper currency, guarded by proper regulations and restrictions, is the life: and I cannot but think that it might be very detrimental to the commerce of this kingdom, and to paper credit, if men, after they have put their names upon a bill of exchange, and, by that means, as far as in them lay, given it a credit and a currency in the world, should be permit-

ted to annul their own act, to practice a fraud upon the world, and to give the lie to what they have attested, and thereby overturn their own security." Commercial policy, seems to have been the ground on which he was of opinion, that the decision in the case of *Walton* v. *Shelley* should be sustained. The force of the reason will be admitted, when it is considered, that upon her trade and commerce depends to a great extent the prosperity of Great Britain, and that bills of exchange enter into almost all important commercial transactions. This course of reasoning, might very well influence the course of decision in England upon the question before us, and warrant the adoption of a rule there, which would be inapplicable here. The rule as settled in the case of *Jordaine* v. *Lashbrooke*, that a party to a negotiable instrument is a competent witness to prove any fact, to which any other witness would be competent to testify, provided he is not otherwise legally incompetent, has been acquiesced in, and is believed to be the established doctrine of the English Courts at the present day.

In the case of the *Bank of the United States* v. *Dunn*, 6 Peters 51, the Supreme Court of the United States affirmed the doctrine laid down in the case of *Walton* v. *Shelley*. Mr. Justice *McLean*, in delivering the opinion of the court remarked that, it was a well settled principle, "that no man who was a party to a negotiable instrument, shall be permitted, by his own testimony, to invalidate it. Having given it the sanction of his name, and thereby added to the value of the instrument, by giving it currency, he shall not be permitted to testify that the note was given for a gambling consideration, or under any other circumstances which would destroy its validity. This doctrine is clearly laid down in the case of *Walton* v. *Shelley, and is still held to be law.*" In the case of the *Bank of the Metropolis* v. *Jones*, 8 Peters, 12, the rule laid down

in 6 Pet. 51, was reconsidered and affirmed. Mr. Justice *Barbour* after quoting from the opinion of Mr. Justice *McLean*, says, that the "doctrine of that case *is sustained by reason and authority.*"

The next case in order is that of *U. S.* v. *Leffler*, 11 Peters 86. It was there determined that the principle settled in the case of the *Bank U. S.* v. *Dunn*, "does not extend to any other case, to which the reasoning does not apply;" and the decision of the Circuit Court of the United States for the eastern district of Virginia, admitting the principal in the bond declared upon to prove that one of the co-obligors had executed the bond on condition that others would execute it, wasaffirmed by the supreme court.

The next and last case involving the question under consideration, is that of *Scott* v. *Lloyd*, 12 Peters 145. The supreme court of the United States in that case, held, that where the grantor of an annuity by deed, has conveyed all his interest in the property charged with the annuity, and an allegation of usury in the granting of the annuity is afterwards made, he may be a witness to prove usury.

In *Churchill* v. *Suter*, 4 Mass. R. 156, the facts were, that the defendant made a note payable to one Charles Copeland or order, which Copeland endorsed in blank; and which, to raise money, they delivered to one Bartlett, a broker, to negotiate in the market; who also endorsed it in blank, and sold it to the plaintiff. The question arose as to whether the endorsers were competent witnesses to prove an usurious consideration, under the facts above stated, and the further fact, *that Bartlett did not inform the plaintiff that the note was made to sell in the market*, and that the whole bargain consisted in a simple offer and acceptance of ninety four per cent. for the note. Chief Justice *Parsons*, in giving the opinion of the court, remarked, after a review of the English cases in respect to the admission

of a party to an instrument, as a witness, to prove it void in its creation, that, "no conclusion, on either side, can with certainty be drawn." The Chief Justice then says: "More than twenty years ago, after a full argument, the court unanimously decided that the testimony of the parties to the note should not be admitted; and the decision has been uniformly adhered to. In this court, therefore, there has been no diversity of practice: and if we admit the endorsers in this case, we must overturn a series of our own decisions." After considering the case in reference to public convenience and to private morals, in which the reasoning in the case of *Walton* v. *Shelley* is adopted, the Chief Justice further said that in the case before them, to admit the parties to the illegal contract as witnesses, would not tend to suppress fraud, but to encourage it, by enabling the parties to it to enjoy all the beneficial fruits of it, and to throw the mischievous consequences on an *innocent endorsee*. The decision in this case may well be upheld, on two grounds: 1st. The rule as established in the case of *Walton* v. *Shelley*, had been affirmed by the supreme court of Massachusetts, and acted upon for more than twenty years; and 2d. To permit the endorsers to prove the usury alleged, would be to enable parties to a fraud to throw the mischievous consequences of it on an *innocent endorsee*. In the case of *Fox* v. *Whitney*, 16 Mass. R. 118, it was held competent for an administrator, in an action against him, by the administrator of the promisee of a negotiable note, made by his intestate, to prove the note to have been given upon an usurious consideration; and that a person who had signed the note as surety, although not so expressed in the note, was a competent witness to prove such consideration. Chief Justice *Parker*, who delivered the opinion of the court, said, that the rule by which parties to notes were excluded from being witnesses, to discredit the security to which they had given currency, did

not apply to the case before them: that the principle on which the case of *Churchill* v. *Suter* rested, did not apply, because the note remained in the hands of the original promisee; and no innocent endorsee could be prejudiced, the contest being between the original parties to the illegal contract. In the case of *Packard* v. *Richardson*, 17 Mass. R. 122, the case of *Churchill* v. *Suter* was again considered, and the principle there laid down was re-affirmed. In the recent case of *Thayer* v. *Crossman*, 1 Metc. R. 416, the cases from Massachusetts above cited are reviewed, and the rule they established is stated and vindicated by Chief Justice *Shaw*.

The supreme court of New York, in the case of *Winter* v. *Saidler*, 3 John. Cas. 185, held, that a person is not a competent witness, to impeach the validity of a negotiable note, or instrument, which he has made or endorsed, though he is not interested in the event of the suit. It is worthy of remark, however, that the rule there established was in opposition to the opinions of *Kent* and *Radcliffe*, justices. The former, after a critical and able review of the English cases on the subject, rejects the authority of the case of *Walton* v. *Shelley*. The case of *Winter* v. *Saidler* was subsequently called in question, and finally overthrown, by a series of decisions in the supreme court of New York: (See *Stafford* v. *Rice*, 5 Cowen 23; *Bank of Utica* v. *Hilliard*, Id. 153; *Williams* v. *Walbridge*, 3 Wend. 415.)

The supreme court of New Hampshire, after a careful examination of all the reported cases, were of opinion "that the rule must be limited to cases, where the party to a negotiable instrument is called to testify facts which render the note void, *even in the hands of a bona fide endorsee, for a valuable consideration, without notice.*" *Bryant* v. *Ritterbush*, 2 N. H. Rep. 212. The authority of the case of *Walton* v. *Shelley* is confirmed in the case of *Deering*

v. *Sawtell*, 4 Greenl. R. 193; and *Chandler* v. *Morton*, 5 Id. 375. In the former case, *Weston*, Justice, said that a rule which had been so uniformly adhered to in Massachusetts and Maine, could not be called in question.

It would also seem that the rule as established in Massachusetts, Maine and New Hampshire, has been sustained by the courts of Pennsylvania, Louisiana and Mississippi. In Vermont the decisions have vacillated. The case of *Jordaine* v. *Lashbrooke* was followed in *Nichols* v. *Holgate*, 2 Aik. R. 138, but this decision is said to have been disapproved by all the judges, in *Chandler* v. *Mason*, 2 Verm. R. 198. The general doctrine of *Jordaine* v. *Lashbrooke* has been followed in New York; Virginia; (*Taylor* v. *Beck*, 3 Rand. R. 316.) Connecticut; (*Townsend* v. *Bush*, 1 Conn. R. 260.) South Carolina; (*Knight* v. *Packard*, 3 McCord, 71.) Tennessee; (2 Yerger, 35.) Maryland, (*Ringgold* v. *Tyson*, 3 Harr. and John. R. 172.) New Jersey; (*Freeman* v. *Buttin*, 2 Harr. R. 192.) North Carolina; (*Guy* v. *Hall*, 3 Murphy, 151.) Georgia; (*Slack* v. *Moss*, 1 Dudley, 161.) Alabama; (*Todd* v. *Stafford*, 1 Stew. R. 199.)

I have thus reviewed, at some length, a few of the many adjudications involving the important question before us, and stated as far as I have been able to do so, the rule which has been adopted by the courts of the several states. Before proceeding to examine the question upon general principles, it may be proper to correct a misapprehension which might arise from the language of the court in the leading case of the *Bank of the U. S.* v. *Dunn*. The doctrine of that case is said to be clearly laid down in *Walton* v. *Shelley*, and still held to be law. If the learned judge by whom that opinion was delivered, meant to affirm that the rule as laid down in *Walton* v. *Shelley* was still held to be law in England, it is apprehended, that the remark is not supported by any adjudged cases

to be found in the English reports, since the decision of *Jordaine* v. *Lashbrooke*. A brief examination of a few elementary works of approved authority, and a reference to adjudged cases, will prove, very conclusively, that the rule as laid down by the King's Bench, in *Jordaine* v. *Lashbrooke*, has been regarded and acted upon, as settled law in England, from the year 1798 to the present day. *Chitty*, in his treatise on bills of exchange, p. 413, states the general rule to be, that it is no objection to the *competency* of a witness, that he is a party to the same bill or note, unless he be *directly* interested in the result of the suit; and though it was formerly held, that no party should be permitted to invalidate an instrument he had signed, a contrary rule now prevails. In stating the rule laid down in *Walton* v. *Shelley*, *Phillips*, in Vol. 1, p. 43 of his work on evidence, says, that it appears to have been the first case in support of such a rule, and that the contrary seems now to be fully established. A party to a bill is competent to prove that it is void; although the contrary was once held. 1 Stark. Ev. 179. The rule now received in England, is, that the party to any instrument, whether negotiable or not, is a competent witness to prove any fact, to which any other witness would be competent to testify; provided he is not shewn to be legally infamous, and is not interested in the event of the suit. 1 Greenl. Ev. 429. *Peake*, in his law of evidence, considers the rule laid down in *Walton* v. *Shelley*, as no longer existing, after the solemn decision of the court in the case of *Jordaine* v. *Lashbrooke*.

In the case of *Jones* v. *Brook*, 4 Taunt. 464, tried in 1808, it became a question whether the wife of the drawer of the bill was a competent witness, in an action against the acceptor, to prove usury; the evidence of the wife having been received, a rule *nisi* was obtained to set aside the verdict, on the ground that the witness ought not to

have been admitted. *Best* and *Pell*, who showed cause against the rule, said, *arguendo*, that the question was decided by the authority of *Jordaine* v. *Lashbrooke;* since which the rule no longer prevailed, that a person could not be called to invalidate an instrument to which he had set his name. *Shepard* and *Vaughn* in support of the rule, said they would not attempt to combat the doctrine laid down in *Jordaine* v. *Lashbrooke*. *Mansfield*, Chief Justice, in the course of his opinion, uses this language: "An objection was taken to the witness, who was the wife of the drawer; and the objection was overruled, on the ground that it was now the practice to receive persons whose names are on bills of exchange, as witnesses to impeach such bills: and so it is, &c." The admissions of counsel, strengthened and supported by the eminent judge, who gave the leading opinion in the case of *Walton* v. *Shelley*, are conclusive to show, that in 1808, ten years after the decision of *Jordaine* v. *Lashbrooke*, the authority of that case had not been shaken. In the case of *United States* v. *Leffler*, 11 Peters 95, Mr. Justice *Barbour* remarks that "the case of *Jordaine* v. *Lashbrooke* overruled the case of *Walton* v. *Shelley*, by deciding that, in an action by the endorsee of a bill of exchange against the acceptor, the latter may call the payee as a witness, to prove that the bill was void in its creation; *and such is the doctrine which has since been held in England.*" These references prove, beyond doubt, that the case of *Walton* v. *Shelley* is not now, and has not been, law in England, for nearly half a century. And it certainly cannot be said to have been law in this country, when its authority has been denied by the highest judicial tribunals in several of the states of the Union.

Let us now examine the question on principle. *Mansfield*, Chief Justice, predicates the rule laid down in *Walton* v. *Shelley*, on public policy, which forbids a party who

has signed a paper or deed to give testimony to invalidate the instrument which he has signed: and it would seem, that the learned Chief Justice supposed, that the rule thus laid down, falls within the spirit of the maxim of the Roman law, *nemo, allegans suam turpitudinem, est audiendus.* Now in respect to this maxim, it is denied that any such exists; Gilman's Rep. 275–6. But admitting the existence of the maxim, which is certainly founded in sound morality and propriety, yet, with all due deference, it is apprehended, that the Chief Justice misapplied it to the case then before him. Evans, in a note to the translation of Pothier on Obligations, (Vol. 2, p. 276,) refers to the application of this maxim, by Lord *Mansfield*, in the case of *Walton* v. *Shelley;* and says: "I conceive, however, the real principle of the maxim is no more than that a person shall not found a claim, or defence, upon his own iniquity, and that it has no relation to the case of a witness; and, in fact, it must in general be very difficult to conceive that a person would be inclined, as a witness, to state his own misconduct, in opposition to the truth, unless he appeared to have some motive for doing so, connected with the event of the cause." Chancellor *Kent*, in considering the maxim, *nemo allegans, &c.*, says that "it is applicable to *parties* rather than to *witnesses;* and it goes no more to the exclusion of witnesses in civil, than in criminal cases." 3 John. Cas. 192. Such, unquestionably, is the true meaning of the maxim of the civil law, which has been incorporated into the common law, as it is liberally applied, both by the courts of common law and equity, in England and in this country. Let us now address ourselves to that principle of public policy, which excludes a party who has signed a paper or deed, from giving testimony to invalidate it. The reason given for the rule by Lord *Mansfield* is, that a person who signs such an instrument gives credit to it; and that it is of consequence to

mankind that no person should hang out false colors to deceive them, by first affixing his signature to a paper, and then afterwards giving testimony to invalidate it. How far the rule laid down by Lord *Mansfield*, has been adopted in practice by the courts in this country, will be seen by reference to the adjudged cases I have had occasion to refer to, in the progress of this opinion. It is sufficient here, to state, that it never has been applied, either in England or this country, to the extent which the general language used by Lord *Mansfield* would warrant. It has been frittered away, and restricted in its application, by almost all the decisions, to *negotiable instruments* in the hands of an innocent holder. In a well considered opinion by Chief Justice *Shaw*, (*Thayer* v. *Crossman*, 1 Metc. R. 416,) that able judge examined the rule, in order to ascertain its extent, limits and qualifications; and excluded from its operation the case, where an endorser was offered as a witness to prove a note paid before it was endorsed; the endorsement having been made after the note was due, and the action being by the endorsee against the maker. He denies, also, that the rule can be applied, as between the original parties, and to a note not negotiated and put in circulation. But it is unnecessary to multiply authorities to show, that the comprehensive rule laid down by Lord *Mansfield*, has been restricted in practice, to such an extent as to render it almost harmless. A few remarks as to the reason of the rule: If it is of consequence to mankind that no person shall hang out false colors to deceive them, by affixing his signature to a paper, and afterwards giving testimony to invalidate it, it is of greater consequence to mankind that violations of law, and fraud, should be detected and punished; and that courts should not, in the language of Lord *Kenyon*, "for some technical reason, or for some reason of policy, shut their ears, and not suffer facts to be disclosed, which may be

laid before them by a witness of irreproachable character, and not interested in the event of the suit." A forcible illustration of the danger and injustice of such a rule is stated by Lord *Kenyon* in the case of *Jordaine* v. *Lashbrooke:* "The rule contended for by the plaintiff," (says his Lordship,) "is this, that however infamously you (the defendant) have been used, whatever fraud may have been committed on you, whatever may be the right of other persons, if I, (the plaintiff,) the party to the fraud, can get on the instrument the name of the person who may be the only witness to the transaction, I will stand entrenched within the forms of law, and impose silence on that only witness, though he may be a person of unimpeachable character, and not interested in the cause." This illustration presents in a strong and clear light, the enormities which the adoption of the rule of exclusion laid down in *Walton* v. *Shelley* would sanction. We cannot put the seal of our approbation upon a doctrine fraught with so much mischief. We cannot sanction a rule of evidence which would shut out from investigation the thousand cases of fraud that are constantly occurring, and for which no remedy could be provided, if that rule is to be considered binding or obligatory. We cannot invite persons to come into our courts and expose violations of law and fraud, if he who violates the law, or perpetrates the fraud is to find security and shelter in some vague, and fanciful rule of policy. Again; it is admitted that the rule of exclusion adopted in *Walton* v. *Shelley* is an exception to the general rule by which the competency of witnesses is tested. It is of great consequence that that general rule should be preserved inviolate; and that exceptions should not be multiplied, unless demanded by a reason so strong and irresistible as to outweigh the reasons on which the general rule itself is founded. Once destroy the landmarks by which courts

are guided in determining the competency of witnesses, and we shall soon reap all the consequences which invariably follow a departure from a rule long established, well defined, and capable of instant and easy application. We shall be subjected to the uncertainties, inconveniences, and vexations, resulting from a series of inconsistent and vibrating decisions, from which we were rescued by the decision in the case of *Bent* v. *Baker*, 3 T. R. 34. The refined, subtle, and sometimes incomprehensible grounds, on which witnesses were rejected as incompetent, gave way to the rule which is now so universally adopted. We can now distinguish between that accurate and direct interest which goes to the competency of testimony, and that influence which merely affects the credit of it. The tendency of modern legislation, and the more recent adjudications in our courts, is rather to restrict, than enlarge the objections which go to the competency of testimony.

O. P. Lacey was not legally interested in the event of the cause. The original bills, as well as the one on which this suit was brought, were made and discounted for his exclusive benefit. The contract for discounting them was made between him and the real plaintiffs in this case: they were the original parties to the transaction. The drawer of the bill, who, for aught that appears, was in no respect conversant with the facts or circumstances respecting the negotiation of the original bills, is now sued, and offers to show by O. P. Lacey, the acceptor, that the contract declared upon is tainted with usury. The court below received his testimony, and I think, both upon principle and authority, that its ruling in this respect, was legal and proper.

2. The next question to be determined, is, whether that part of the charge of the court, by which the jury were directed, in the event that they found the contract declared upon was usurious, to render a verdict for the

plaintiff for the amount appearing to be due on the contract, less three times the excessive interest, can, upon correct legal principles be sustained. The instruction thus given to the jury, was founded upon the opinion that the contract was governed by the laws of this state, and not by the laws of New York or Indiana, which rendered void all contracts infected with usury. It is to be observed that the real plaintiff in this cause, is a corporation created by a law of the state of Indiana. The capacity of this corporation to make a contract, therefore, must be tested by that law. There is no doubt that the bank had authority under its charter, to discount the bills of the 1st February, and 14th April, 1840. The act of incorporation authorizes the bank "to discount, on banking principles and usages, bills of exchange, &c.;" and upon loans or discounts, the bank is also authorized "to receive six per cent. per annum, and no more." From the evidence in this cause it is clear, that no more than six per cent. was charged or reserved by way of interest, at the time the original bills were discounted: it is equally clear, that the bills or notes received by O. P. Lacey from the bank, were at a discount of from six to ten per cent.: and it is contended, that, although the nominal amount received in bank notes, less the discount of six per cent., was equal to the amount specified in the two bills of exchange, yet the transaction was usurious. The reasoning by which the defendant endeavors to sustain this conclusion, is, that the charter of the bank, contemplates that six per cent. and no more, can be reserved upon a loan of *money*, or that which is its equivalent in value. Thus, if a loan is asked of $100 for a year, and the bank gives to the person to whom the loan is made $94, in the current coin of the United States, the transaction is unexceptionable; but if, instead of giving to the borrower $94 in coin, the bank gives $94 in bank bills which are depreci-

ated below the specie standard ten per cent., the borrower in point of fact, receives only $84, and the reservation of six per cent. on $100 is a plain and direct infraction of the charter. The defendant, in other words, contends that the current value of the bills or notes he received, at the time of lending and borrowing, was to be considered their real value, and that the amount reserved by way of interest, should be regulated by the real, and not the nominal value of the bills or notes so received. There is nothing in the case to show that the bank was insolvent at the time the loan was made. On the contrary, it appears that the bills issued by the bank, constituted the principal circulating medium of the country; that for all ordinary porposes, and in all business transactions, a one dollar bill of the bank, was equivalent to a dollar in current coin; that the bank paid out and received the bills of the several branches of the parent institution, without discount; and that the bills of the bank were received at the the Farmers and Mechanics' Bank of Michigan at Niles for debts, and passed current in the community. From the evidence before us, it would also appear that the bank did not suspend the payment of its obligations, in specie, until July, 1840. Where a contract, on its face, imports that a greater rate of interest was reserved, than is allowed by law, there is no room left for presumption; the intent is apparent. But in cases like that before us, where the contract *appears* to have been fairly made, there is nothing on its face from which the *law* would imply that a violation of the charter was contemplated by the plaintiffs, at the time the bills were discounted. To constitute usury, it must be clearly established, that there existed an intention to take usurious interest: for, if neither party intended a violation of law, and acted bona fide, the law will not infer a corrupt agreement; and the same principle would apply to the prohibition in the char-

ter of a bank. *Bank of the United States* v. *Waggoner*, 9 Peters 399, and cases there cited. See also, 13 Pet. 65. But if the plaintiffs, with a view to secure a greater rate of interest than is allowed by law, paid out depreciated notes, they will be held responsible for all the consequences of such an act. The question of intent, is properly referrible to a jury, who are to determine it. The charge upon this point, appears to me to have been proper: indeed, I am not aware that any exception was taken to it.

Supposing, however, that the jury should find that the facts warrant the presumption that the payment by the bank to O. P. Lacey, of depreciated bank notes, was a device, by which to obtain a greater rate of interest than is allowed by law:—it then becomes important to determine whether the contract is absolutely void, or whether, according to our laws, the plaintiff only forfeits three times the usurious interest. A corporation possesses only those powers expressly given by its charter. Among those granted to the Indiana State Bank, is a power to discount bills and loan money, reserving upon such loan six per cent. per annum, and no more. There is no provision in the charter which declares that a contract reserving more than six per cent, shall be void. No principle, however, is, at this day, better settled, than that a court will never carry into effect a contract made in violation of a positive law, any more than they would a contract founded on an immoral consideration. If, therefore, there was an incapacity on the part of the bank to make the contract declared upon, or, if that contract was made in violation of its charter, a court of justice will not lend its aid to carry it into execution. How far is the principle I have thus laid down, applicable to the present case? The contract sued upon was made in Michigan, to be performed in New York. On the part of the defendant, it was insisted that if the jury found that the consideration

of the contract was usurious, the plaintiff could not recover, as by the laws of New York, the place of performance, all such contracts are declared to be void. The general principle in relation to contracts made in one place, to be executed at another, is well settled:—they are to be governed by the laws of the place of performance. And in respect to interest, if by the laws of the place of performance, a greater rate of interest is allowed, than that permitted at the place of the contract, the parties may stipulate for the higher interest. *Andrews* v. *Pond*, 13 Peters, 65. But it is unnecessary to determine this question, as it is shown that the contract in this case must be governed by the law of Indiana incorporating the bank. If the original contract was void in consequence of a want of power on the part of the bank to make that contract, and if the bill in the present case, in the language of the Supreme Court of the United States, in the case of *Armstrong* v. *Toler*, 11 Wheat. 258, grew out of the illegal act, a court of justice will not enforce it. If, for instance, a suit had been brought in this state, on the original contract between the parties, and a jury, under proper instructions, had found that that contract involved a violation of the charter of the bank, which is its constitution, the law would pronounce the contract void:—not because the bank had violated the general usury law of Indiana, but because it had violated the law of its creation, which limits and restricts it in respect to the contracts it may lawfully make. Now, if it shall appear that the contract upon which this suit is brought, grew out of the illegal contract first entered into between the parties, or, in other words, was not a new contract, founded upon a new consideration, it would appear too clear for argument, that this new contract comes before us with all the infirmities which attached to the old one. The reason is obvious: the original agreement being void, for want of

capacity on the part of the bank to contract, and the new agreement being a renewal of the old one, it is tainted with the illegality which attached to the latter; and, as the courts of Indiana, if a suit had been there instituted on the bill declared upon, would have pronounced it void, as having been inseparably connected with the contract out of which it grew, so the courts of this state will examine into the capacity of the bank to make a contract, and if it discovers a want of capacity to make the one on which a recovery is sought, they will not carry it into effect. That the contract in the present case was infected by the illegality, if any existed, which attached to the one out of which it grew, there can be no doubt. See *Smith* v. *Barstow*, ante, 155. The charge of the court, then, should have been, that, if the jury found the original agreement between the parties illegal, it was their duty to find a general verdict for the defendant.

It is proper to remark, that this view was not brought to the attention of the court below. The great struggle on the part of counsel seemed to be, on the one hand, to support the contract declared upon, by the laws of Michigan, and on the other hand, to apply to it the law of New York, without reference to the fact that the plaintiff was a corporation—a legal entity,—whose powers were restricted, limited, and controlled, by the law of its being.

We can no more lend our aid in carrying into execution the agreement now sought to be enforced, if it involve a violation of the charter of the bank, than we could carry into effect any other contract made by the bank, for the purchase of lands, mills, or other property, though that contract were made in this state.

*New trial granted.*

## The People v. Antoine Beaubien.

Indictment for obstructing a highway. As appeared in support of the indictment, the alleged highway was situated upon a tract formerly known as the Antoine Beaubein farm, which was annexed to the city of Detroit, in 1832; in 1836, the defendant, being proprietor, caused the same to be surveyed into lots, blocks, and streets, and a plat thereof to be recorded, on which the alleged highway was laid out, and designated, "Street leading to burying ground;" but the plat was not acknowledged;—*Held*, no dedication under R. L. 1833, p. 531, which provides that "town plats executed, acknowledged and recorded, in the manner therein prescribed, shall be deemed a sufficient conveyance to vest the fee of such parcels as are thereon expressed, named, or intended to be for public uses, in the county in which such town lies; in trust," &c.

As further appeared, after the plat was recorded, the defendant conveyed to different grantees, and at sundry times, by deeds duly executed and acknowledged, several lots designated thereon; the deeds describing the lots according to the plat, and referring to it as of record: *Held*, that these conveyances did not supply the defect in the plat, or operate as an acknowledgement of it.

But, *held* further, that, independent of the statute, there might be a valid dedication at common law, by acts *in pais*, without deed; and that the making and recording of the plat, and the execution of the conveyances of lots as designated upon it, were acts *in pais*, of the defendant, tending to establish such dedication.

Acts *in pais*, however, to constitute a valid dedication, must clearly evince an interest to dedicate.

And all such acts of the proprietor, tending to show his intention, are admissible in evidence, where it is attempted to establish a public right, against that of the proprietor.

*Held*, accordingly, that it was competent for the defendant to rebut the presumption of dedication arising from his acts proved in support of the indictment, by evidence of facts tending to show that no dedication was intended; as that the *locus in quo* was originally a private lane, leading along the westerly side of the Antoine Beaubien farm; that in 1827, the defendant's ancestor, then being the proprietor, conveyed a portion of the farm to the city of Detroit, for a burial ground; and, in the same indenture, granted a right of way over this lane, for the purpose of ingress and egress to and from such burial ground,—the city covenanting, in the same instrument, to erect and maintain a gate, at the entrance of the lane from a public street; that this gate was afterwards erected and for a long

time maintained; that on a plat of a portion of this farm, made by the defendant, and placed upon record in 1832, this lane was designated, "Lane to burying ground;" that about 1835, or 1836, it ceased to be used as a way to the burial ground, on account of the opening of public streets leading thereto, which were more convenient; that, in 1836, the defendant resumed exclusive possession of the lane, on the claim that the right of way over it, granted to the city, had been forfeited; that in 1837, the city released the right of way to the defendant; that from that time to the finding of the indictment, the defendant had continued occasionally to lease, sell, or convey portions of the lane; and he, and those claiming under him, had occupied and built upon the same, as his and their private property; that it never had been a thoroughfare; nor had it ever been open, used, or improved as a public highway.

And, the question being presented by a special verdict finding the above facts, *it was held* further, that there had been no dedication of the alleged way to the public.

*Sed quære*, as to whether, as between the defendant and his grantees, each of his conveyances to them of lots as designated on the plat, and referring to it, was not an implied grant of a right of way over the "Street leading to burying ground," as laid out on the plat, or an implied covenant that it should remain open as a public highway.

Land dedicated to public uses as a highway, by the proprietor, does not in fact become a highway, so that an indictment will lie for its obstruction, until accepted or used as such.

Indictment against the proprietor for obstructing it, is not, of itself, a sufficient acceptance.

CASE reserved from Wayne District Court. This was an indictment for obstructing a highway, which was described as commonly called "Lane to Burying Ground," or "Street leading to Burying Ground," leading from Jefferson Avenue in the city of Detroit, and thence passing by a certain place in said city, usually called the "Old Burying Ground," to the Fort Gratiot road, in said city.

The cause was tried before the Hon. B. F. H. Witherell, Presiding Judge at the September term, 1845, of the District Court.

The jury returned a special verdict, finding the following facts, viz:—From the evidence adduced upon the part of the prosecution, they found,—"That Antoine

Beaubien, Senior, father of the defendant, was, on the 1st of June, 1827, and long prior thereto had been seized of the "Antoine Beaubien Farm," so called, then lying near to, but beyond the limits of the city of Detroit, and over which the alleged highway runs; that he continued seized thereof until March 24, 1836, when he died intestate, leaving the defendant surviving him, and his sole heir at law. That by an act of the legislative council of the late territory of Michigan, approved May 28, 1832, all that part of said farm lying between Detroit River and the Fort Gratiot Road was annexed to, and made a part of, and has ever since continued to be a part of, the city of Detroit. That January 26, 1836, there was recorded in the registry of deeds for said city, by the city register, but without any certificate or acknowledgement thereof being thereon or thereto of record, a map or plat of so much of said farm as was thus made a part of the city, purporting to lay out and subdivide the same into blocks, lots, streets, lanes, &c. in the manner appearing on a copy of said plat annexed to the special verdict and made a part thereof, and that this is the only map ever recorded of that part of said farm lying north of Larned street.* That the open space on this map designated, 'Street leading to Burying Ground,' is the alleged high-

* As no copy of this map can be here given, it may render the case more intelligible to state that, as appears by the map, the "Antoine Beaubien Farm" is a strip of land about 500 feet in width, extending from the bank of the Detroit river, in a northwardly direction to, and across, the Fort Gratiot road, about 220 rods distant from the river. At a point about 70 rods distant from the river, it is crossed by Jefferson Avenue, the principal street of Detroit, and about 200 feet further from the river, by Larned street. By the plat, these and the various other streets of the city running parallel to the river, are laid out across it, as are also other streets running from the river to the Fort Gratiot road. On the rear of this portion of the farm, and adjoining the Fort Gratiot road, is the "Old Burying Ground;" and on the plat there appears an open space thirty feet wide, leading from Jefferson Avenue by the westerly side of the "Burying Ground," to the Fort Gratiot road, and designated thereon, "Street leading to Burying Ground." The map is designated on its face, "Plat of the farm of Antoine Beaubien, extending from Detroit river to the Fort Gratiot road, as surveyed into town lots by John Mullett, surveyor, in 1831, 1833 and 1835."

way described in, and intended by the indictment. That at sundry times subsequent to the record of this map, the defendant had conveyed to various persons by deed, divers lots, parts and parcels of said farm, and had described such lots in the conveyances, by their appropriate numbers and blocks, and as being thus numbered and described 'according to the survey thereof by John Mullett, surveyor, the map or plat whereof is duly recorded.'" [Several such deeds made to different individuals during the years 1836 and 1837, were annexed to and made a part of the verdict.] "That the open space above mentioned appears also on 'Farmers Map of Detroit,' and is thereupon designated 'Lane to Burying Ground;' and that, subsequent to the year 1837, the defendant had also conveyed to various persons by deed, several other lots on said farm, and described them in the conveyances as numbered on, and according to 'Farmer's Map of said city of Detroit.' That the various other streets laid down on the plat recorded in 1836, had, ever since the record thereof, been open, continued and used, as public streets of said city, without any obstruction or objection by the defendant; but that the alleged highway described in the indictment, had ever since that time been by him built upon, enclosed, deeded away, leased away, and obstructed."

From the evidence adduced by the defendant, the jury found: "That, on the 1st of June, 1827, Antoine Beaubien, Senior, by a certain indenture duly executed, acknowledged, and recorded, conveyed to the Mayor, Recorder, Aldermen and Freemen of the city of Detroit, that parcel of said farm adjoining the Fort Gratiot Road, now known, and on the said recorded plat designated, as 'Burying Ground;' 'to be occupied as a burial ground and place of interment for the dead;' and also, 'the right of way for free ingress and egress, to and from said pre-

mises,' over a lane particularly described, being the same designated on the said recorded plat, as 'Street leading to Burying Ground,' and alleged in the indictment to be a public highway; that in and by the same indenture, the said Mayor, Recorder, &c., covenanted that they and their successors should and would, 'at all times and forever thereafter, at their own expense, well and sufficiently build and set up, a fence around the premises conveyed; and also, 'a bridge over the ditch crossing said lane:' and also, 'that they would construct a good and sufficient board gate in the fence of said Beaubien on Jefferson Avenue, at the entrance to the lane above mentioned, and the said fence, bridge and drain, would keep in good condition and repair forever.' That soon after the execution of this instrument, said Antoine Beaubien, Senior, became lunatic, and in the year 1831, was duly found and declared so to be by the judge of probate of Wayne county; and in the same year the defendant was duly appointed guardian for him, and continued to be his guardian until the time of his decease; that while such guardian, the defendant, for the purpose of showing the relative position of said farm, and for the convenience of selling and leasing lots thereon, found it necessary to have, and caused to be made, a survey and plat of that part of the farm lying between Larned street and Detroit river; which plat was duly recorded." [A copy of this plat was annexed to and formed a part of the special verdict; and on it so much of the alleged highway as lies between Jefferson Avenue and Larned streets, was laid out and designated, "Lane to Burying Ground."] "That the sole object and purpose of devoting the open space designated on the last mentioned plat as 'Lane to Burying Ground,' was, to indicate the easement on and across said farm granted to the corporation of Detroit, and to show the relative situation of lots on Jefferson Avenue, and on Lar-

ned street, on said farm. That, at the time of the execution of the conveyance to the corporation of Detroit, and for years afterwards, said farm was an enclosed field, and the only access to said 'Burying Ground' was over and through said 'lane,' which was entered from Jefferson Avenue, through a gate; that the Fort Gratiot Road was not then, nor for years afterwards, laid out or constructed; that this lane was thirty feet wide, and ran on and across the westerly side of said farm, and along the easterly side of the 'Lambert Beaubien Farm,' so called, and on each side of it there was a fence running continuously from Jefferson Avenue to the Burying Ground; that the gate at the entrance thereof was kept habitually closed and locked, from the time of the conveyance to the corporation of Detroit, down to the time when by long use it became frail, out of repair, and broken down; and the key thereof was kept by the defendant, and delivered by him from time to time on application for the same, to persons desiring to pass through the lane on funeral occasions. That the corporation of Detroit did not observe their covenants contained in the indenture between said corporation and said Antoine Beaubien, Senior, nor the conditions thereof, on them binding; but failed during the years 1835 and 1836, to keep the gate, fence and bridge, specified in said indenture, in good and lawful condition and repair; and allowed the same to get wholly out of repair, decayed and dilapidated. That about the same time, Beaubien and St. Antoine streets, in said city, were laid out, opened and used, and became, either of them, more suitable and convenient for the purpose of repairing to and from the 'Burying Ground;' and thereupon became and were used for that purpose, and said 'lane' wholly ceased to be used therefor: that said 'lane' never was used for any other purpose than that above mentioned, and never was worked or improved as a highway,

nor were any highway taxes ever collected on account of it, or disbursed upon it. That thus ceasing to be used, and the corporation of Detroit so neglecting to keep the conditions in the conveyance to them, the defendant, on account thereof, in the year 1836, entered upon the resumed said 'lane,' or easement; and in the year 1837, on suggestion of his counsel that it might be advisable, as a matter of prudence, he applied for and obtained from, the corporation of Detroit, a quit claim deed to him of said 'lane,' excepting such portion thereof as ran along the westerly side of the 'Burying Ground,' and such other portions as were crossed by the streets of the city, extended across it, and the said farm, as designated on the plat recorded in 1836; and the defendant, at the same time, conveyed to the said corporation all those portions of said 'lane,' not so quit claimed to him. That, upon the execution of the last mentioned conveyances, the defendant commenced, and afterwards continued to sell and lease different portions of said 'lane,' and erected valuable improvements upon other portions of it; acting in regard to it as he did in respect to other portions of said farm openly and publicly, and with the knowledge of his lessees, grantees and others, without any molestation, let, or hindrance, until the finding of this indictment. That ever since the execution of said quit claim deed by the corporation of Detroit, said 'lane' has been assessed and taxed as the private property of the defendant and his grantees and lessees, for city, county and state taxes, and such taxes have been duly collected. That since some time prior to the year 1837, said 'Burying Ground' has been but little used as a place of interment for the dead in consequence of having become nearly occupied, but that said corporation purchased another lot in a different part of the city, which has been mostly used as a place of interment

since that time. That the fact that the defendant occupied, built upon, sold, and leased said 'lane,' and claimed the same as his property, has been notorious ever since 1836. That in conveying lots on said farm, the defendant left undisposed of a strip of land six feet wide, along the easterly side of said 'lane,' and that, since he has resumed said lane, he has, in disposing of portions thereof, disposed of said six feet in width lying along such portions. That the defendant is an illiterate person, ignorant of the English language; knows but little of business, and is wholly incapable of understanding the legal intendment of his acts, without explanation from counsel and others, and has been obliged to depend upon others to draw all his conveyances."

The verdict concludes that, "if upon the facts thus found, and the law applicable thereto, the court are of opinion that the defendant is guilty, the jury find him guilty, otherwise they find "not guilty."

It will be observed that the verdict distinguishes the facts established on the part of the prosecution, from those proved in defence of the indictment. In the course of the trial, the evidence in defence was objected to by the prosecution, as inadmissible, on the ground that as an absolute and irrevocable dedication by plat duly recorded, and subsequent conveyances of the defendant recognizing it, had been shown, such evidence was not admissible to contradict the dedication. The court admitted the evidence subject to the objection.

The verdict having been rendered, the defendant moved for judgment thereon; whereupon, the Presiding Judge reserved the questions arising upon this motion, including the question of the admissibility of the defendant's testimony, and certified the case to this court for its opinion thereon.

*A. W. Buel*, Prosecuting Attorney, and *Geo. C. Bates*, for the People.

The facts which the jury find established on the part of the prosecution, show an absolute, express, immediate, and irrevocable dedication of the ground in question to the public, as a street or public highway; and such dedication by plat, record thereof, and subsequent deeds recognizing the same, cannot be contradicted by parol. It amounts to a covenant, that there are such streets as are designated on the plat, and to an *estoppel*, preventing the person making it from denying the existence of such streets. R. L. 1833, p, 531; *Parker* v. *Smith*, 17 Mass. R. 415; *Trustees of Watertown* v. *Cowen*, 4 Paige's Ch. R. 515; *Cooper* v. *Alden*, Harr. Ch. R. 72; *Sinclair* v. *Comstock*, Id. 404, '12; *Beatty* v. *Kurtz*, 2 Peters, 566; *City of Cincinnati* v. *White's Lessee*, 6 Id. 431; *Matter of 17th St., New York*, 1 Wend. 262; *Matter of Lewis St., New York*, 2 Id. 472; *Livingston* v. *Mayor, &c., of New York*, 8 Id. 89, 99; *Wyman* v. *Same*, 11 Id. 489; 19 Id. 130; 17 Id. 651; *Matter of 39th St., New York*, 1 Hill's R. 193.

It may be said that the dedication in this case was qualified and contingent, and, as such, liable to be revoked. But the recorded plat does not show upon its face any contingency whatever. *Underwood* v. *Stuyvesant*, 19 John. R. 180, is not applicable, for there, by express statutory provision, no dedication could be made, unless subject to ratification or rejection, by the corporation of New York city. This was a legal contingency, which the world was bound to notice; but in the present case, there was no such contingency. That contended for amounts to a reservation of the power in the proprietor, to revoke his dedication, at will. Neither is *Burraclough* v. *Johnson*, 35 Eng. C. L. R. 337, in point, for there the question was whether there had been a dedication by prescription.

It may be contended also, that the plat never having been acknowledged according to the statute, (R. L. 1827, p. 279,) was illegally recorded, and therefore not binding. But the statute does not alter or abolish the common law relating to dedication; it merely superadds that a plat duly acknowledged shall operate, not merely as a dedication of the *use*, but as an *absolute grant of the fee.* Besides, every acknowledgment of a deed wherein the proprietor conveys lots according to a plat, as duly recorded, must operate in law as a fresh acknowledgment of the plat by the proprietor. And a proprietor conveying lots "according to a plat duly recorded," is estopped from denying the regularity and legality of the record.

*Van Dyke & Emmons* and *A. D. Fraser* contra.

1. The making and recording of the plat, and the subsequent conveyances of the defendant, referring to the same as duly recorded, did not *per se* constitute the space thereon designated "Street leading to Burying Ground," a *highway.* Though by such acts an owner may vest in his individual grantees a right of way, easement, or other equitable right in lands designated as streets, squares, or avenues, such right is distinct from the claims of the public, and is not a right, the infringement of which will be punished by indictment. No individual can, by his own act merely, create a highway. He may signify his consent to dedicate his land to such an easement, but the land does not become a highway until acts of *user* by the public. If the public neglect to use and work it, and refuse to recognize it as such, and lay out, work and use other roads which render it entirely useless, then it is not a highway. In support of these positions the following authorities were cited, and commented upon at length: *Rex* v. *Hudson*, Strange, 894, 909; *Lade* v. *Shepherd*, Id. 1004; *Rugby Charity* v. *Merriweather*, 11 East, 375; *Rex*

v. *Lloyd*, 1 Camp. 260; *Woodyer* v. *Hadden*, 1 Eng. C. L. R. 156; *Wood* v. *Veal*, 7 Id. 158; *Trustees British Museum* v. *Finnis*, 24 Id. 406; *Barryclough* v. *Johnson*, 35 Id. 337; *Jarvis* v. *Dean*, 13 Id. 45; *Rex* v. *St. Benedict Parish*, 6 Id. 483; Woolw. on ways, 287: also the following American cases, on the subject of dedication: *Willoughby* v. *Jenks*, 20 Wend. 97, 98; *Livingston* v. *Mayor of New York*, 8 Id. 85, 89, 90, 94, 97 to 99, 104; *Seventeenth St., N. Y.*, 1 Id. 270; *Lewis St. N. Y.*, 2 Id. 472; *Wyman* v. *Mayor, &c., of N. Y.*, 11 Id. 486, 493 '7; *Farmer St. N. Y.*, 17 Id. 661; *Thirty-second St. N. Y.*, 19 Id. 128; *Pearsall* v. *Post*, 20 Id. 117; *Trustees Watertown* v. *Cowen*, 4 Paige Ch. R. 510; *Cincinnati* v. *White's Lessees*, 6 Peters 431; *Hinkley* v. *Hastings*, 2 Pick. R. 172; *Hobbs* v. *Lowell*, 19 Id. 405; *Emerson* v. *Willey*, 7 Id. 68; *Rowell* v. *Montville*, 4 Greenl. R. 270; *O'Linda* v. *Lathrop*, 21 Pick. R. 296; *Parker* v. *Smith*, 17 Mass. R. 413; *Brown* v. *Manning*, 6 O. Cond. R. 129; *Leclerc* v. *Trustees, &c.*, 7 Id. 354; *Bailey* v. *Copeland*, Wright's R. 150. The English authorities cited all tend to show that there must be *user* by the public. It would even seem from *Woodyer* v. *Hadden*, and *Wood* v. *Veal*, that in order to constitute a highway, there must be a *thoroughfare*, subject to use by the whole public. Most of the American authorities cited above, are cases where it has been decided that a grantor may be considered as dedicating lands to which he refers in his deed. Many of them use the words "*dedication to the public.*" But an attention to the facts of each case, and to the principles upon which the cases are respectively decided, will show that they use the phrase in a narrow and untechnical sense. The very cases in which it occurs decide that the *public* have no rights, until an intention to take is manifested. Some of them, as the Massachusetts and the earlier New York cases, say that as between the grantor and the grantee, there is an *implied covenant* for a right of

way. This we grant. It is the true doctrine: and where the courts of New York, in later cases, took the broader ground of dedication, they merely held that it was a dedication so far as to *estop* the grantor from claiming damages, when the road was laid out by the public. They abandoned the old language of implied covenant, as such covenants were abolished by statute in that state. Other cases, as *Cincinnati* v. *White's Lessees*, in 6 Peters, and *Trustees of Watertown* v. *Cowen*, 4 Paige, also *O'Linda* v. *Lathrop*, 21 Pick., go, as do some of the earlier English cases, upon the ground of an *estoppel in pais*, which prevents the grantor from depriving his grantee of the anticipated benefit. We may, for the present, concede this also. It does not follow that, because the grantor's acts *estop* him from resuming the alleged highway as against his grantee, or are construed to be an *implied covenant* in favor of the grantee, they vest in the public, without any *user*, a fixed and determinate right, the infringement of which will be protected against by indictment.

2. The evidence in defence was properly admitted. The words "Street leading to Burying Ground," are susceptible of different interpretations. We may therefore show antecedent and contemporaneous circumstances to control or modify their meaning. *Parker* v. *Smith*, 17 Mass. R. 413; see also 1 Greenl. Ev. 325 § 287 note 3; Id. 333 note, 316 '18 '19 '21, '24, '26, '7 '40; 1 Cow. & Hill's notes to Ph. Ev. 1359 '60 '68 '73 '99, 1400 '1 '3 '5, and the numerous cases there cited. And this we might do, even if the meaning were free from ambiguity.

The deeds in this case were introduced not as evidence of any agreement or contract between the parties to the cause, but simply of an admission; and as such they may be explained, contradicted or varied, like any other written or verbal admission; 1 Greenl. Ev. 315, 373.

3. As to *estoppels in pais*, they operate only in fa-

vor of parties who have acted on them. Though a stranger may give in evidence matters which parties or privies might have plead by way of *estoppel*, such evidence is for the consideration of the jury; 1 Greenl. Ev. 26, 323, 236; 2 Stark. Ev. 575, '6; Cow. & Hill's notes to Ph. Ev. 1436, 1437, and cases there cited. And if the reason of the principle of implied dedication be that of an *estoppel in pais*, that reason is inapplicable here, because there has been no *user* by the public.

4. The evidence in defence being admitted, there remains no question as to *intention*. It is certain that there was no dedication. 1. The origin of the way is shown to have been a *limited right*, which, as the cases show, in *law* estops the inference of dedication. The jury have no right to find against it. 2. The gate or barrier is admitted to be a legal and designated mode of rebutting the presumption of dedication. When the fact of such a barrier appears, there is no question for the jury. 3. If the question of dedication or not, is open, every fact is in favor of the defendant—the width of the lane—its termination—that it is not now necessary as a way to the burying ground, though necessary when granted—that the city was to keep it in repair, and keep gates—that it was never used by the public—that the city never worked it—but taxed it as *private property*, which actually disproves acceptance, and *estops* the public from claiming it as a highway.

5. If the facts be considered as showing a grant of a limited and conditional right of way, then we say there has been no dedication to the public, and no right has been infringed which will be protected by *public indictment*; *Roberts* v. *Carr.*, 1 Camp. 260, note; *Rex* v. *Northampton*, 1 M. & S. 262; 2 Chitt. Cr. Law 566; *Woodyer* v. *Hadden*, 1 Eng. C. L. R. 156; *Stafford* v. *Coney*, 13 Id. 39;

*Burraclough* v. *Johnson*, 35 Id. 337 ; Hawk. Pl. Cr. 76, § 1 ; see also numerous other cases cited ante.

GOODWIN, J., delivered the opinion of the court.

The questions reserved for the opinion of this court, in the case presented, are,

1. Was the testimony offered by the defendant and received subject to the objection made to it, admissible?

2. Under the law applicable to the special finding, is the defendant guilty, or not guilty, of the offence charged in the indictment?

On the part of the prosecution it is insisted, that the alleged highway was dedicated to the public use as a public street or highway, by the record of the plat of 1836, on which it was laid out and designated as "Street leading to Burying Ground," and by the subsequent execution, by the defendant, of conveyances to different persons of lots as designated on this plat, and referring to it as duly recorded; and, that the evidence offered by the defendant, was inadmissible to control or destroy the legal operation and effect of these acts.

The "Act to provide for the recording of town plats, and for other purposes," approved April 12, 1827, (R. L. 1827 p. 278,) was in force when the plat of 1836 was recorded. The first section of this statute provided, that whenever a town should thereafter be laid out, the proprietor should, before selling any lots, cause a true map or plat thereof to be recorded in the registry of the county where the same lay, and imposed a penalty for selling lots before this should have been done. The second section provided that such maps or plats should particularly set forth and describe all the public ground within such town, by its boundaries, courses, and extent; and whether it be intended for streets, alleys, commons, or other public uses; and all the lots intended for sale, by progressive

numbers, and their precise length and width; and that these maps made and acknowledged before a justice of the peace, or a justice of the county court of the county, or a judge of the supreme court, and certified under the hand and seal of the judge or justice taking such acknowledgment, should be deemed a sufficient conveyance to vest the fee of such parcels of land as were therein expressed, named, and intended to be for public use, in the county in which such town should lie, to and for the uses and purposes therein named, expressed and intended, and for no other use or purpose whatever.

This statute, as is apparent on its face, was designed to provide an explicit mode for the dedication of streets and other grounds designed for public uses, upon the laying out of towns by individual proprietors, and to render the rights of purchasers, and the public generally, in grounds thus dedicated, definite and certain. It also obviated the difficulty met with in some of the cases in the application of common law principles of dedication, in regard to the ownership of the fee, by providing that, upon compliance with the provisions of the act, this should vest in the county, in trust for the designed uses.

The mode in which the dedication was to be made, and the title to pass, was specifically pointed out. No formal grant was required, and no grantee was designated. A map or plat was required, with the public grounds, streets, &c., particularly set forth and described upon it. This was required to be acknowledged before one of the officers named in the act, and to be accompanied with a certificate of the acknowledgment, under the hand and seal of the officer. The map, with the acknowledgment, was also required to be recorded. The mode of conveyance required by this statute was peculiar, and different from any other known to the law; and upon obvious and familiar principles, to be operative to pass the title, a con-

veyance under the statute must have fully complied with its several requirements.

In this case the ground laid out and mapped was an addition to the city of Detroit, not included in its limits at the time of the passage of the act. The map appears to have been recorded in January, 1836. It does not appear to have been acknowledged as required by the act, and is accompanied with no certificate of acknowledgment. The subsequent references to it, in deeds to individual purchasers of lots, and the acknowledgment of those deeds to the grantees named in them, cannot supply the defect, or operate as an acknowledgment of the map with the certificate signed and sealed, required by the statute.

Those deeds, with their references, may be very proper evidences as acts *in pais* to establish a dedication upon general rules of law, independent of the statute. And, though the jury do not find that the plat was placed upon record by the defendant, or by his express authority, yet the deeds show the act, by whomsoever done, to have been by him ratified and confirmed.

The next question which arises is, whether, aside from the provision of the statute, the place in question became, by the acts of the defendant, a public street or highway, under the general rules of law; for, though it may not have become so by force of the statute, yet it may have been thus dedicated to the public for that purpose. And the recording of the plat, and the reference to it as duly recorded under the provisions of the statute, are facts entitled to great weight, in determining this point. It is contended by the prosecution that these acts—the causing the survey, the making and recording the map, the selling of lots according to it, as is done in the deeds mentioned in the verdict—operated as a dedication of the land to the public as a street, and that the evidence offered and received was incompetent to show that no dedication was

designed. On the other hand, not only is the opposite of these propositions contended, but it is insisted, that even if these acts amounted to a dedication, there must have been an acceptance on the part of the public, or its constituted authorities, before any right in the public could attach. To determine the questions presented, an examination becomes necessary, of some of the cases upon the doctrine of dedication, of late much considered, and the principles by which it is governed.

*Rex* v. *Hudson*, 2 Strange 909, was a prosecution by information for stopping a common footway. It was proved that the *locus in quo* had been a common passage as far back as the witnesses could remember. The defendant produced a lease of it for the term of fifty-six years, for the purpose of being used as a passage way during the term, which had then recently expired. It was held that the defendant was not guilty, and that the time during which it had been left open after the expiration of the lease, was not long enough to amount to a gift to the public.

*Lade* v. *Shepherd*, 2 Strange 1004, was an action of trespass. The place of the supposed trespass was the property of the plaintiff, who had several years before built a street upon it, which had been ever since used as a highway. It was held that there had been a dedication to the public for a right of passage, but not a transfer of the property in the soil.

In *Rex* v. *Lloyd*, 1 Camp. 260, which was an indictment for obstructing a highway, the place in question was a narrow and circuitous street or passage in the city of London, which had been open and used by the public as far back as could be remembered. It had been long lighted by the city; there had been no chain across it, nor any mark to denote that it was private property. The houses upon it had been owned by one individual. He sold a part at one end of the passage, and the purchaser closed

the passage, separating his own from the residue of the buildings upon it, by a wall. It was held that there was a dedication; Lord *Ellenborough* remarking, that if the owner of the soil throws open a passage, and neither marks by any visible distinction that he means to preserve his rights over it, nor excludes persons from passing through it by positive prohibition, he shall be presumed to have dedicated it to the public; and further, that the public are not to be excluded from it after being allowed to use it so long without any interruption.

The same doctrine was held in *Rex* v. *Barr*, 4 Camp. 16, a similar case, where the way had been used for fifty years, and there had been a succession of tenants, and express notice to the steward. Although the act of the tenant would not affect the right of the landlord, yet there having been successive changes of tenants, with notice of the user, and this not inhibited or prevented, the dedication was held to have been made.

In the case of the *Trustees of the Rugby Charity* v. *Merryweather*, 11 East 375, note *a*, tried before Lord *Kenyon*, there had been a street open for fifty years, terminating against a house at the end; the plaintiff accounted for not having put up a bar or the like, to denote that the way had not been relinquished to the public at large, by the fact that the *locus in quo* had been under lease for a long term; but it appeared that the lease had expired ten years before, and the street had remained open for eight years after its expiration, the parties having been in treaty for the right of way. It was held that there had been a dedication. This case has been, however, in effect overruled by subsequent decisions,—the circumstances being considered as sufficiently rebutting the presumption of a dedication.

In the case of *Woodyer* v. *Hadden*, 5 Taunton 126, (1 E. C. L. R. 34,) the question of what acts amounted to a

dedication was elaborately considered. The action was trespass upon the plaintiffs' close called John Street, being in the city of London. The plaintiffs had erected a street across their own land, terminating against the defendant's close on the west, which was separated from the end of the street by the defendant's fence for twenty-one years, during nineteen of which houses were completed, and the street publicly watched, cleansed and lighted, and both the footways, and half the horseway thereof, paved at the private expense of the inhabitants. Another street was also made by the plaintiffs, intersecting this at right angles, and communicating with another public street on the north. The houses had been built on the street from time to time at different times; and the actual use of the street had been mainly, if not entirely, for these houses. It was held that there had not been such a dedication to the public, as that the defendant might pull down his wall and use the street as a highway, continuing it on to his own land. And Lord *Mansfield*, who concurred in the opinion of the court, made a distinction between the use, for the purposes of the inhabitants of the houses erected by the plaintiffs, and the use by others, and by the defendant, in extending the town over his own land. *Gibbs* deemed the time of user insufficient to presume a dedication, and alludes to the fact that the pavement was unfinished. *Heath*, J., remarked that there were two questions in the case; first, whether there had been a dedication; and second, whether the place was made a common highway; and held that there was not evidence of a dedication, and that the facts showed no intention to give more than a right of passage to the houses; and asks, how could a street like this, which is no thoroughfare, be deemed a public highway? *Chambre*, J., dissented, and was of the opinion that the acts showed a dedication, remarking that no particular time was necessary; that if the act

of dedication be unequivocal, it might take place immediately. This is a leading case on this subject. There was no map appearing in the case, but the street was laid out on the ground, and buildings were erected thereon, and leased. The street did not communicate with a highway at both terminations, but was a *cul de sac.* All the facts and circumstances were gone into to determine whether there had been a dedication or not, and whether a highway or not.

*Wood* v. *Veal*, 5 B. & Ald. 454, (7 E. C. L. R. 158,) was an action of trespass, and a justification was set up under a public right of way. A street had been used for many years by the public, and paved, lighted, and watched, under an act of parliament, in which it was enumerated as one of the streets of Westminster; but the plaintiff proved a lease for ninety-nine years including the place in dispute, which had recently expired, and he soon after erected a fence across the street, for the pulling down of which the action was brought. Held no dedication, and no highway; for that the act of the tenant did not bind the landlord, the owner of the property, and it was by his assent only that the dedication could be made.

In the case of the *King* v. *the Parish of St. Benedict*, 4 B. & Ald. 447, (6 E. C. L. R. 482,) where a road was set out by commissioners under a local act, and certain persons only were by the act to use it, but in fact it had been used by the public for many years, it was held that this was not sufficient evidence of a dedication to the public; and that, if it was, there being no evidence that the parish had acquiesced in the dedication, it was not a public road which the parish were bound to repair. And in reference to the repairs, *Bailey*, J., said that where there is a dedication of a road by the owner of the soil, the parish is bound to repair, and he thought there should be evidence of the acquiescence of the parish in that dedication.

The *Trustees of the British Museum* v. *Finnis & others*, 5 Carr. & Payne 460, (24 E. C. L. R. 406,) was trespass for taking up stones which paved a portion of ground on the outside of the wall of the British Museum. The place was claimed to be a highway. It appeared that it had been used as such for thirty years, but that originally it was enclosed with a fence which decayed and fell, and the public then went upon it. Held not a dedication, and the rule applied that where the ground is opened to the public and used, and no act done excluding the inference of dedication, there a right will be acquired; and that if the party does not mean to dedicate as a way, but only to give a license, he should do some act to show a license only. In the case, the original enclosure, with some of the other circumstances as to the pavement, rebutted the presumption of a dedication.

Without going further into the English cases on this subject, which are somewhat numerous, it may be remarked that, to constitute a valid dedication, there must exist the intention to dedicate, clearly evinced by the acts of the owner of the land; that there must be, as was said in a late case, (*Poole* v. *Huskisson*, 11 Excheq. R. 830,) an *animus dedicandi;* or, as Chief Justice *Denman* said in *Barraclough* v. *Johnson*, 8 Ad. & E. 99, (35 E. C. L. R. 337,) "a dedication must be made with the intention to dedicate;" that while there may be a dedication by acts *in pais*, without deed, all such acts connected with, or relating to the premises, tending to show the design and object of the dedication which is alleged, may be gone into for the purpose of determining whether there has been a dedication or not.

This subject has also come under consideration in the courts of the United States, and of several of the states of the Union.

The leading case in the supreme court of the United

States is the *City of Cincinnati* v. *White's Lessees*, 6 Peters 431. The question was in relation to the dedication of a common in the city of Cincinnati. The original equitable owners had laid out the city, with its streets and the common in question, and the public had used and enjoyed them accordingly for a series of years. Afterwards, a person who had become vested with the legal title, brought ejectment for the common. It was held that the right of the public to use the common rested on the same principles as the right to use the streets; and that there had been a dedication to the public use, when the town was laid out, which gave an indefeasible title to the city of Cincinnati. The court considered that the setting apart of the common for public use, the enjoyment of it as such, and the acquisition of private and individual rights with reference to it, were in the nature of an *estoppel in pais*, which precluded the original owner from revoking the dedication.

Like doctrines were held in *Barclay* v. *Howell's Lessee*, Id. 498, which was ejectment for land in Pittsburgh, between Water Street and the Monongahela River. In both these cases, plans or maps were made, at the time of laying out these respective cities, and the question in each was, as to the right to the *possession*, in opposition to the alledged dedication. And it was held that the dedication being established, precluded the plaintiffs from recovering in ejectment. In the former, it was held that rights of this description did not rest upon length of possession, but the dedication might be presumed, if the street was used with the assent of the owner of the soil. *Jarvis* v. *Dean*, 3 Bing. 447, was relied upon. It was added that such use should be for such a length of time that the public accomodation and private rights might be materially affected by interruption of the enjoyment. In the latter case it was held that the immediate use was not necessa-

ry to the right, if the dedication were unequivocal; but, if that were doubtful, the circumstance that there never had been any use ought to weigh against the dedication.

Several cases have been referred to, decided by the courts of New York, where the doctrine has been much discussed. The cases principally relied upon by the counsel for the prosecution, arose in relation to the assessment of damages for opening streets in the city of New York. It appears that under an early statute of the state, commissioners were authorized to mark out and designate the sites of streets within the corporate limits, over ground not yet laid out into lots and streets, and thus prospectively fix the plan of the city as it should be extended by the progress of population and improvement; and that the owners of the property were prohibited from opening other streets than those designated by the commissioners on their plan or map. The statute also provided that where the streets were opened by the city authorities, the fee of the soil over which they passed should be vested in the city, and damages for the appropriation to the public use assessed against the proprietors of the adjacent lots benefitted by the improvement. In the cases referred to, the supreme court held, as did the court of errors, in reviewing their decisions, that where the individual owners had laid out the ground into lots, bounding them on the streets thus designated, and made maps or plans of their own designating the lots, and sold lots by the plan, or by the commissioners' map, a right was acquired by the purchasers, to have the streets thus designated and referred to, open to public use; and that the owner, as against the purchasers, retained only the fee of the soil, subject to the easement; and, where the street was opened and established as a public street by the city authorities, and the title of the same vested in the city, the owner was entitled to only nominal damages. This view is expressly

taken by the Chancellor, in his opinion given in the court of errors, in the case of *Livingston* v. *Mayor of New York*, 8 Wend. 85. In *Wyman* v. *Mayor of New York*, 11 Wend. 490, the Chief Justice reviews the previous cases of this description which had arisen in that state, and reaffirms the same doctrine. He decides that, not only the purchasers of lots bounding on the particular street, but all the purchasers of lots from the grantor, within the tract laid out by him and embraced in his plan or map, are entitled to the benefit of the easement, and to have all the streets thus designated kept open for the benefit of the property purchased; and that a release by the owners immediately bounding on the street, would not extinguish the rights of the others. He remarks that each purchaser of a lot gave an enhanced price, in consequence of having, not only a street adjacent to his own lot, but of having a number of streets in the vicinity, according to the map or plan by which he purchased. He afterwards asserts the very general proposition, that if the proprietor sells a single lot he adopts the map, and thereby makes an appropriation or dedication to the public use, of the ground laid out as streets; which is, however, subsequently qualified by the further remark that the recognition of the plan laying out his ground, is a dedication of the streets to be taken for public use whenever the corporation shall think proper to open them; leaving unaffected the distinction before taken, between rights acquired by the public, and those of the grantee as against the grantor. The judgment of the supreme court in this case was affirmed by the court of errors, the Chancellor there reaffirming the views which he had taken in the previous case of *Livingston* v. *Mayor of New York*.

In each of these cases, Senator *Sherman*, in delivering his opinion in the court of errors, alluded to the distinction between dedication evidenced by user alone, for a

considerable period of time, and that evidenced by other acts showing an immediate dedication. And in the case of *Livingston*, he considered a dedication to have been shown in both ways—the streets having been actually open nineteen years. The case of *Wyman*, he regarded as a case of immediate dedication, and referred to the fact, among others, that the street (Fifth Street in N. Y.,) had been open for public use before it was taken by the commissioners, though it did not appear to have been used as a thoroughfare for any definite time.

The case of *Thirty-second Street*, 19 Wend. 128, was a similar question of assessment of damages where lots had been sold, bounded on streets, and a part of the streets conveyed, with covenants that they should always be and remain open as public highways, and the streets had not been actually opened. In the previous cases, reliance had been placed on the doctrine of implied covenant, and rights thereby created, and the Revised Statutes had intervened and abolished implied covenants. Justice *Bronson*, in delivering the opinion of the court, refers to the two above mentioned cases of *Livingston* and *Wyman*, as proceeding, not only on the ground of implied covenant, but also upon the ground of an implied grant of a right of way, or dedication of the land to public use,—not distinguishing between the two,—and arrives at the same result respecting the damages, which had been before established. He also alludes to the case of *Furman Street*, 17 Wend. 649, in which the opinion was likewise delivered by himself. That was a case of assessment of damages for opening a street in the city of Brooklyn. The statutes relating to streets in this city, were somewhat similar to those relating to the city of New York. In 1806, however, and before these statutes were passed, an individual had laid out a considerable tract of land into blocks, lots and streets, and sold lots according to the plan: the

streets were subsequently adopted by the city, and, upon opening them, the proprietor was held entitled only to nominal damages, as in the New York city cases. The principle of dedication was alluded to, and the remarks of Justice *Bronson* upon this subject, as applied to the acts of selling by a plat with streets designated, are certainly very strong, and seem to lose sight of the distinction between an implied grant to the grantees, and dedication to the public at large. As to the question of damages under the statutes referred to, if the right to have the street open existed, whether it were by dedication or implied grant was immaterial.

If, at the time of the recognition of the plan by the sale of lots with reference to it, the streets designated were thrown open to general use, then there would be an actual dedication. In the language of Lord *Denman* above quoted, a dedication would be made with the intention to dedicate. But where they are not so, but continue enclosed, in the possession of the original proprietor, it may well be questioned who have acquired rights, or have cause of complaint, beyond the grantees. If in such case the proprietor should alter his design and re-purchase the lots which he had previously sold, or should obtain from the grantees a relinquishment of all right to the contemplated streets, and to have them open, could the public at large complain? Would any of their rights be infringed? In *Willoughby* v. *Jenks*, 20 Wend. 96, where the question arose in a different form, the action being trespass, the distinction is recognized by Justice *Cowen*, though the case went off upon a question as to the jurisdiction of a justice of the peace.

The supreme court of Massachusetts, in *Hinckley* v. *Hastings*, 2 Pick. 162, deemed the principle of dedication of a street or highway as inapplicable in that state, and maintained trespass, although there had been a *user* of the

*locus in quo* for six years, as a public street in Boston,— the alledged survey and laying out of the street by the proper authorities under the statute being void for uncertainty. The subject was, however, further considered in *Hobbs* v. *Inhabitants of Lowell*, 19 Pick. 105, and it was there held that a highway might, in that commonwealth, be established by dedication on the part of the owner of the soil; but a suggestion is made as to whether an assent is not necessary, and if so, what should constitute such assent; and facts are referred to in the case, showing full assent by the public authorities.

The previous case of *Parker* v. *Smith*, 17 Mass. 413, relied upon by the prosecution, was an action on the case for obstructing a way, and turned upon the construction and effect of a deed conveying a piece of land in New Bedford, bounding it southerly and westerly on a way or street. It was held to be an implied covenant that there were such streets, and that the grantor and his heirs were estopped from denying that there were streets or ways to the extent of the land on those two sides. The doctrine was also laid down, however, that when, at the time of the grant, there is a way in fact existing, which corresponds with the one mentioned in the deed, and this does not extend through the whole line of the land granted, the parties shall be supposed to have had reference to such actual existing way as a boundary, as far as it extends, and not to have contemplated one co-extensive with the land. This was a private action for an injury to a private right.

The same doctrine of implied covenant and *estoppel* between the parties to a deed, is recognized in the case of *Van O'Linda* v. *Lathrop*, 21 Pick. R. 296.

This examination of some of the numerous authorities referred to, without extending it farther, is sufficient to show the principles applicable to this class of cases.

That there may be an immediate dedication of property to public uses, especially as streets or highways, by acts operating as such, and unequivocally evincing an intent to dedicate, there can be no doubt. At the same time, when it is attempted to establish a public, against an individual right, by acts *in pais*, all of those acts bearing upon the question are proper to be considered. And further; there is a distinction between individual rights under individual grants from which such a dedication is sought to be established, and those of the public at large —the grant of the right to the individual grantee being one thing, and the dedication to the public, which may be inferred or presumed to have been intended from the grant, another.

In the case before us, the evidence to establish the highway consisted of the survey of the ground into lots and streets; the recording of the map; the conveyances by the defendant to several individuals of lots upon it, and referring to the map and survey. These conveyances were not to any public authorities, or in trust for any public use; they were to the individual grantees. The question is not as to their right under those conveyances;—that question is not now before us;—but as to the existence of the alledged highway. Whatever may be the effect of those conveyances as between the parties to them, in regard to the alledged public right, they are but acts *in pais* tending to establish it. Was then the testimony offered by the defendant and received subject to objection, admissible? In other words, was it competent for the defendant to show in defence of the action, the facts which the special verdict finds to have been proved by this testimony? The doctrine is urged, and is well settled, that even as between parties to a contract, the facts and circumstances relative to the actual condition of the subject matter may be proved, to show what was the mean-

ing and effect of the terms used, and much more when deeds are used as acts recognizing rights in the public, and for the purpose of establishing those rights. It was, then, competent for the defendant to show the situation of the alledged way at the period of the making of the map and deeds; that the place in question was never open to the public; that it was enclosed, and in possession of the defendant; and, with the view to account for the particular designation on the maps, of "Lane to the Burying Ground," and "Street to Burying Ground," to show a restricted right of way existing by special grant, for specific purposes; and for this purpose the grant itself, showing its origin and extent.

It appears from the verdict that the alleged way was never open to the public generally; that while the other streets designated on the plat were so, from the time of its being recorded, this has been from that period in the possession of the defendant, and by him, and those claiming under him, leased, occupied, and in part built upon; that from 1827 down to the recording of the plat, there had been, under the special grant to the municipality of Detroit, a *limited* right of way (no highway or thoroughfare) to the burying ground, the possession remaining with the defendant, or his ancestor; and that about the time of the recording of the map, the defendant resumed the exclusive occupation of the way upon a supposed forfeiture of the conditions of the grant. (I say supposed, for it seems to me the counsel and the jury have mistaken the effect of the instrument by which this grant to the city was made. There is no condition contained in it. The provisions for keeping up the fence, gate, &c., are covenants, for breach of which the proper remedy would be by action. They cannot be construed into a condition. If so it would be a condition of the whole grant, and then, by forfeiture, the burying ground itself would revert. The

right of way, then, continued until in fact released by the grantees in 1837. This, however, does not alter the fact found by the jury that the defendant resumed, under an alledged right, the exclusive possession.) There were other broader streets sufficient for the uses of the blocks and lots laid out, of which the dedication was unequivocal; and, on the plat, there were six feet between the lane in question and the nearest adjacent lots; circumstances to be considered, in conjunction with the resumption of the exclusive possession.

Upon these facts, then, was there a dedication; in the language of Justice *Bronson*, (6 Hill, 411,) "the act of giving or devoting" this strip of ground to the public for a highway? Was there "a dedication made, with the intention to dedicate"? We think not; whatever may be the effect of the deeds as between the parties. If, as between them, they may be construed as a grant of a right of way, or a covenant that the lane leading to the burying ground, as designated on the map, should be a public street, yet, in respect to the public at large, no dedication took place.

But even if the facts amounted to a dedication, did the *locus in quo* become a highway? It was never in fact opened or used as such. The common council of Detroit, with whom, under the laws incorporating the city, is the charge of its streets with the power of laying out and opening new ones, have never accepted or adopted this as a street; but on the contrary, released their special right of way over a part of it, which they held by grant. They have treated it, not as a highway, but the reverse. A highway is a public passage for all. If never accepted or adopted by the competent authorities as such, and never opened or used as such, how can it be said that there is a highway? Admit that there was, on the part of the defendant, an intention to dedicate ever so unequivocally

evinced, but no acceptance or adoption, and no way opened or used, could it be called a highway? The indictment, in cases like the present, is for a nuisance for obstructing the passage to the public inconvenience. But where no passage has in fact existed, how are the public incommoded? There may be the right to have the easement, but until the easement in fact exists; until the public have been put into the possession and enjoyment of it, it seems to me there can be no criminal prosecution.

It was urged by the counsel for the prosecution that the acts of the defefendant, themselves constituted a dedication; and that this prosecution in behalf of the people was an acceptance of the dedication. But is this an appropriate mode of acceptance;—after dedication alledged to have been made some nine years ago, and no acceptance or adoption of the gift, indicated by *user* or otherwise, and the proprietor and his grantees have covered the premises with buildings and improvements, to come forward and present him criminally by a grand jury, as guilty of a misdemeanor, and then, when he presents these facts on the trial, to say, why sir, we only mean by this a public acceptance of the gift you made us some nine years since? The counsel did not refer us to any authorities for this mode of acceptance; but we think that neither the *civil*, or common law, or common reason, or common justice can give it countenance or support.

Upon this point, that whatever the intention as indicated by the acts of the defendant, yet there was no public street over the ground in question by any acceptance or adoption by the public authorities, or by *user*, it never having been in fact opened, we might have disposed of this case; but the proposition that, by the acts of the defendant, it was dedicated and constituted a highway, having been urged and argued by counsel very elaborately, and with great research and ability, and the language

used in some of the cases much pressed, we deemed it due to the counsel, as well as to the importance of the case to consider the doctrine urged, and the principles applicable to it.

The opinion of the court, to be certified to the district court for the county of Wayne, is, that, upon the finding of the jury, the defendant is not guilty, and judgment should be rendered in his favor.

*Certified accordingly.**

* Since this case was decided, the 2d vol. of Greenl. on Ev. has been published, in which the author, with his usual conciseness and accuracy, states some of the principles considered in this case, as follows: "The existence of a public way is proved, either by a copy of the record, or by other documentary evidence of the original laying out by the proper authorities, pursuant to statutes; or by evidence either of immemorial usage, or, of *dedication* of the road to public use. In the latter case, *two* things are essential to be proved; the *act of dedication*, and the *acceptance* of it on the part of the public." "If accepted and used by the public in the manner intended, it works as an estoppel *in pais*, precluding the owner, and all claiming in his right, from asserting any ownership inconsistent with such use. The right of the public does not rest upon any grant by deed, nor upon a twenty years' possession; but *upon the use of the land with the assent of the owner*, for such a length of time, that the public accommodation and private rights might be materially affected by an interruption of the enjoyment." "It" (the question of dedication or not) "is a question of intention, and therefore may be proved or disproved by the acts of the owner and the circumstances under which the use has been permitted." "The evidence of dedication of a way may be *rebutted* by proof of any acts on the part of the owner of the soil, showing that he only intended to give license to pass over his land, and not to dedicate a right of way to the public." §§ 662, 664. *Rep,*

## WING v. WARNER.

Decrees and orders, final and interlocutory, defined, and the distinction between them stated and explained.

Under R. S. 1838, p. 379, §§ 121, 122, no appeal lies to this court from an order of the Chancellor denying a motion for the dissolution of a preliminary injunction, heard on answer to a part, and demurrer to the residue of the bill, before the time for filing replication had expired; even though the motion was founded, in part, upon want of equity in the bill, and, in denying it, the Chancellor gave his opinion upon the merits of the controversy between the parties; such order being interlocutory merely, and not a *decree or final order* within the meaning of the statute.*

MOTION to dismiss an appeal from chancery. The case is stated in the opinion of the court.

*Miles & Wilson* in support of the motion.

*O. Hawkins & E. Mundy* contra.

GOODWIN, J., delivered the opinion of the court.

The bill in this case was filed by Wing against Warner, June 19th, 1845, for the purpose of correcting certain alledged mistakes in an award made by arbitrators to whom the parties had submitted certain matters in controversy between them, and also to be relieved against the payment of $3,000, mentioned in the agreement for submission, and claimed by the complainant to be a penalty merely, and by the defendant to be stipulated damages; and for the recovery of which, as stipulated damages, the defendant had brought an action at law. Upon the filing of the bill, an injunction was obtained against the prosecution of the action at law, upon the allowance of Justice FELCH of this court. On the 9th of July, a demurrer was filed to a part, and an answer to the residue

* See *Prentis* v. *Rice*, and *Benedict* v. *Thompson*, post.

of the bill, and a motion was made to dissolve the injunction; which motion was founded upon the answer and demurrer, and was also for want of general equity in the bill. On the 9th of November following, the Chancellor delivered his opinion denying the motion, with $5 costs against the defendant; and an order was thereupon entered to that effect. From this order the defendant appealed to this court; and the complainant now moves that the appeal be dismissed, on the ground that it will not lie under the statute.

R. S. 1838, p. 379, § 121, provides that "any person, complainant or defendant, who may think himself aggrieved by the *decree or final order* of the court of chancery, in any cause, may appeal therefrom to the supreme court." The next section provides that such appeal shall be claimed and entered within ninety days after the time of the making of such decree or final order, and that "the appellant shall, within the said ninety days, file a bond to the appellee," &c., "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 court of chancery shall be affirmed;" and that thereupon "all further proceedings in the cause shall be stayed in the court of chancery," &c. The statute also provides for the return to this court of certified copies of the proceedings, for the examination by this court of errors that may be found or assigned in the order or decree appealed from. §§ 124, 125.*

Is the order appealed from, a decree or final order in this cause, within the meaning of the statute?

In the ordinary language employed in reference to chancery proceedings, the decree in a cause is the sentence or judgment pronounced by the chancellor, and passed and entered in the proceedings of the court, upon the

* The Revised Statutes of 1846, Chap. 90, § 143 to 147, contain the same provisions relative to appeals from the circuit courts in chancery.

merits of the matter in controversy between the parties, after the cause is matured and brought to a hearing before him; and this, after the pleadings and proofs, in the ordinary and usual course of proceedings, are closed. The sentence thus passed and entered, is what is usually termed the decree. Orders in the cause, anterior to this stage of it, are more usually termed interlocutory orders; not decrees. This common use of the term decree is in conformity to its use in the books of practice and reports.

Harrison, in his Chancery Practice, vol. 1, p. 617, defines a decree to be "the final sentence or order of the court, determining the rights of the parties in the matters in litigation, and dispensing justice between them, agreeable to equity and good conscience;" and then, after pointing out the mode of settilng the decree, subsequent to the annunciation of the opinion of the chancellor, observes that, "passing and entering the decree are essentially requisite to the perfect completion of it." He proceeds, in the same section, to show the distinction between an interlocutory order, and a final decree made after the cause has been so brought to a hearing. In treating of orders, (vol. 2, p. 174,) he describes interlocutory orders to be "such as are antecedent to the decree."

In Lube's Eq. Pl. 115, a similar definition of the decree is given, and nearly in the same words used by Harrison. And on page 44 is found a like definition of interlocutory orders. In Moulton's Ch. Pr., p. 34, the same distinction is taken, and very clearly defined, between interlocutory orders and decrees; as is that between interlocutory decrees, or decretal orders made upon the hearing of the cause, and the final decree after every fact necessary to dispose of the merits is fully ascertained. And, I may add that these distinctions are found in all the books of practice relating to the subject. 1 Barb. Ch.

Pr. 326. See also the opinion of *Sutherland*, J., in *Kane* v. *Whittick*, 8 Wend. 224.

In *Rowley* v. *Van Benthuysen*, 16 Wend. 369, Justice *Bronson* says, "a decree in chancery, like a judgment at law, is the sentence pronounced by the court upon the matter of right between the parties, and is founded on the pleadings and proofs in the cause;" and he adds, "a decree may be final or interlocutory; but in either case, it is an adjudication upon the merits, and not an order in relation to some collateral matter."

A final order is one which finally disposes of the whole matter of the suit; and may be either the decree itself, or an order subsequent to the decree, when something further remains to be done in carrying the decree into effect before the whole subject is finally disposed of, and a further and final order is requisite for that purpose.

Was this a decree within the statute above quoted? A preliminary injunction had been granted, staying proceedings at law, and the court refused to dissolve it upon the demurrer and answer. It was not, however, an order made upon the final hearing of the cause upon its merits. The cause was not matured for that purpose. No replication had been put in to the answer, and the time for filing it, by the practice of the court, had not elapsed. Nor had the demurrer been brought to a hearing. In the stage in which the cause was, an application might, before a hearing could be had, have been made, to amend the bill without prejudice to the injunction, and an amendment made; also, testimony, if requisite, or desired by either of the parties, might have been taken upon an issue made by replication; and this the complainant might have desired to do before a final hearing. The order, then, was not a decree in the cause within the meaning of the statute. It is equally clear that it was not a final order. A preliminary injunction, or one which is awarded

anterior to the cause being brought to a final hearing, is ancillary to the suit, and for the purpose of protecting the rights of the parties, and preserving the property in controversy during the litigation. It is within the discretion of the chancellor, depending on the circumstances of the case. And orders granting, modifying, continuing, or dissolving such injunctions, are interlocutory orders. Upon the final hearing, the chancellor may dissolve such an injunction, or make it perpetual, or otherwise by the decree dispose of the subject of it, as the equity of the case, as then presented, may require; and, until then, there is no decree which, under the statute, can be appealed from. 1 Madd. Ch. 12; 2 Harr. Ch. Pr. 220; Lube's Eq. Pl. 53; 1 Moult. Ch. Pr. 189.

It is said that the Chancellor, in denying the motion, passed upon and decided the whole merits of the controversy between the parties; and his opinion has been produced and read to us to show this. It is also insisted, that the motion was, in part, founded upon alledged want of equity in the bill. As the injunction depends upon the circumstances of the case, every application for one, or for the dissolution of one, otherwise than for irregularity, necessarily involves, incidentally, in some degree, the merits of the case as then presented. But they are passed upon only for the purposes of the motion; and any opinion given, is only an expression of the reasons for the then contemplated order. Neither these reasons, nor the order made upon them, constitute the decree or final order in the cause. When the cause is brought to a hearing, upon being matured for that purpose, if the aspect of the cause is not changed by further pleadings and proofs, the opinion before expressed, if not changed on further deliberation, would pass into a decree, and be the subject of appeal. But, even then, the chancellor would not be concluded by the previously expressed

opinion, if upon further consideration he should arrive at a different determination. And, should it happen that, intervening the interlocutory order and the final hearing, a decision of this court should be made in some other cause, upon similar points in controversy, adverse to his previously expressed opinion, he would almost necessarily do so. The reasons given upon an interlocutory application, however strongly expressed upon the merits involved, are not the decree in the cause. It often happens that such applications are more or less connected with the merits of the controversy, and lead to an expression of an opinion in regard to them. For instance, the appointment of a receiver often becomes necessary, for the preservation of the subject of litigation *pendente lite*, that the party entitled may eventually have the benefit of it. 2 Madd. Ch. 222, '3; 1 Barb. Ch. Pr. 658: 4 Wend. 173. This may be absolutely necessary, to prevent waste or destruction, and to secure to a party seeking redress from the court, the fruit of the litigation. In such cases it very frequently becomes necessary to decide, incidentally, the merits of the controversy as at that period presented. But the effect is to place the subject of it in the custody of the court, in the hands of an officer of the court, until the final hearing upon the merits, when it is disposed of according to the equities of the case.

That the construction we have given to the statute is the correct one, is also evident from its other provisions. Three months are given for the appeal; and, when taken, all further proceedings before the chancellor are suspended, until the determination of the supreme court. Can a party wait for near three months, and then, when a cause is perhaps ripe for disposition on the merits, or its position otherwise materially changed, appeal, and bring under review in this court a mere interlocutory order, previously made in the cause? Or should he be permit-

ted to appeal from every interlocutory order, incidentally affecting the merits, and eliciting an expression of opinion from the chancellor, and bring the cause here, and suspend, for the time, all proceedings before him; and thus, by repeated appeals, protract the final determination of the controversy? It seems to me evident that the legislature did not so design, and that such is not the true construction of the provisions in question. No light can be drawn to aid in their construction on this point, from the English law, or that of New York, in regard to appeals from chancery. In England the appeal is allowed, as well from interlocutory orders, as from final decrees, upon petition to the House of Lords; and when the appeal is from an interlocutory order, the proceedings in the court of chancery are suspended only as to the matter appealed from, and not as to other matters in the cause. 1 Harr. Ch. Pr., 680. In New York, appeals are regulated by a statute very different from ours, and appeals from interlocutory orders are allowed; but the time for taking them, is limited to fifteen days after the order; while appeals from final decrees may be taken at any time within two years.

The case of *Kirby* v. *Ingersoll*, in this court, has been referred to as an authority for sustaining this appeal. And it is for this cause that I have deemed it requisite to consider the question more minutely than would be otherwise thought requisite, and to refer thus particularly to principles which, by chancery practitioners, will be regarded as very familiar. That was an appeal to this court from an order refusing to dissolve an injunction, and directing the appointment of a receiver. A bill had been filed, and an injunction obtained. Upon the bill and affidavits, an application for the appointment of a receiver was presented. Before it was heard, an answer was interposed, and a motion made to dissolve the injunction: also, coun-

ter affidavits were presented, in opposition to the motion for the appointment of a receiver. There was no replication to the answer, and the time for filing replication had not then elapsed. Both motions were heard together, and the chancellor denied that for the dissolution of the injunction, and directed the appointment of a receiver of the property in controversy, and, in doing so, expressed an opinion upon the merits of the case as presented on bill and answer, and declared a certain assignment in controversy between the parties null and void. A motion to dismiss the appeal as not warranted by the statute, was denied. But it was stated that the court were divided in opinion; that the decision was made, in order that the cause might proceed to argument; and that the question would be open for further consideration in the cause, upon its final disposition. A part of the court thought the appeal should be sustained, for the reason that otherwise, the interests of the appellants might be impaired before they could have any remedy. The question was re-argued, upon the argument of the cause in chief. Before the case was decided there were two changes in the bench of this court, and when decided, it went off on the merits, and this question was not further noticed. See 1 Dougl. Mich. R., 477. If, then, this case be in point, (and it is certainly somewhat analogous,) the question having been decided by an equally divided court, and left open in the manner it was for further consideration, the case cannot be considered as having the weight of authority.

Upon full consideration, then, of the case before us, and of the statute, and the course of proceeding of the court of chancery, as connected with it, I am clearly of the opinion that this appeal cannot be sustained, and that the motion to dismiss it should prevail.

It has been said that unless the appeal is allowed in such cases, a party may be subjected to injury or inconvenience by the chancellor's decision, before he can have remedy by appeal. The answer is, that when the statute is clear, this is a consideration to be addressed to the legislature; and I apprehend that when that body shall provide for an appeal from interlocutory orders, although incidentally connected with the merits, other very different provisions will be made, from those now existing. In every case, where an injunction is allowed for the preservation of the subject of controversy until the final hearing, more or less inconvenience is suffered; but this is left to the discretion of the chancellor, and it is in his power to protect the rights of the defendant, when, by it, they may be impaired, by requiring security to him; and it is to be presumed that in such cases he will require the security to be given.

*Appeal dismissed.*

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PRENTIS *v.* RICE, RING, AND SHOEMAKER.

Where, on petition of one of several defendants and proffer of an answer, the chancellor made an order setting aside a final decree, taken *pro-confesso*, in a foreclosure suit, and permitting the party to defend, unless the complainant should elect to assign to him the decree for a sum named in the order, and the complainant thereupon appealed to this court, from the decision of the Chancellor granting the order, *it was held*, that the appeal would not lie, for that the order was not a *decree or final order*, within the meaning of R. S. 1838, p. 379, §§ 121, 122.*

MOTION to dismiss an appeal from chancery. The case sufficiently appears from the opinion of the court.

*J. V. Campbell* in support of the motion.

* See *Wing* v. *Warner*, ante p. 288, and *Benedict* v. *Thompson*, post.

*H. T. Backus*, contra.

GOODWIN, J., delivered the opinion of the court.

A bill of complaint was filed by the complainant, as assignee, to foreclose a mortgage executed by the defendant Rice, to the defendant Ring, and a final decree was taken *pro confesso*, on the 20th March, 1844, for the sale of the premises, to satisfy the amount due. In September, 1844, the defendant Shoemaker presented a petition to the chancellor to set aside this decree, and for leave to put in an answer and defend; alledging facts in excuse of the default, and equitable considerations for the interposition of the chancellor upon the application, and accompanying his petition with affidavits, and an answer to the complainant's bill. The application was resisted by the complainant, who interposed an answer to the petition, accompanied also with affidavits. Upon consideration of the application, the chancellor, on the 3d of December, 1844, granted the motion permitting Shoemaker to answer and defend in respect to his equities, unless the complainant should elect to assign to him the decree upon payment, by him, to the complainant, of $400, and interest from December 16, 1841, and certain costs in the case. This condition grew out of equities alledged by the defendant Shoemaker, in his petition and answer exhibited on the application.

A motion is made to dismiss this appeal, on the ground that the order appealed from is not "a decree or final order" in the cause, within the meaning of R. S. 1838, p. 379, §§ 121, 122.*

The application made to the court of chancery was one of those frequently made to that court after a default of answer, and a bill taken as confessed. It was, to be sure, made at a late period, being after final decree, and

* See R. S. 1846, Ch. 90, § 143, *et seq.*

facts were alledged to excuse the delay. Still it was an application in that cause, by one of the parties to it, in opposition to the claims of the complainant. It is not a decree or final order in the cause, but sets aside and vacates the final decree, and lets in one of the defendants, to set up an equitable defence on his part, with the view to a further and ultimate final decree being made. It vacates the proceedings as to him, back to the period in the cause where he should have answered, from which the cause is to proceed to a final decree.

It is insisted by the counsel for the appellant, that this is in effect a decree or final order upon the merits, because, as it is alledged, the chancellor has passed upon the equities alledged by the defendant Shoemaker, and embodied his decision upon them in the order. But how are they embraced in the order? Merely in the shape of a condition. And it is a frequent occurrence to attach equitable conditions to the setting aside a default, both in courts of law and equity. The order in the case does not direct or compel the complainant to assign the decree, or the defendant Shoemaker to pay the money mentioned in it.

Shoemaker had, in his petition, insisted that he was under obligation to pay only that sum, and that upon paying it he was entitled to the mortgage; and, at the same time, he offered to pay it. The chancellor, in the order, merely says to the complainant, if you will accept this sum and assign the decree to the defendant Shoemaker, the motion shall be denied; otherwise it is granted, and Shoemaker permitted to defend, and to present, by answer, and have tried, his alledged equities, in due course of proceedings in the court. And the effect is, to enable the defendant so to do. If the complainant does not see fit to elect, according to the condition, the answer is received: he has an opportunity to reply to it, and thereupon proofs, if desired by either party, may be ta-

ken, and the cause then brought to a hearing, and the equities of the parties disposed of by a final decree.

The order, then, not being a decree or final order within the provisions of the statute, the appeal must be dismissed.

*Appeal dismissed.*

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## BENEDICT *v.* THOMPSON.

An order of the chancellor in a foreclosure suit, confirming the master's report of the appraisal, set off and conveyance of the mortgaged premises under the appraisal law of 1842, is a *final order*, from which, under R. S. 1838, p. 379, § 121, an appeal lies to this court.*

*Held*, that it was not competent for this court, on an appeal from such order, to review the decree, made two years before the order, directing such appraisal, set off and conveyance.

*Semble*, that an appeal might have been taken from the decree, within the time limited by the statute; it being a *final decree* within R. S. 1838, p. 379, § 121.

It seems, that where a final decree is the subject of appeal, this court will review all previous orders connected with the decree, and affecting the merits; but on an appeal from a *final order*, the court is restricted to a review of so much of the proceedings, or to such orders, as are connected with the final order.

APPEAL from Chancery. The bill in this case was filed by Benedict, to foreclose a mortgage executed by Thompson, October 10, 1837. In August, 1842, the chancellor made a decree requiring the mortgaged premises to be appraised, set off, and conveyed to the complainant, by and under direction of a master, pursuant to the appraisal law of February 17, 1842 (S. L. 1842, p. 135). On the 4th September, 1843, the master filed his report showing an appraisal and set off of the mortgaged premises,

* See *Wing* v. *Warner*, ante 288, and *Prentis* v. *Rice*, ante 296.

and conveyance thereof to, and acceptance by the complainant; and, on the 9th of July, 1844, the chancellor made an order confirming this report of the master. From this order the defendant appealed to this court; and relying upon the authority of *Bronson* v. *Kinzie*, 1 Howard, 311, (decided in 1843,) he assigned for error, that the decree of August, 1842, was void, the law under which it was made being unconstitutional, in so far as it applied to pre-existing mortgages. The complainant contended, 1st. That the appeal ought to be dismissed, on the ground that under R. S. 1838, p. 379, § 121, an appeal would not lie to this court, from the order confirming the master's report; and, 2d. That if well taken, it was not competent for this court, on such appeal, to review the decree of August, 1842.

*Wm. A. Fletcher* for the defendant, appellant.

*James Kingsley* for the complainant, appellee.

WHIPPLE, J., delivered the opinion of the court.

1. The first question which is presented for our determination is, whether the appeal in this case is well taken. The statute (R. S. 1838, p. 379, §§ 121, 125,) provides that "any person, complainant or defendant, who may think himself aggrieved by the *decree or final order* of the court of chancery, may appeal therefrom to the supreme court;" and that "upon any order or decree being brought by appeal to the supreme court, that court shall examine all errors that shall be assigned or found in such *order or decree*," &c. Some difficulty has arisen in giving a construction to this statute. Questions arising under it have been presented for our determination upon several occasions, and we have generally confined our opinions to the particular case before the court, without attempting to lay down any general rule by which the right of appeal could be tested. It

would, indeed, be almost impossible to define the boundaries of this right in all cases. Our judicial system, from the organization of the territory to the present day, shows that the right of a party to have his cause reviewed by the highest judicatory has, with few exceptions, been granted by express statute; and we should be indisposed to restrict this salutary right by a stringent construction of the statute allowing appeals from the court of chancery. Policy and propriety both demand, however, that too broad a construction of the statute should not be given. Such a construction would embarrass the hearing of causes upon their real merits, protract litigation, and be followed by delays that would amount to a practical denial of justice. Applying to the question before us the decisions of this court in other causes argued during the present term, (*Wing* v. *Warner*, and *Prentis* v. *Rice*, *ante* pp. 288, 296,) we are of the opinion that the appeal was authorized by the statute, and that the preliminary objection to the jurisdiction of this court must be overruled.

2. Another question presented by this case, and which arises upon the assignment of errors, is, whether, on this appeal, it is competent for this court to review the decree of August, 1842, directing the appraisement, set off, and conveyance of the mortgaged premises. It is to be observed that under the statute above referred to, this court can only examine the errors that may be assigned or found in the order or decree appealed from. On behalf of the appellant it is insisted that it is competent for this court to review every other order or decree in the cause, touching the merits. Will our statute warrant this construction? The decisions of other tribunals on this subject, are somewhat confused and contradictory. *Hoffman* says that it is the general rule that only such parts of the decree as are complained of in the petition of appeal, will be decided upon by the court of errors. 2 Hoff. Ch. Pr.,

48. In *Sands* v. *Codwise*, 4 John. R. 601, Chancellor *Kent* sustains this rule. In *Atkinson* v. *Marks*, 1 Cowen 691, Mr. Justice *Sutherland* remarked that as the appeal was from the final decree, it opened for consideration all prior orders or decrees in any way connected with it. The same rule is laid down by Chief Justice *Spencer*, in *Jaques* v. *The Methodist E. Church*, 17 John. R. 549. In *Wilson* v. *Troup*, 2 Cowen 195, it was determined that an appeal from a final order brought up an interlocutory order suppressing depositions which might bear upon the final decree. Upon appeals to the House of Lords in England, the appellant is confined to the objections specified in the petition of appeal. In *Bouchier* v. *Dillon*, 1 Bligh. N. S. 688, the appellant was permitted to amend his petition so as to extend his appeal to orders not embraced in the original petition. Upon an appeal from the decree of the vice chancellor, in *Orange Co. Bank* v. *Fink*, the court held that an appeal from a final decree, more than nine months after the entry of an interlocutory order, did not have the effect of bringing up the merits of such order for examination. 7 Paige, 87.

Was, then, the decree of the chancellor in this cause, directing the mortgaged premises to be appraised, &c., a final, or an interlocutory decree? I am of the opinion that it was a final decree. It was a decree upon the merits, and settled the subject matter of litigation between the parties: it was, in the language of Chief Justice *Savage*, referred to in 7 Paige 19, "the last decree which was necessary to give the parties the full and entire benefit of the judgment of the court." No questions were reserved upon which the judgment of the court could thereafter be invoked. All the facts necessary to an adjudication upon the whole merits of the controversy were before the court; and its judgment was just as conclusive as respects the merits, as though it had been the last decree in the cause.

In order to carry into execution the decree, the master was directed to cause the premises to be appraised and set off to the complainant, and to execute a deed to him, in the event of his signifying his acceptance of the appraisement. It also became necessary, in order to consummate the proceedings, that an order should be taken in respect to the doings of the master; but this order never brings before the chancellor the merits of the former or final decree, but simply the regularity of the proceedings of the master: the court, in other words, examines into his doings, to ascertain whether its mandate has been obeyed. This last order confirming the acts of the master may be the subject of appeal, and such appeal would bring into review such other matters as are necessarily connected with it. "The usual decree, in mortgage cases, for the sale of the property, and the distribution of the funds among the parties, and finally disposing of the question of costs, is a final decree." *Mills* v. *Hoag*, 7 Paige, 19. The same doctrine is asserted by the supreme court of the United States, in *Ray* v. *Law*, 3 Cranch, 179. If the decree in such cases is final, it would be difficult to perceive why the decree directing the appraisement, &c. of the mortgaged premises, is not a final decree. The rights of the parties, and the merits of the controversy, are just as fully settled in the one case as in the other: the only difference is in the mode of executing the decree. In the one case, the premises are exposed to sale at public auction; and in the other, they are appraised and set off to the mortgagee. The proceedings in both cases have the same object in view, viz: the satisfaction of the amount due on the mortgage. Whether the money arising from the sale of the land, or the land itself, is applied in liquidation of the debt, can make no difference as to the character of the decree. The decree, then, of the 31st August, 1842, directing the mortgaged premises to be ap-

praised, &c., was a final decree, and one which the defendant might have brought before us by appeal.

It appears by the transcript, that the premises were appraised and conveyed to the complainant, by the master, on the 26th August, 1843; and that, on the 4th September following, he filed his report showing the manner in which he had executed the final decree of 31st August, 1842. It further appears that on the 10th January, 1844, at the first term of the court of chancery after the appraisement, &c., the defendant moved the court to set aside all the proceedings subsequent to the decree, on the ground; 1st. That the law under which the appraisement was made was unconstitutional; and 2dly. Because the decree was not enrolled before the appraisement. On the same day this motion was overruled, and a petition for a rehearing filed, presented, argued and submitted for decision. This petition was based upon the first ground taken by the defendant in support of his motion to vacate the proceedings subsequent to the decree. At the following July term, the court denied a rehearing, (Walk. Ch. R. 446,) and directed the final order now brought before us by appeal. By our statute, ninety days are allowed for appealing from the decree or final order of the court of chancery. By the 105th rule of the court of chancery, a bill of review must be brought within that time. The principal object of a rehearing is, to enable the court to review its own decree, without the expense and delay incident to an appeal. By a rule of the English chancery, it would seem that a petition for a rehearing must be presented within a fortnight after the order pronounced. 2 Madd. Ch. 482. Our statute provides that a decree cannot be enrolled until the expiration of thirty days from the time it is entered in the minutes of the court. R. S. 1838, p. 369. That period, in any event, is allowed to present a petition for a rehearing. We cannot, of course,

review, upon this appeal, the order of the chancellor denying a rehearing: that was a matter submitted entirely to his discretion. I have recited the proceedings in the order in which they appear in the transcript, for the reason that it is urged on the part of the appellant, that he had exhausted all the means provided by law and the practice of the court below, to achieve his object, before taking an appeal to this court. It is not perceived that this circumstance can influence the determination of this court upon the question we are now considering. I have already said that the decree of the 31st August, 1842, was final, and not interlocutory; and the question now recurs, whether, under the facts in this case, the decisions from which I have quoted, and the provisions of our statute, it is competent for this court to review that decree. We are of opinion that that decree cannot be the subject of examination here. The time had elapsed for appealing to this court, when the petition for a rehearing was presented; and two years intervened between entry of the final decree and the order confirming the master's report of appraisement, &c. It would seem a most extraordinary course of proceeding, to permit a party who has appealed from an order of the court of chancery, to make that the pretext for reviewing a decree which was final and conclusive in respect to the matter in controversy between the parties. The effect of such a decision would be to overthrow a wise and salutary provision of our law which limits the time within which an appeal may be taken. The appellant would be permitted to do that indirectly which the statute expressly prohibits. In the present instance, we should be called upon, not to reverse or affirm for errors appearing in the final order appealed from, but for errors apparent in the final decree in the cause. Such a decision would lead to consequences

which it is the duty of this court to avert. A decree conclusive in regard to the merits of a controversy may be made, and a period of several years may elapse before the final disposition of the cause; the last order made in the cause may be such an one as would authorize an appeal. Will it be said that upon such an appeal it would be competent to bring into question the merits of the final decree, after, perhaps, much time, labor, and money has been expended? Such a course of decision would operate most oppressively, and we are not disposed to give a construction to the statute which will lead to such consequences, when another construction, more reasonable and equitable, is justified by its language. The appellant, in this case, asks of this court to review a decree after the time for a rehearing, for bringing a bill of review, and for prosecuting an appeal, had elapsed. This we cannot do. Without pretending to lay down any general rule on the subject, it may, I think, be safely affirmed, that where a *final decree* is the subject of appeal, this court will review all previous orders connected with such decree, and affecting the merits. In an appeal from a *final order*, we are restricted to a review of so much of the proceedings, or to such orders as are connected with the *final order* brought before us by appeal. In the present case, we are permitted to look into the final decree and subsequent proceedings to ascertain whether the report of the master shows an execution of that decree; or, in other words, to see whether his proceedings were warranted by the decree; but we cannot look into it for the purpose of determining whether the principles of that decree were right or wrong. This decision will admonish parties litigant, that where a decree is made upon the merits of a cause, with which they are aggrieved, an appeal must be taken within ninety days; and that this court will not, after that period has elapsed, review the

merits of such decree upon an appeal taken from a final order made in the further progress of the cause.

The decree of the court of chancery must be affirmed.

*Decree affirmed.*

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## LASTLY v. CRAMER.

An act of May 15th, 1820, (R. L. 1833, p. 570, § 6,) limited the time for bringing ejectment and other real and possessory actions, for causes of action thereafter accruing, to twenty years. An act of November 15, 1829, (Id. 408,) limited the period to *ten* years where the cause of action *had then accrued.* The Revised Statutes which took effect August 31, 1838, repealed these acts, (p. 690,) and substituted a new limitation of *twenty* years, by Ch. 1. Tit. VI. Pt. 3d; the 8th section of which provided, however, that causes of action which should have accrued before the said 31st of August, 1838, should not be affected by that chapter, but should be determined by the law under which the same *accrued.* In ejectment, commenced in 1840, for a cause of action which accrued in 1822, *it was held,* construing § 8 above referred to with reference to the other provisions of the Revised Statutes of 1838, relating to the same subject, (§ 7, p. 574, §§ 2, 3, p. 697, §§ 25, 27, p. 580,) that the action was barred by the act of November 15th, 1829.

CASE reserved from Michilimacinac Circuit Court. Ejectment. The suit was commenced in July, 1840. Lastly, the plaintiff, claimed title to the premises in controversy, under a mortgage of the same, executed November 2, 1822, by one Puthuff, to one Wheeler, and by Wheeler assigned to the plaintiff, August 19, 1829; and under a foreclosure of said mortgage, in the circuit court of the United States, in and for the county of Michilimacinac, in the late territory of Michigan, sitting as a court of chancery, and a sale and conveyance of the premises to the plaintiff, on the 17th of February, 1835, in pursuance of the final decree on such foreclosure. The defendant,

Cramer, claimed the premises as tenant under one Douseman, who, by himself, or those holding under him, had been in the continued adverse possession, under a claim of title, since 1821.

On the trial, at the July term, 1843, of the circuit court, the question was raised, and reserved by the Presiding Judge for the opinion of this court, of whether the plaintiff's action was barred by the operation of the act of limitations of November 5, 1829. (R. L. 1833, p. 408.)

*H. H. Emmons*, for the plaintiff.

*H. T. Backus*, for the defendant.

WHIPPLE, J. delivered the opinion of the court.

The question submitted is, whether the action is barred by the statute of limitations of November 5, 1829, (R. L. 1833, p. 408.) This question is involved in some intricacy and doubt in consequence of the obscurity of the language, and the apparently conflicting provisions of the Revised Statutes of 1838, relating to this subject. We have no doubt respecting the intention of the legislature to subject this, and other like cases, to the operation of the act of 1829, notwithstanding its repeal by the Revised Statutes. That statute was founded in a wise policy; it was emphatically a statute of repose; and we feel bound to apply its provisions to the present case, and to all others similarly circumstanced, if we can do so without violating any stern and inflexible rule of law. An examination of the statutes of limitation in force before the adoption of the Revised Statutes of 1838, and of the several provisions of the latter statutes respecting the same subject matter, will, we think, justify us in asserting that the obvious intention of the legislature may be effectuated without doing violence to any sound rule of construction.

The sixth section of the "Act for the limitation of suits

on penal statutes, criminal prosecutions, and actions at law," passed May 15th, 1820, is as follows: "That no writ of right or other real action, no action of ejectment or other possessory action, of whatsoever name or nature, shall hereafter be sued, prosecuted or maintained, for the recovery of any lands, tenements or hereditaments, if the cause of action shall accrue after the passing of this act, but within twenty years next after the cause of action shall accrue, or have accrued, to the plaintiff or defendant, or plaintiffs or defendants, or those under whom he, she, or they claim; and that no person having right or title of entry into houses, lands, tenements or hereditaments, shall hereafter thereinto enter, but within twenty years next after such right of entry shall accrue or have accrued." R. L. 1833, p. 570. It is to be observed that the first branch of this section is applicable to causes of action accruing after the passage of the act; the second branch is applicable to cases where the "right of entry shall accrue or have accrued."

The first section of the act of 1829, which is amendatory to the act above referred to, is as follows: "No writ of right or other real action, no action of ejectment or other possessory action, of whatsoever name or nature, shall *hereafter* be sued, prosecuted or maintained, for the recovery of any lands, tenements or hereditaments, if the cause of action *has now accrued*, unless the same be brought within *ten* years after the passing of this act; any law, usage or custom to the contrary notwithstanding." Id. p. 408.

These two statutes were repealed by the first section of the "Act to repeal the statutes consolidated in the Revised Statutes" (of 1838,) approved April 6, 1838. R. S. 1838, p. 690. The third section of this act is as follows: "In any case when the limitation or period of time prescribed in any of the acts hereby repealed, for the acquiring of any right, or the barring of any remedy, or for any other

purposes, shall have begun to run, and the same, or any similar limitation is prescribed in the revised statutes, the time of limitation shall continue to run, and shall have the like effect, as if the whole period had begun and ended under the operation of the revised statutes."

The seventh section of Ch. 1, Tit. VI. Pt. 3, of R. S. 1838, entitled, "Of the limitation of real actions and rights of entry," provides, that "the limitation therein before prescribed, as to the time within which an action may be brought to recover any land, or an entry may be made thereupon, shall take effect from and after the 31st day of August, A. D. 1838; and no action for the recovery of any land, nor any entry thereupon, shall be brought or made, after the said 31st day of August, in any case where such action or entry shall be or shall have been barred on or before that day, by the statute of limitation in force at and immediately preceding the time when this chapter shall take effect as law." Section eight provides that, "where the cause or right of action shall have accrued before the time when this chapter shall take effect as law, the same shall not be affected by this chapter, but all such causes of actions shall be determined by the law under which such right of action *accrued*." R. S. 1838, p. 575.

The whole difficulty in the present case consists in giving a construction to the latter clause of the section last quoted.

From the facts before us, the cause of action appears to have accrued in 1822. The first statute of limitations in this state was passed May 15, 1820. The right of action, then, accrued under the act of 1820. If the act of 1829 had not been in force at the time of the adoption of Revised Statutes of 1838, the present case would obviously have been controlled and governed by the act of 1820, the first section of which provides, that no action of

ejectment or other possessory action, of whatsoever name or nature, shall thereafter be sued, &c., if the cause of action shall accrue after the passing of the act, but within twenty years next after the cause of action shall accrue, &c. By the provisions of the first section of the act of 1829, the period of limitation in respect to all causes of action then accrued, was fixed at ten years from the date of the act. With respect, then, to all causes of action accruing between the 15th May, 1820, and the 5th November, 1829, the period of limitation prescribed by the former act, was in fact repealed; or, more properly, a new limitation was substituted by the latter act. The present case falls clearly within the act of 1829, and we must apply its provisions, unless restrained by the latter clause of § 8, Ch. 1, Tit. VI, Pt. 3, of R. S. 1838, above cited. It cannot be said that the act of 1829 was intended to be repealed so far as it was applicable to causes of action accruing previous to the 31st August, 1838, when the Revised Statutes of that year took effect. The whole legislation of the state upon the subject of the limitation acts of 1820 and 1829, shows, very conclusively, the intention that all causes of action existing at the adoption of the Revised Statutes of 1838, should be subject to those acts and be determined by them. The seventh section of the chapter entitled, "Of the limitation of real actions and rights of entry," fortifies, in very clear and intelligible language, this view. It provides, in express terms, that "no action for the recovery of any land, nor any entry thereupon, shall be brought or made after the 31st August, 1838, in any case where such action or entry *shall be*, or *shall have been barred* on or before that day, by the statute of limitations in force at and immediately preceding the time when this chapter shall take effect as law." This section indicates the intention of the legislature, to preserve the limitation acts of 1820 and 1829 so

far as they were applicable to causes of action then existing. It relates, it is true, to causes of action "which *shall be*, or *shall have been barred*, on or before the 31st August, 1838:" nevertheless, it shows that the legislature never contemplated the absolute and unconditional repeal of the acts referred to. The eighth section of the same chapter provides for cases where the cause of action shall have *accrued* before the 31st August, 1838, by declaring that they shall not be affected by that chapter, but that "all such causes of action shall be determined by the law under which such right of action *accrued*." Now, it is too clear for argument, that if a right of action was *barred* by the act of 1829, the seventh section provides that the *bar* shall continue, notwithstanding the repeal of that act. If so, does it not furnish a key by which to construe the true meaning of the latter clause of the eighth section above quoted? I think it does. Effect could not be given to the seventh section if we were to suppose that the act of 1829 was absolutely repealed; for the act of 1820 applies exclusively to causes of action *thereafter* accruing; the act of 1829 to all causes of action then actually existing, whether arising before or after the 15th May, 1820. If, therefore, the act of 1829 was unqualifiedly repealed, there was no act of limitations in force on the 31st August, 1838, applicable to causes of action arising previous to 1820, except the limitation prescribed in the Revised Statutes of 1838; from which it would follow, that while an action of ejectment for a cause accruing on the 20th May, 1820, would be barred by the 20th May, 1840, such action for a cause accruing *before* that time, would not be barred until twenty years after the Revised Statutes took effect. We cannot suppose that the legislature intended to make so extraordinary and unreasonable a provision.

Sections 2 and 3 of the act contained in the Revised

Statutes of 1838, (p. 697,) repealing the limitation acts of 1820 and 1829, shed a good deal of light upon the provisions of the 7th and 8th sections of the chapter of the same statutes concerning the limitation of real actions and rights of entry. (R. S. 1838, p. 574.) The latter section provides that, in any case, where the limitation or period of time prescribed in the repealed acts shall have begun to run, and the same, or any similar limitation is prescribed in the revised statutes, the time of limitation shall continue to run, and shall have the like effect, as if the whole period had begun and ended under the revised statutes. This provision furnishes strong ground for the presumption that the acts of 1820 and 1829 were, for certain purposes, to be considered as in force.

In the 27th section of the chapter of R. S. 1838, entitled, "Of the limitation of personal actions," (p. 576,) it is provided, that when the cause or right of action shall have accrued before the 31st August, 1838, it shall not be affected by that chapter, but all such causes of action shall be determined agreeably to the law under which the right of action accrued. The 25th section of the same chapter provides that no personal action shall be maintained, which, at or before the day when that chapter shall take effect as law, shall have been barred by the statute of limitation in force at any time before that day. This section is referred to for the purpose of showing that the legislature were controlled by a policy which seems impressed upon their whole legislation upon this subject. That policy was to apply to cases as they might arise, the statute of limitations in force at the time the revised statutes took effect. It can hardly be supposed that the legislature would not permit a personal action to be maintained, which had been barred by the statute of limitations in force at the time the revised statutes took effect, and not apply the same rule to actions concerning

real property. The necessity and policy of preserving those statutes in force, and applying their provisions to causes of action which had been barred, is infinitely stronger, in this class of cases, than in those concerning personal property. The legislature could not have lost sight of the fact that Michigan had been under the dominion of three independent governments; and that it would be extremely difficult, if not impossible, in many cases, to show the source, or furnish legal proof of the titles of real estate, although originally granted by lawful authority. The evidence of the title of many estates had been removed beyond the state, as Michigan was ceded by one government to another; and what evidences may have been left behind, were, in many cases, lost by the ravages of war. To obviate the difficulties growing out of such a state of things, acts of congress, and statutes of limitations have been passed, the effect of which has been to quiet titles to real estate. We are not disposed to open the door to controversies, after it has been closed by these wise and salutary laws.

Finally, from a view of the several provisions of the Revised Statutes of 1838 having relation to the question before us, we think it is obvious that the legislature never intended to revive a cause of action barred by the provisions of any statute of limitations in force at the time when the Revised Statutes took effect; and, as the cause or right of action, in the present case, accrued before the 31st August, 1838, and was subject to the provisions of the act of 5th November, 1829, we feel bound to determine it by that act; although the literal interpretation of § 8 of the chapter concerning the limitation of real actions, would warrant the interpretation that the present case should be determined by the law of 1820—the right of action having accrued under that law. The literal sense of the latter clause of that section must be so con-

strued as to effectuate the manifest intention of the legislature, to be gathered from a survey of the several acts relating to the subject. We do no violence to the language of that section, in giving it such a construction as comports with the intention of the law-maker; for, after the passage of the act of 1829, which substituted for the case before us a new limitation for the old one, it may, without any great perversion of language, be said that the cause of action accrued under that law.

The construction we have given to the several provisions of the Revised Statutes of 1838, comports with that given by the legislature in 1843, by an act declaring that the provisions of those statutes shall be so construed as to mean and intend that all causes of action which accrued anterior to the time when they took effect, shall be governed and determined by the several statutes of limitation in force applicable thereto. If a doubt existed as to the true construction of the Revised Statutes of 1838, this legislative interpretation would be entitled to much weight; especially as such interpretation is justified by sound policy, and has relation to matters which merely affect the remedy, without impairing any right.

*Ordered certified accordingly.*

## Ross W. Wood and others v. Moses B. Savage and Sophia, his wife, Moses Savage, William Savage and Eurotas P. Hastings.

*Held*, that a *parol* ante-nuptial promise, by a husband, to hold money belonging to his wife at the time of marriage, as her trustee, and invest it in real estate in her name and for her separate use, could not be given in evidence to sustain a post-nuptial settlement upon the wife, as against creditors; such promise being founded solely upon the consideration of marriage, and therefore within the statute of frauds. R. L. 1833, p. 342, § 10.*

*It seems*, that a voluntary post-nuptial settlement upon a wife, by a husband who was indebted at the time, is fraudulent and void as against existing creditors: And, that it is *prima facie* fraudulent, even as against subsequent creditors; but that, as against them, the presumption of fraud arising from the fact of indebtedness may be repelled by circumstances; as that the debts existing at the time were secured by mortgage, or in the settlement. If the husband was not indebted at the time, the settlement will be valid unless actual fraud is shown.

Bill to reach and have applied to the payment of a judgment for $1873.67, which complainants had recovered against B. & W., partners, in November, 1838, a farm, of which the title was in B.'s wife and father.

The wife's title was this: She was married to B. in October, 1835: at the time, she had $1500 in money of her own; and it was agreed by *parol* between her and B., on the day preceding their marriage, that he should hold this money as her trustee, and invest it in real estate in her name and for her separate use, whenever a favorable opportunity offered; and a part of the money was then delivered to him, and the balance soon after the marriage. In November, 1837, B. purchased for, and procured to be conveyed to his wife, with her assent, the undivided half of said farm; paying therefor $1050 out of the partnership funds of B. & W. In June, 1839, a like purchase for, and conveyance to the wife of the other half of the farm, was consummated, for the consideration of $1500, of which B. paid $500 down, and the balance was secured by a mortgage executed by the wife, and notes which B. signed with her as surety. At the time of the first purchase, the firm of B. & W. owed sundry debts which were not secured by mortgage or otherwise, but whether their indebtedness to the complainants then existed did not appear.

The only title of B.'s father, to the farm, was derived through a quit claim deed, executed to him by B. in 1840, in consummation of a purchase of B.'s interest, sup-

* See R. S. 1838, p. 330, § 2, and R. S. 1846, p. 326, § 2.

posed to be a life estate, made in good faith, and for a valuable consideration, but with full knowledge of all the facts.

*Held*, that, as to the complainants, the farm must be deemed the property of B. and subject to sale to satisfy their judgment against B. & W.

APPEAL from Chancery. For a report of the case in that court, see Walk. Ch. R. 471.

In November, 1838, the complainants recovered a judgment, upon bond and warrant of attorney dated the 27th day of June previous, against Moses B. and William Savage, as partners, for $1852.67 damages, and $21 costs, on which an execution was issued and returned unsatisfied. They then filed their bill in this case to reach and have applied to the payment of their debt, a certain farm in Washtenaw county, the legal title of which was in Sophia, the wife of Moses B. Savage, and in Moses Savage, his father.

The facts were substantially these: Moses B. and Sophia Savage were married in October, 1835, in New York, where Sophia then resided. She was at that time a widow, with one child, and having $1,500 of her own, mostly in cash, it was agreed by parol between her and Moses B. on the evening of the day preceding their marriage, that he should take this money, and, as her agent or trustee, invest it in real estate in Michigan, in her name and for her benefit, whenever a favorable opportunity offered; and a part of the money was then handed to him, and the balance a short time after the marriage. On the 27th of November, 1837, Moses B., with the assent of his wife, purchased for her the undivided half of the farm in controversy, of one Reighley, for $1,050, and paid for it out of the partnership funds of Moses B. and William Savage; and the deed was thereupon executed by Reighley directly to Mrs. Savage. On the 4th day of June, 1839, the other half of the farm, with her approbation and consent, was purchased for her, of one Phelps, for $1,500;

and a conveyance thereof was thereupon executed to her by Phelps. Of the purchase money, $500 was paid down, and the balance secured by a mortgage from her to Phelps, and her promissory notes signed by Moses B. as her surety; which notes and mortgage had not been paid at the time of the filing of the bill. At the time of the purchase from Reighley, the firm of Moses B. and William Savage owed sundry debts which were not shown to have been secured by mortgage or otherwise; but whether their indebtedness to the complainants then existed, did not appear in the case.

In May, 1840, Moses B. executed a quit claim deed of all his interest in the farm, supposed to be a life estate, to his father Moses Savage, who had knowledge of all the facts touching the title, for the consideration of $700, which was paid to him, and applied to the payment of his individual debts, and the debts of the firm of M. B. & W. Savage.

The bill charged that the purchases from Reighley and Phelps were in fact made by Moses B. Savage, and the conveyances taken in the name of his wife, for the purpose of defeating and defrauding his creditors; and that the conveyance by Moses B. to his father, Moses Savage, was made for a like purpose. The defendants answered severally, denying the fraud charged against them, and setting forth the facts above stated.

On the hearing before him, the Chancellor made a decree dismissing the complainants' bill; from which decree the complainants appealed to this court.

*A. D. Fraser* and *A. Davidson*, for the complainants. No authorities need be cited to show that the wife's money becomes the property of her husband by the marriage. And the settlement by the purchase of the Washtenaw farm, having been made long after the marriage, and after the marital rights of the husband to his wife's money

had attached, was a voluntary settlement; and the husband having been indebted at the time, it is fraudulent and void as to his creditors. Post-nuptial settlements, where the husband was indebted at the time, have, in every instance, been declared fraudulent and void as against creditors. *Reade* v. *Livingston*, 3 John. Ch. R. 492, 500; 4 Id. 450; *Saxton* v. *Wheaton*, 8 Wheat. 229; *Rundle* v. *Murgatroyd's assignees*, 4 Dall. 304; 12 Serg. & Rawle, 448; 3 Desau. R. 230; 2 Nott & McCord, 544; *Richardson* v. *Smallwood*, 4 Eng. Cond. Ch. R. 262. It has been held that such a settlement is to be presumed fraudulent as against all existing debts, without regard to their amount, or the extent of the property settled, or the circumstances of the party. 1 Story's Eq. Jur. 350, 352, 354; *Randall* v. *Morgan*, 12 Ves. 74; 1 Bay's R. 173; 3 Desau. R. 233; 4 Id. 232; Ath. on Marr. Sett. 212; 2 Bro. C. C. 92. The *parol* promise before the marriage, even if proved, will not support the settlement. *Lavender* v. *Blackstone*, 2 Lev. 146; 1 Strange, 236; *Reade* v. *Livingston*, 3 John. Ch. R. 488; 1 Story's Eq. Jur. §374; 1 Eden, 55; *Izzard* v. *Izzard*, 1 Bail. (S. C.) Eq. R. 228; 1 Atk. 15; 2 Id. 511, 600; Sugd. on Powers, 422, '3; Ath. on Marr. Sett. 149; R. L. 1833, pp. 310, 342, 343, §§11, 113; R. S. 1338, p. 330, §2, p. 332, §2.

*Douglass & Walker*, for the defendants, cited Reeve's Dom. Rel. 176, 174; 2 P. Wms. 594; Clancy, 441, '6, 476, '7, '8; 6 Ves. 759; 17 Id. 171, '2; 9 Id. 193; 2 Id. 18; 3 John. Ch. R. 494; 2 Story's Eq. Jur. § 1370; 2 Paige, 303; *Taggard* v. *Talcott*, 2 Edw. Ch. R. 628.

GOODWIN, J. delivered the opinion of the Court.

[After some comments upon the doubtful and conflicting statements of Moses B. and Sophia Savage as to whether the agreement to invest the $1,500 of her money in real

estate for her sole use and benefit, was made before or after their marriage, the opinion proceeds :] Taking it then as established by the testimony of Moses B. Savage, that this agreement was made, and the money received in pursuance of it, anterior to the marriage, and that the purchase of the Washtenaw farm was made out of that fund, in fulfilment, in whole or in part, of the agreement and trust, the question arises, was that agreement valid, and will it support the transaction as against the complainants? And if that agreement by parol was not valid, and cannot be given in evidence against the complainants to sustain the transaction, then was the purchase of the farm valid as a settlement upon the wife, independently of the previous agreement?

It has long been the well established doctrine of courts of equity, that ante-nuptial agreements between the parties to a contemplated marriage, for the settlement of property upon the wife to her separate use, are valid and will be supported; but it is insisted that the statute of frauds requires them to be in writing, and that if they are not so, subsequent settlements based upon them cannot be sustained.

Atherly, in his learned treatise on Marriage Settlements, says that it has been held that settlements after marriage are good against creditors and purchasers, though resting on mere parol agreements, when such agreements were entered into before the marriage; but adds, that this doctrine has been called in question, and that he does not see how it can possibly be sustained; for, to support the settlement, resort must be had to the parol agreement, and this can only be proved by parol evidence, and to admit parol evidence, in such a case, would be completely inconsistent with the spirit and design of the statute of frauds. p. 149. See also Sugd. on Powers, 421, '2, to the same effect. In the cases which arose before the

statute of frauds of Charles II., rendering void promises in consideration of marriage, not in writing, such agreements, and settlements in pursuance of them, were sustained. Since that statute, the subject has been much discussed, and the cases do not seem to be altogether harmonious. In *Montacute* v. *Maxwell*, 1 P. Wms. 618; S. C. 1 Str. 236, decided in 1720, the wife filed a bill to compel her husband to settle her own estate to her separate use, setting forth a parol promise before marriage: a plea of the statute of frauds of Charles II. was interposed and allowed. The bill was amended, and allegations inserted to show fraud; and thereupon a like plea directed to stand for an answer. In the report of the case by Strange, is a *dictum* of the Lord Chancellor, that such parol agreement on marriage will support a settlement made in pursuance of it after marriage, and that it had been frequently so determined. Sugden, in his treatise above cited, refers to this and says: "It is apprehended, however, that no such determination was ever made." In *Beaumont* v. *Thorp*, 1 Ves. 27, decided in 1747, a settlement by the husband upon the wife, after marriage, which was attempted to be supported upon a previous promise, was held a voluntary settlement against creditors. No articles were recited in the settlement, and the case arose upon a bill filed by a creditor seeking to avoid it. In *Spurgeon* v. *Collier*, Eden's R. 50, decided in 1758, the question arose in a different form, and was distinctly decided. Collier settled an estate upon his niece and her husband, alleged to be in pursuance of an agreement made with the husband before and in consideration of the marriage. This settlement was impeached by a creditor. The Lord Keeper decided that the original agreement was not proved; and that if proved it would not better the case. He remarked, that since the statute, the husband could have no remedy on the agreement; and that in that

case "the settlement was voluntary, for it could not be compelled: it was made to a person having no right to demand, for where there is no remedy there is no right." And he adds, that "if such parol agreement could give effect to a subsequent settlement, it would be a dangerous blow to the statute." This view is equally applicable where the agreement is between the parties to the marriage: the danger and the mischief designed to be met and prevented by the statute are the same in either case. In *Dundas* v. *Dutens*, 1 Ves. 196, decided in 1790, Lord *Thurlow*, by an interrogatory to the Solicitor General, intimated that a settlement after marriage, *reciting a previous ante-nuptial parol agreement*, would be good; the Solicitor General replying that he thought not. In another report of this case found in Cox's Cases, the Lord Chancellor is reported to have decided the question in favor of the settlement. What was the point actually decided seems to be left in some doubt. In *Randall* v. *May*, 12 Ves. 67, decided in 1806, the Master of the Rolls expressed the opinion that such a promise, though recited in the settlement, would not be good as against creditors. He states that there are cases to the contrary, and notices *Dundas* v. *Dutens*, and the intimation given by Lord *Thurlow*, but refers to the point as undecided. In *Reade* v. *Livingston*, 3 John. Ch. R. 481, Chancellor *Kent* reviews the authorities upon the subject and arrives at the conclusion, that where there is no recital of a previous ante-nuptial agreement, the settlement cannot be supported; and expresses an opinion that even with such a recital, the reason and policy of the case, and the weight of authority are against it. He refers to all of the cases above cited except that of *Spurgeon* v. *Collier* which seems to have escaped his observation. In the case before us, no recital of any previous agreement appears, but it is a purchase made by the husband, and a conveyance thereupon made directly to

the wife. Upon authority, then, I think the ante-nuptial agreement in this case clearly within the statute of frauds, (R. L. 1833, p. 342, § 10 ;) and I cannot see why it would not be so even if there were articles of settlement reciting it. As against creditors it would be but the declaration of the parties to it; and I cannot see how their after declaration of a previous alleged agreement can be more effectual against creditors in this form than in any other. In either case, to establish it, resort must be had to proof; and this must be by parol, which is against the object and intent of the statute. Justice *Story*, in treating of this subject in his Commentaries on Equity, § 374, says: "The strong inclination now seems to be, to consider such a settlement incapable of support from any evidence of a parol contract."

It is conceded that at the time of the alleged agreement, and also of the settlement, similar statutes of frauds were in force in New York and in this state: no question, therefore, as to the *lex loci*, arises.

It is said, however, that the wife's money, and not merely the marriage, constituted the consideration. How so? Independently of the promise, this would, by the marriage, pass to the husband and become his. He would be entitled to, and receive possession of it, as his own absolutely. The effect of the agreement is, not to give him the possession, for that he would have without it, but to devest him of his marital right over it, and of all benefit from it. In consideration of the marriage he agrees to part with the property conferred by the law as incident to it, and to make the settlement. Suppose the money placed in the hands of a third person, instead of the husband, to invest for the wife's separate use. If done before marriage, without the knowledge and consent of the proposed husband, it would be a fraud upon his marital rights, and would not affect them: the money would,

nevertheless, be his. Suppose he, then, agrees with the proposed wife that a third person shall, as her trustee, invest it for her benefit: what is the consideration? Not the money: he has it not: that goes into the hands of the trustee for the wife's separate use. The marriage, and that only, is the consideration. How does the case differ when the husband himself receives the money under the agreement, and becomes the trustee? Only in this, that, in addition to his renouncing his marital rights over it, and personal benefit from it, he also assumes the burthen of the trust. The fact that he does so, precludes that the money is the consideration. She might decline the marriage and retain the money, unless he would consent to the proposed settlement. If he does so consent, he, in consideration of the marriage, parts with a portion of the rights incident to it, which the law would otherwise confer upon him.

In the case of *Izzard* v. *Izzard*, 1 Baily's Eq. R. 228, decided in 1831, the court of appeals of South Carolina expressly applied the doctrine to a case where there was an alleged parol agreement before marriage to settle upon the wife her own personal property, holding a subsequent settlement void against creditors.

The case of *Taggart* v. *Talcott*, 2 Edw. Ch. R. 628, decided in New York by Vice Chancellor *McCoun*, in 1836, is cited by the defendants' counsel. That case is, in some respects, analogous to the present, but in other respects it is different. No question was made or arose in it, in regard to the statute of frauds. The husband, in 1829, received from his wife's father $3945.00, and placed the same to the credit of the father on his books, with the understanding that it was to be her separate property, and all furniture purchased with it was to be carried to the account of this fund, as her sole property. Household furniture was purchased with the money, and, upon a creditor's bill

against the husband, the wife petitioned to be protected in the enjoyment of the furniture as her separate property; and the petition was granted. This, as I understand the case, was a gift, subsequent to the marriage, by the father of the wife, to her separate use: so placed by him in the hands of the husband. Of course the husband was held, according to the principles of courts of equity, to be a trustee for the wife. If the money had belonged to the wife at the time of the marriage, the question would have been different; and then, I think, the case would have been within the decision of Chancellor *Kent* in *Reade* v. *Livingston*.

The conclusion to which I have arrived, then, is that the parol agreement antecedent to the marriage, cannot be set up to support the transaction of 1837, as against creditors, and that, consequently, it must be considered unconnected with that agreement.

The next question, then, is, can this be supported as a settlement after marriage? In other words, can a post-nuptial settlement, not founded on a previous ante-nuptial agreement, or any valuable consideration at the time of making it, be sustained against creditors? Upon this subject the law has been much considered and is well settled. It is that where the husband is indebted at the time of making the settlement, it is void as against both existing and subsequent creditors; that either class of creditors may avoid it by showing that the settler was indebted at the time of making it, with the distinction, however, that in respect to subsequent creditors the presumption of fraud may be repelled by circumstances; that, if the settler is not indebted at the time, the settlement is valid as against them, unless actual fraud appears, as by his thus devesting himself of his property with a view of contracting debts; which would be clearly evinced by his shortly after incurring debts, and evading their payment. The only

question which seems to remain in doubt or unsettled is, as to what circumstances will repel the presumption of fraud, where the settler was in debt at the time, and the settlement is sought to be avoided by subsequent creditors. That the debts then owing were secured by mortgage, or in the settlement, have been held to be such circumstances. As to what others are sufficient seems not to be precisely settled. The doctrine, as above stated, is laid down in Atherly on Marriage Settlements, and in Story's Commentaries on Equity in the chapter on constructive frauds, and it is fully sustained by the current of English, and generally by the American cases, many of which have been referred to by the appellants in their brief; and it seems to be so well settled that a particular reference to these cases is unnecessary. They are collected and reviewed by Chancellor *Kent* in his elaborate opinion in *Reade* v. *Livingston*, before cited, and by Chief Justice *Marshall* in *Saxton* v. *Wheaton*, 8 Wheat. 229; 5 Pet. Cond. R. 419. These cases have mostly arisen under the provisions of English and American statutes against fraudulent conveyances, affirmatory of the common law, and essentially like those contained in our statutes of 1833 and 1838: and from the same authorities which establish the general doctrine, it is found that the creditor who seeks to avoid the settlement, must prove that the settler was indebted at the time he made it; and the settlement will prevail if it is left in doubt whether the debt of the creditor seeking to impeach its validity, was contracted anterior or subsequent to the settlement. Ath. on Marr. Set. 220; *White* v. *Sampson*, 3 Atk. 410; *Stephen* v. *Olive*, 2 Bro. Ch. Cas. 92.*

* The American authorities on the subject of voluntary conveyances, are collected and very ably reviewed, in a valuable work recently published, entitled American Leading Cases, (Vol. I. pp. 1—69.) On page 66 the authors say that "the rule *generally* established in this country, may be taken to be, that a voluntary post-nuptial settlement on a wife or children, will be good if the husband be not in debt at the time, or

Upon the facts presented in this case, how stands the transaction of November 22, 1837? The judgment was rendered in November, 1838, upon a warrant of attorney executed in June of the same year. The bill, as originally filed, merely set forth the judgment and execution upon it, but not the time of the creation of the debt. Moses B. Savage answered, and after his answer the bill was amended so as to charge the several conveyances of the Washtenaw property to have been made subsequently to the indebtedness to the complainants, and with the intention of defrauding the complainants, and other creditors. Moses B. made no further answer, and the amendments do not appear to have been taken *pro confesso* against him. Mrs. Savage, in her answer, admits the judgment and execution, but is silent as to the allegation of the previous indebtedness. When the answer is silent as to a fact alleged, which is charged to be within the personal knowledge of the defendant, or is of such a nature that it is presumed to be so, the fact is deemed admitted; otherwise not. Now this fact is not charged as within the personal knowledge of Mrs. Savage, nor is it such a fact as will be presumed to be so, and therefore it cannot be regarded as admitted by her. What then is the proof? When the indebtedness accrued, the evidence does not show. It appears from the examination of Moses B. that it existed in June, 1838, and that on the 27th of that month the warrant of attorney was executed; also, that Mr. Wood, one of the complainants, was in Monroe during that month, to see him in regard to it. He states that at the time of a sale of property to his father, in May, 1838, judgment had not been rendered, or, as he recol-

the settlement be not disproportionate to his means, taking into view his debts and situation; in short, if it be *bona fide*, reasonable, and clear of any intent, actual or constructive to defraud. *Picquet* v. *Swan*, 4 Mason, 444, 451; *Gassett* v. *Grout*, 4 Metc. 486, 488." *Reporter.*

lected, suit commenced. For aught that appears the debt might have been contracted after November 22, 1837. Then, as to the other debts: From the whole of the testimony of Moses B., we think the conclusion is irresistible that he was indebted to sundry other creditors besides the complainants, at the time of the conveyance by Raleigh, although, through the inadvertence of counsel, doubtless, in not eliciting the facts fully on his examination, he does not state directly and expressly that he was so indebted. Is there any circumstance to repel the presumption of fraud arising from the fact of the existence of such indebtedness? There is none. There is no evidence to show that those debts were secured by mortgage, or otherwise; indeed, we must infer from the facts in evidence that they were not. It follows, then, that the settlement of November, 22, 1837, by the Raleigh purchase, is fraudulent in respect to creditors, and must be so held.

As to the purchase of Phelps in 1839, that was clearly void, under the first branch of the rule above stated relative to voluntary settlements; as it was made after the complainants had obtained their judgment.

Now, as to the conveyance of the Washtenaw farm to Moses Savage in 1840. First, in relation to the alleged fraud. There are certainly some circumstances of suspicion. Moses visited his son Moses B., at Monroe, in 1839, and must have acquired some knowledge of his indebtedness, though in his answer he denies any knowledge of the judgment in favor of the complainants. After the purchase, Moses B. let the farm to Phelps, and received the proceeds, a part of which he applied in improvements upon the farm, and a part to his own use. He also kept some stock upon it in conjunction with Phelps. He states that he acted as the agent of his father, and that what he reserved to his own use was not more than a compensation for his agency. It is in proof, however,

that the sale was made to provide money for the payment of certain debts of Moses B., and that the consideration money was paid, and was in fact applied to the payment of those debts. It does not appear that the consideration was at all inadequate, even if Moses B. possessed, as was supposed, a life estate in the farm. A sale to pay creditors, with actual payment to them, can hardly be supposed to be fraudulent as to other creditors; and it appears to me that, with these facts, the circumstances of suspicion are not sufficient to authorize us to say that the sale was fraudulent.

But then the question arises, what interest did Moses B., the husband, convey on his own part, or on the part of his wife Sophia? It is insisted that the settlement was to her sole and separate use. If so, in equity, the husband's right over it would be devested, and the settlement, though invalid as it respects creditors, is valid as between the parties. The deeds to Mrs. Savage are not before us, and whether they are to her separate use on their face does not expressly appear; but from the answers and the testimony, such seems to have been the nature and character of the settlement. Now, what interest passed by the conveyance to Moses Savage? If the land was, as between the husband and wife, the separate property of the wife, and she was entitled to the usufruct, the conveyance passed only the husband's interest; and this would be nothing in equity, if it appeared on the face of the deed; and even if not, yet, upon the facts insisted upon by Moses B. and Sophia, it would be nothing; for if a legal life estate remained in him, it would yet, in equity, be in trust for her benefit, and only thus could Moses Savage take it: and all that was conveyed to and held by and for Mrs. Savage, is, under the principles we have adverted to, for the benefit of creditors, and would so pass to Moses Savage, if the trust appeared on the face of the deed,

or he had notice of it. Now, in his answer, he also sets up the same facts, but more briefly, insisted upon by Moses B. and Mrs. Savage, viz. that "Mrs. Savage had placed $1,500 of her own funds in the hands of her husband, in trust solely to be invested in real estate in Michigan for her benefit and in her name;" and then, after stating that the land was purchased with these funds, he adds, "that the same was deeded to her directly, in furtherance and pursuance of said trust, and by her accepted in pursuance and fulfilment of said trust." He also goes on to state that he knew that the interest he purchased was only such as Moses B. held as the husband. Now, the parol agreement being void as against creditors, and all three of these defendants agreeing as to the fact that the land was held as above stated, if all the interest which Moses B. and his wife held, was, in respect to creditors, a trust for their benefit, then it follows that whatever interest, if any, Moses, the father, acquired by the deed of the husband, must be subject to the same trust. I have arrived at this conclusion with some hesitation. It appears to me the most difficult question of the case, and it was not fully presented on the argument. But if the land as between Moses B. and his wife was the wife's separate property, but subject to the claims of creditors, and the father took only as the husband held, (if he held any thing at all,) it seems to me that this is the necessary result.

The conclusion, then, is, that the decree of the Chancellor should be reversed, and a decree entered declaring the Washtenaw farm, in respect to creditors, the property of the defendant Moses B. Savage; and that the right, title and interest held by him and his wife, and also that held by Moses Savage under the deed to him of May, 1840, be sold to satisfy the amount due upon the judgment of the complainants; the sale of the undivided half

to be subject to the mortgage to Phelps for the purchase money.*

*Decree accordingly.*

* The facts and the opinion of the court relating to one branch of this case, which involved the question of the validity, as against the complainants, of a conveyance by Moses B. and William Savage to their father, Moses Savage, in May, 1838, of certain property in Monroe, have been entirely omitted in this report, as neither involving nor determining any legal principle; although the case as decided in the court of chancery, is reported in full in Walk. Ch. R. 471. As to this conveyance, the decree of the Chancellor sustaining its validity, was affirmed by this court.

## Bostwick *v.* Dodge.

B. against whom D. had recovered a judgment in the circuit court, removed the cause into this court by writ of error: soon afterwards he applied for and obtained his discharge under the bankrupt law of 1841, D. proving the judgment as a claim against his estate in bankruptcy. Supposing that by these proceedings the judgment had been *ipso facto* discharged, and that nothing remained to be done to prevent its affirmance, B. neglected to advise with or instruct his attorney, who, after the discharge in bankruptcy, and in ignorance of it, moved the cause on to a hearing in this court, where the judgment below was affirmed, (see 1 Dougl. Mich. R. 416,) and execution issued thereon. B. now moved that the execution be perpetually stayed.

The Court, holding B.'s neglect to avail himself of the discharge before the judgment of affirmance, to be satisfactorily explained, granted the motion, on the terms of his paying the costs of all the proceedings in this court.*

* See *Parks* v. *Goodwin*, (decided Jan. Term, 1848,) granting the same relief to a party who had *gone through bankruptcy* between the argument and the decision of the cause in this court.

## Elizabeth Welch v. Alexander H. Stowell, John V. Ruehle, and Henry Myers.

The statute, (S. L. 1832, p. 40. § 3,) empowering the common council of the city of Detroit "to make all such by-laws and ordinances as may be deemed expedient for the purpose of preventing and suppressing houses of ill fame within the limits of the city," does not authorize the common council, by ordinance and resolution, to require the city marshal to demolish a house occupied as a house of ill fame, and adjudged by such council to be a common nuisance.

Neither have individuals the right to abate the nuisance occasioned by the occupation of a building as a house of ill fame, by demolishing the building.

It seems that the power to abate a nuisance is limited to the removal of that in which the nuisance consists.

Indictment of the offenders is the appropriate remedy, both at common law and under the statute, for the suppression of houses of ill fame.

Case reserved from the Wayne Circuit Court. This was an action of trespass for demolishing a dwelling house in the city of Detroit, owned and occupied by the plaintiff, Elizabeth Welch. At the trial in the circuit court, the jury returned a special verdict, by which they found that the trespass had been committed by the defendants as alleged in the declaration; but that, at the time, the house was, and for more than ten years previously had been, occupied by the plaintiff as a house of ill fame, and that it was a common nuisance. They further found that, on the 16th of September, 1836, and before the trespass alleged, the common council of the city of Detroit passed an ordinance, to the effect that, when any house or building within the limits of the city, occupied or kept as a house of ill fame, should be deemed by the common council to be a common nuisance, it should be competent for such common council to abate such nuisance by ordering such house or other building to be pulled down and re-

moved, at the expense of the owner, proprietor, or occupant thereof, at the discretion of the common council. That afterwards the said common council, by resolution duly adopted, ordered, adjudged, and declared the dwelling house of the plaintiff, described in the declaration, to be such common nuisance, and empowered and directed the city marshal to proceed with sufficient force and apparatus, to demolish the same: And that the alleged trespass was committed by the defendants, while acting in obedience to this resolution,—Stowell being, at the time, marshal, and Ruehle one of the aldermen of the city, and Myers assisting at the request of Stowell.

The question of whether, upon the facts thus found, the defendants were justified in pulling down the house of the plaintiff, was reserved by the Presiding Judge for the opinion of this court.

*George C. Bates* and *C. Tryon*, for the plaintiff,

*D. E. Harbaugh*, City Attorney, and *A. D. Fraser*, for defendants.

WHIPPLE, J. delivered the opinion of the Court.

The third section of "An act to amend 'an act entitled an act relative to the city of Detroit,'" approved June 29, 1832, (S. L. 1832, p. 40,) confers upon the common council of the city, "full power and authority to make all such by laws and ordinances, as may by the said common council, be deemed expedient, for effectually preventing and suppressing all disorderly houses, and houses of ill fame, within the limits of said city."

Under this grant of power, the common council, on the 16th September, 1836, adopted an ordinance entitled "an ordinance to suppress disorderly houses and houses of ill fame."

The first section of this ordinance provides, that "any

person or persons who shall, within the limits of the city of Detroit, keep a disorderly or ill governed house or place, or a house for the resort of persons of evil name or fame, &c., shall, on conviction thereof before the Mayor's Court of said city, be punished by fine and imprisonment or either, at the discretion of the court," &c.

The second section provides that, "when any such house or building, so occupied, shall be deemed by the common council to be a common nuisance, it shall be competent for said common council to abate such nuisance by ordering such house or other building to be pulled down and removed, at the expense of the owner, proprietor or occupant thereof, at the discretion of such common council."

In the case of *Slaughter* v. *The People*,* these provis-

* Following is a report of the case here cited, which was decided at the January Term, 1842, of the Supreme Court—Present: Wm. A. Fletcher, C. J., and Morell, Whipple and Ransom, Justices.

James Slaughter v. The People.

Keeping a house of ill fame, is a *criminal offence* within the meaning of Article I, § 11, of the constitution of the state, which declares that "no person shall be held to answer for a criminal offence, unless on presentment of a grand jury; except," &c.

*Held*, accordingly, that an ordinance of the common council of Detroit, prescribing the punishment for keeping a house of ill fame within the limits of the city, and providing for the trial and conviction of offenders by the mayor's court, where the proceedings are by complaint, *without presentment of a grand jury*, was unconstitutional; and that a summary conviction, by the mayor's court, for a violation of this ordinance, was void.

Certiorari to the Mayor's Court of the city of Detroit. Summary proceedings by complaint, without indictment, having been instituted against James Slaughter, in the mayor's court, for keeping a house of ill fame, within the limits of the city, in violation of an ordinance of the common council of the city, he was tried and convicted by that court, and sentenced to pay a fine of one hundred dollars. To reverse this judgment, Slaughter sued out this writ of *certiorari*.

*C. Tryon* and *Geo. C. Bates*, for the plaintiff in error.

*D. E. Harbaugh*, City Attorney, and *A. D. Fraser*, for the People.

Whipple, J., delivered the opinion of the Court. It is insisted, as a ground for reversing the judgment of the mayor's court, that the offence of keeping a house of ill fame, is, both by common law and the statute of this state, a *criminal offence;*

ions of the act of the legislature, and of the ordinances of the city, were fully considered by this court; and we then determined that the summary conviction of the plaintiff, under the first section of the ordinance, was void, as being repugnant to that provision of the constitution which declares that "no person shall be held to answer for a *criminal offence*, unless on the presentment or indictment of a grand jury, except," &c. The question now arises whether, under the general grant of power contained in the act of 29th June, 1832, and the facts in this case, the defendants were justified in pulling down the house of the plaintiff. In order to determine this question, we must examine into the validity of the second section of the ordinance above referred to. It is undeniable, that the act referred to has invested the common council with large

and, inasmuch as the party was tried without the intervention of a grand jury, the proceedings are irregular and void.

With respect to the first branch of the proposition, there can be no doubt. "All disorderly inns or alehouses, bawdy houses, &c. are public nuisances, and may, therefore, be indicted." 1 Russ. on Crimes, 297. Again: "Every person who shall keep a house of ill fame, resorted to for the purpose of prostitution or lewdness, shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding three hundred dollars." R. S. 1838, p. 617. Whether, therefore, we consult the common law, or the statute of this state, it is clear that keeping a bawdy house, or house of ill fame, is an offence, punishable by fine or imprisonment in the discretion of the court.

The determination of the second branch of the proposition must depend upon the construction of Article I, section 11, of the constitution of this state, which provides that, "No person shall be held to answer for a *criminal offence*, unless on the presentment or indictment of a grand jury, except in cases of impeachment, or in cases cognizable by justices of the peace, or arising in the army or militia when in actual service, in time of war or public danger." What, then, is a "*criminal offence*," within the true intent and meaning of the constitution? To determine this question, we must necessarily define the term, "criminal offence." "A crime or misdemeanor," says Blackstone, "is an act committed, or omitted, in violation of a public law, either forbidding or commanding it." 4 Bl. Com. 5. It will be perceived that this definition is applicable both to crimes and misdemeanors, which, says the same eminent author, "properly speaking, are mere synonymous terms; though, in common usage, the word '*crimes*' is made to denote such offences as are of a deeper and more atrocious dye; while smaller faults and omissions of less consequence, are comprised under the gentler name of 'misdemeanors' only." We must, then, consider the term "*criminal offence*," in its strict legal and technical sense, as including both crimes and misdemeanors, unless it is manifest that the framers of the constitution intended to limit or restrain the meaning of that term, as it was then and is now under-

discretionary powers; but it is our duty to ascertain the intention of the legislature, and to give effect to such intention, provided we can do so, without violating those wise and salutary rules by which courts are guided in the construction of statutes. Is it, then, fair to presume that the legislature ever contemplated conferring upon the common council the authority to demolish a house to which persons of evil name may resort? It is a sound rule in the construction of statutes, that general words may be restrained or enlarged, so as to effectuate the intention of the law-maker; so, where a general authority to legislate over a subject is conferred by the sovereign power upon a subordinate political corporation, it is always presumed that their legislation will conform, as far as practicable, to the legislation of the state, on the same subject matter;

stood and expounded by authors of the highest repute; for it is readily conceded that general terms in a constitution or statute may be restrained in their meaning or application, provided violence is not done to any of those fundamental rules by which courts are guided in the construction of laws; and especially is this true, where effect is given to the obvious intention of the law-maker. It is contended by the counsel for the defendants in error, that the term "criminal offence," in our constitution, is synonymous with the term "capital or other infamous crime," in the corresponding provision of the constitution of the United States; and that the words, "infamous crimes," are intended to denote "such offences as are of a deeper and more atrocious dye;" or, in other words, that class of offences denominated at the common law, "*felonies.*" Upon a full and deliberate examination of this part of the case, I have come to the conclusion, that to restrain and limit the general language used in the constitution, in the manner thus contended for, would violate both the letter and the spirit of the provision now under consideration.

I shall now briefly state some of the most prominent and obvious reasons by which my mind has been led to this result. And first: It is a fair presumption that the framers of our constitution, in adopting legal terms, had reference to their strict legal and technical import. To suppose otherwise, would argue a degree of carelessness in the use of language, which would be inexcusable in an ordinary legislative body, but especially so in a body engaged in framing a permanent constitution and form of government. Secondly: It is quite probable that the Convention, in adopting the provision in question, consulted the corresponding provision in the constitution of the United States, which is eminently distinguished, not merely for the principles it embodies, but for the precision and clearness with which those principles are stated. To my mind the difference in the phraseology was intentional, and not merely accidental. Thirdly: Not only does our constitution differ from the constitution of the United States, in this respect, but very essentially from the constitutions of almost every state in the Union. Fourthly: In the most modern of the constitutions of the states of the Union, there is a manifest inclination, not merely to enlarge, but to guard with great strictness

that no new or extraordinary remedies for suppressing an evil,—remedies unknown to the legislation of the state or to the common law,—can be provided, unless the authority to provide such remedies is given in express terms. Again: ordinances and by-laws must be reasonable; and their reasonableness is, in general, to be tested by the intention of the authority granting the charter, and the good of the corporation erected by the charter. With these rules and principles in view, can it be supposed that the legislature intended by a general grant of power to make all such by-laws and ordinances as might be deemed proper and necessary to suppress houses of ill fame, to authorize the common council to adopt the remedy provided for in the ordinance under consideration? A bawdy house is a public nuisance, both at the common law and under our stat-

the liberties of the citizen. Fifthly, The ancient rule with respect to the distinction between felonies and misdemeanors, has given place to another more enlightened and just. And Sixthly, In view of the rule as it now exists, the same reasons which are urged in support of the principal that no man shall be called upon to answer for a *felony*, unless he be first indicted by a grand jury, apply with equal force to cases where an individual is charged with an offence known at common law as a misdemeanor. If my reasoning be right, then, it follows, that the term "criminal offence" used in the constitution, is to be taken in its most comprehensive sense, as including both felonies and misdemeanors.

The next question to be determined is, whether in this case, the provision of the constitution referred to, has been violated. The return to the writ of certiorari shows that the incipient proceeding before the mayors' court was a complaint, charging the plaintiff in error with the commission of an offence against the ordinances of the City; that upon the complaint the defendant below was tried, found guilty, and sentenced to pay a fine of fifty cents. If the views I have expressed be correct, it follows that this proceeding in the mayors' court, against the plaintiff in error, was void, as being against that provision of the constitution, which declares, that "No person shall be held to answer for any criminal offence, unless on the presentment or indictment of a grand jury." I have not been unmindful of the views taken of the present case by the counsel for the city upon the argument, or of the numerous points made in the brief with which I have been furnished to sustain the proceedings below. If I have not noticed them particularly, the reason will be found in the fact, that I have deemed them as inapplicable to the *real* question presented for the consideration of this court. Before, however, dismissing this part of the case, I desire, very briefly to comment upon one point made by the counsel in argument, and relied upon in his brief. It is said that, the legislature, by an act passed June 9, 1832, invested the common council of the city with full power to make by-laws and ordinances, "for effectually preventing and suppressing all disorderly houses and houses of ill fame, within the limits of said city." (S. L. 1832, p. 40 § 3.) That in pursuance of the power thus

ute; the penalty for maintaining such a nuisance is fine and imprisonment; *this* is the mode provided for their suppression by the general law of the state, and the common law. The mode, then, provided by the ordinance for suppressing the evil, it is obvious, is both novel and extraordinary. By the common and statute law, *fine and imprisonment* are considered adequate for the suppression of the evil: by the *ordinance*, a new and unusual remedy for the mischief is provided. The law of necessity alone, it appears to me, could justify the common council in resorting to the destruction of property to suppress houses of prostitution. In providing remedies for existing evils, the legislative authority usually adopt the means adapted to the end sought to be accomplished. It is, I think, manifest, that the penalties inflicted in such cases, are abund-

granted, the ordinance under which the defendant below was convicted was adopted on the 16th September 1836, and provides that if "any person or persons, shall, within the limits of the city of Detroit, keep a disorderly or ill governed house, or place, or a house or place for the resort of persons of evil name and fame or of dishonest conversation," &c., such person or persons "shall be punished by fine and imprisonment, or either, at the discretion of the court." The second section provides "that when any such house or building, so occupied or kept as aforesaid, shall be deemed by the common council to be a common nuisance, it shall be competent to said common council to abate such nuisance." &c. It is further said that the act of the legislature conferring the power, was passed previous to the adoption of the constitution, and inasmuch as the legislature of the state did, in the Revised Statutes which took effect on the 31st August, 1838, ratify and confirm the charter of the city, this ratification is to be regarded as an expression of the legislature in favor of the constitutionality of the act of 1832, and as such, entitled to great weight. A legislative construction of the constitution is entitled to, and should always be treated with the highest respect, by a co-ordinate department of the government; but such expression of opinion is by no means conclusive or binding, and this court will never hesitate to pronounce any law void, where it manifestly violates the constitution. But it is unnecessary for us to pronounce the act of 1832, unconstitutional. I do not, myself, perceive that it is so. It is the "ordinance" under which the plaintiff in error was convicted that I think unconstitutional. I go farther, and suggest a doubt, whether, under the act of 1832, the common council possessed the *power* of passing the first section of the ordinance under which the proceedings in the case were had. The power to prevent and suppress houses of ill fame, does not necessarily invest the common council with power to pass a law which makes it a criminal offence for any person to keep such a house, and impose a penalty of fine and imprisonment, *without any limitation as to the amount of the fine, or the term of the imprisonment.* To confer upon a municipal corporation powers so vast as those asserted in the ordinance—powers by which a court, proceeding in a *summary way*, may incarcerate a citizen, for a day or a year,

antly sufficient to cure the evil, without a destruction of the building in which the victims of prostitution reside. The law, by acting on the individuals themselves by the imposition of fines and incarceration in jails and penitentiaries, can better eradicate the evil, than by resorting to the extraordinary remedy provided for in the ordinance. It must, indeed, be an extreme case, that will authorize the municipal authorities of the city to doom a house to destruction by a simple resolution declaring it a house of ill fame. The expediency of such an exercise of power might well be questioned, though authorized by the supreme authority of the state, even if the fact is first to be *judicially* ascertained, that the inmates of a house are prostitutes. If so, it would require a very strong and clear expression of the legislative will, before affirming that such power is granted to a corporation, whose sentence of condemnation, in respect to the fact, is not based upon the verdict of a jury, but a simple resolution of the common council. It is apprehended, therefore, that the

or five years, and impose a pecuniary penalty of one dollar, or one thousand dollars, *at its discretion*,—appears to me to be repugnant to all the notions which we have formed of the nature of the institutions under which we live. I cannot believe for a moment, that the act of 1832 will warrant an exercise of power which might be wielded for purposes of oppression. No instance can be found in our laws where a *discretion* so broad has been conferred, even upon our higher judicial tribunals, where the proceedings are had according to the course of the common law; and surely it could not have been intended to clothe an inferior jurisdiction with a *discretion so dangerous and unusual*.

It was asserted with some emphasis by the counsel for the city, that the determination of this case, by the court, would determine in effect the powers of the common council, and the mayors' court, in respect to its police regulations. I disclaim the expression of any opinion respecting any law or ordinance except those whose validity is necessarily involved in the case at bar; and I shall at all times be ready to sustain the proceedings both of the common council, and the mayors court, when they act within the scope of the authority conferred upon them. That the former should be invested with all necessary and usual powers to carry into effect the object for which the corporation was created, and that tribunals should be erected to enforce those powers by a summary proceeding, is very readily granted. The legislature have performed their duty by a grant of power sufficiently broad to authorize the enforcement of the most rigid police; it is for the local authorities to see that the grant thus liberally made is not abused.

*Judgment reversed.*

authority claimed for the common council, never was intended to be granted. The legislature must be presumed to have been aware that to keep a bawdy house, was a "*criminal offence*," within the meaning of Article I, section 11, of the constitution of this state; and it is scarcely credible that a power so vast as that claimed, and to be executed in a mode so unusual, could have been granted. We think the act of the legislature should receive a more reasonable construction—a construction more consistent with all our notions of right and justice,—a construction which will protect, as well the public, against the evil complained of, as the rights of property, which should be held sacred. The whole course of proceeding marked out by the second section of the ordinance is altogether too summary and extraordinary to receive the sanction of any judicial tribunal familiar with those guards by which the rights of persons and property in this country are secured. All that would be required of the common council would be the adoption, without judicial investigation, of a resolution that a house is inhabited by persons of ill fame, and then, of an order directing its demolition. This summary proceeding, it appears to me, would be an attempt in too many instances, to correct public morals, at too great a sacrifice of right and justice. If the common council may *make* such an order in respect to the worthless house inhabited by the plaintiff, they may make a like one to be executed upon the most costly edifice in the city, provided it should, without even the knowledge of the owner, be the abode of the vicious and profligate. Such a proceeding no community would tolerate. The public health and morals of large towns and cities demand the enforcement of a rigid police, and the authorities should be armed with all the necessary powers for the protection of both. All the powers necessary for these purposes, have been granted to the city of Detroit; to this grant of

power the plaintiff makes no complaint, but objects to the mode and manner of its execution. I think, her complaint is well founded, and that the second section of the ordinance in question is nugatory and void.

But it is said that, irrespective of this provision of the ordinance, the defendants are justified, upon the ground that the house in question was a common nuisance, and that the corporation of the city, or the defendants as individuals, might abate it. The law undoubtedly authorizes the corporation of Detroit, or any person residing within its limits, to abate any nuisance that may exist. This right is one of the few exceptions to the general rule that no man shall take the law into his own hands; the exception finds its vindication in the law of necessity. It is a right, however, to be exercised with caution. Care must be taken that nothing is done but what is absolutely necessary to abate the nuisance. Let us apply the rule contended for by the defendants, to the present case. It is said that the house was a nuisance. This may be very true; but it was a nuisance in consequence of its being the resort of persons of ill fame. That which constitutes or causes the nuisance may be removed: thus, if a house is used for the purpose of a trade or business, by which the health of the public is endangered, the nuisance may be abated, by removing whatsoever may be necessary to prevent the exercise of such trade or business: so a house in which gaming is carried on, to the injury of the public morals; the individual by whom it is occupied may be punished by indictment, and the implements of gaming removed; and a house in which indecent and obscene pictures are exhibited is a nuisance, which may be abated by the removal of the pictures. Thousands of young men are lured to our public theatres, in consequence of their being the resort, nightly, of the profligate and abandoned; this is a nuisance. Yet in this, and in the other

cases stated, it will not be contended that a person would be justified in demolishing the house, for the obvious reason that to suppress the nuisance such an act was unnecessary. So in the case before us, the nuisance was not caused by the erection itself, but by the persons who resorted there for the purpose of prostitution. Our laws have provided a mode by which the cause may be removed; the person who owned or occupied the house, might have been indicted, as well as the persons who resorted there for the purposes of prostitution; and, upon conviction, they would have become the tenants of our jails or penitentiary. This would have been striking at the root of the evil; but surely the destruction of the house did not abate the nuisance. The cause still remained; its inmates would resort to other receptacles of vice; and in no respect would the public morals be promoted. In this, and the like cases, the only remedy for the mischief is to apply the stringent provisions of our criminal law, and thus place its authors where their evil example will no longer offend public decency, or destroy public morals. The rule I have stated in respect to the abatement of a common nuisance, is sustained by cases to be found in Strange, 688; *Cooper* v. *Marshall*, 1 Burr. 267; 7 T. R. 467; 1 Russ on Crimes, 306.

In the argument of the case, the counsel for defendants relied, with much confidence, on the case of *Meeker* v. *Van Rensaeller*, 15 Wend. 397, as supporting the principle contended for by them, that the city authorities had a right to direct the building to be pulled down. I have examined that case with much care, and find the views I have expressed in this opinion strongly confirmed. The facts in the case were, that a building, originally erected as a *tan house* was divided into several apartments, and while the *Asiatic cholera* prevailed in Albany in 1832 these apartments were inhabited by a large number of

emigrants from Ireland. "*The premises were extremely filthy*;" and under the floors were 20 *tan vats*, most of which were filled with putrid stagnant water, which oozed through the floor on walking over them. The building having been pulled down, an action was brought by the owner. Upon the trial of the case the court charged the jury that "if they should find that the building torn down was a nuisance, and that the defendant resided in the neighborhood, and had done no more than was necessary to abate it, they ought to find a verdict in his favor; but if they should find that the *building* was not a nuisance, then the defendant was liable to damages." Upon reviewing the case in the supreme court, Chief Justice *Savage*, remarked that "it was not denied upon the trial that the *building* torn down was a common nuisance, nor was it upon the argument;" and again, that "the proof in the case, from the plaintiff's own witness, was, that there was no other way to come at the evil but by pulling down the building." From the facts in the case, the charge of the court upon the trial, and the subsequent decision of the supreme court, it is quite clear that two facts were either admitted or proved: first, that the building was a common nuisance; and secondly, that it could have been abated in no other way than by its destruction. If these facts were established in the present case, our judgment would be for the defendants. If it had appeared in *Meeker* v *Van Rensaeller* that the building which the emigrants inhabited was cleanly, but that it became dangerous while the cholera prevailed in Albany, in consequence of its being thronged with the emigrants, it is very clear that the determination of the court would have been different. Upon such a state of facts the plaintiff must have recovered, for the reason that the nuisance might have been abated by the removal of the occupants, and that the destruction of the building was unnecessary.

Upon the whole, we are all of opinion that the law arising upon the facts before us, is with the plaintiff.

*Ordered certified accordingly.*

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## Nathaniel Weed, Harvey Weed and Henry W. Barnes, v. Joshua Terry.

Where two parties claim the same land under conflicting titles, and there is a doubt as to which title is valid, that fact is a sufficient consideration for an agreement to compromise and divide the land; and a specific performance of such agreement will be decreed, where there has been no fraud or unfairness.

And this, though the agreement be by parol, if there has been a part performance to take it out of the statute of frauds.

Where the parties to such an agreement had made choice of a third person to make the division, and both attended and taken part in it, and one of them had delivered possession to the other of the portion set off to him, and had permitted the latter to make repairs upon it, lease it, receive the rent and profits, and pay the taxes, *it was held*, that there had been such part performance.

Equity will not compel the specific performance, by a husband, of his agreement to procure his wife to join him in the conveyance of real estate.

Appeal from Chancery. For a report of the case in that court see Walk. Ch. R. 501, where the pleadings and evidence are given somewhat at length.

The case was briefly this: The complainants and the defendant each claimed under conflicting titles "Pontiac village lots, 11, 12, 13, 34, 35 and 36 *of the sub-division of out lots* 14, 15, 16, 25 *and* 26, according to the plat of the same in the registers office for the county of Oakland, in book M of deeds, p. 199."

The complainants claimed through a deed from the sheriff of Oakland county, executed March 30, 1842, in consummation of a sale of the premises to them, March

28, 1840, by virtue of an execution in their favor, against Robert Le Roy and Samuel C. Monson. The execution was regularly levied upon the premises above described, February 4, 1840, but, by mistake of the sheriff, in the entry of the levy, and in the notice which was given of the sale, the premises were incorrectly described—the words italicised in the above description being omitted, and page 119 of book M being stated as the place of record of the plat, whereas there was no record of any portion of Pontiac village plat on any other page of said book except page 199. It appeared also that the lots were sold together and not separately.

Terry, the defendant, claimed title to the premises through a deed of the same executed to him by Robert Le Roy and wife, in March 1840, after the levy, and before the sale to complainants, for the consideration of $1400, under which deed he entered into possession soon after its execution.

In the summer of 1840, Terry made a proposal to the complainants, through H. C. Knight their attorney, for an amicable arrangement of their claims to the premises, by an appraisal and division in proportion to their respective demands on Le Roy—he stating his claim to be about $1,100. This proposition was afterwards agreed to by the complainants, and such acquiescence made known to Terry, who still adhered to the proposition. After a long delay, and about the 1st of March 1842, Terry agreed with Knight upon William McConnell to appraise and divide the property, in pursuance of said agreement. Soon afterwards the appraisal and division was made by McConnell—Terry being present and participating therein—and lots 11 and 12 fell to the share of the complainants, and 13, 34, 35 and 36 to Terry. After the division Terry said it was fair and he was satisfied with it, and it was then agreed that deeds should be executed by the parties to

each other, and that in the mean time each should take possession of their respective portions. One Hunt was then in possession of all the lots as the tenant of Terry, and, as the year for which they had been let to him was then about to expire, Terry was to receive the rent, and Knight, as agent of complainants, agreed to let lots 11 and 12 to Hunt for another year, for $100 rent, in case Hunt should not remain upon the farm he owned. Hunt actually occupied the premises under this agreement, for about a fortnight after the expiration of his lease from Terry, when he went to reside on his farm, and the premises were leased by Knight to one Miles, and from that time until the filing of the bill in this case, the complainants, or persons claiming under them, remained in possession, and during the time paid taxes and expended some money in improvements upon the lots.

In April 1842, in pursuance of the agreement by which each party was to quit claim to the other their respective lots, a quit claim deed of lots 13, 34, 35 and 36 from complainants to Terry, was drawn up by Knight, and sent to the complainants in New York, and by them returned to Knight duly executed, with instructions to deliver it to Terry, on receiving from the latter a quit claim deed of lots 11 and 12. This deed of the complainants was tendered to Terry on or about the 1st of June 1842, when he refused to execute the agreement.

Soon after this deed was forwarded to New York a quit claim deed from Terry and wife to complainants of the other lots, was drawn up by Knight, at the request of Terry, which Terry promised to execute with his wife, when Mr. Whittemore, with whom he desired it should be left, should call at his house for that purpose. Afterwards, in Whittemore's presence, he refused to execute the deed, saying that he had been advised not to do so.

Thereupon the bill in this case was filed by complain-

ants, praying for a specific performance by Terry of his agreement, &c. An answer was filed by Terry and proofs taken.

On the hearing in the court below, the Chancellor decreed that the defendant should execute, acknowledge and deliver to complainants, a quit claim deed of lots 11 and 12, with a covenant against his own acts, and procure his wife to join therein or release her right of dower, on receiving a like deed, executed and acknowledged by complainants, for the other lots; and that the defendants should pay complainants their costs.

From this decree the defendant appealed to this court.

*T. Romeyn*, for the defendant, appellant.

*O. D. Richardson*, for the complainants appellees.

WHIPPLE, J., delivered the opinion of the court.

I do not deem it necessary to consider the question, so fully discussed, in the able and ingenious written argument of the counsel for the appellants, as to whether the title to the real estate which is the subject of controversy between the parties, was, at the time the agreement set out in the bill was entered into, vested in the complainants or defendant. Each claimed to have a valid legal title to the premises. This circumstance constituted the subject of difficulty between the parties. The complainants claimed title by virtue of the sale under the execution set forth in the pleadings; the defendants claim of title rested on the deed from Le Roy and wife to him. It is very clear, that if an action at law had been brought by either party against the other, the rights of one to the exclusion of the other would necessarily have been determined. No court could have sustained the title of either to a *portion* of the premises; the one or the other would have succeeded to the *whole* estate. The doubt which manifestly

hung over the title, induced the parties to attempt an amicable adjustment of their differences. Each desired to avoid the vexation and expense of a protracted law suit. To compromise their difficulty, and avoid the consequences which would follow an exclusive assertion of title by either party, an agreement was entered into, by which each was to quit claim to the other a certain part of the premises. This was the mode resorted to by the parties to buy their peace, and constituted a good consideration for the agreement. It was the compromise of a doubtful claim. This of itself would constitute a sufficient consideration to support the agreement. The circumstance that such a compromise would save the parties the vexation and expense of a law suit, would also have been a good consideration for the agreement. I am not prepared to say, that if the title of the defendant to the land in controversy was clear and unquestionable, this court would carry into execution the agreement entered into between the parties; but enough is disclosed to show that a *doubt*, at least, existed; and this is all that is necessary to be shown to entitle the complainant to the relief he seeks, provided no other obstacle stands in the way of granting it. Instead of entering into a very critical examination, with a view to ascertain with certainty the *strict legal rights* of the parties, I have looked at the case simply to ascertain whether a *doubt* existed in respect to the title. Having satisfied my mind upon this point, I should have no difficulty in directing a specific execution of the agreement, if warranted by the principles of equity law. I hold it to be the duty of courts rather to encourage than discourage parties in resorting to this mode of adjusting conflicting claims; and I cannot agree that the nature or extent of the rights of each, should be nicely scrutinized. Courts should, so far as they can do so legally and properly, support agreements which have for their object the

amicable settlement of doubtful rights by parties; the consideration for such agreements, is not only valuable, but highly meritorious. See 1 Russell 351; *Barlow* v. *Ocean Insurance Co.*, 4 Metc. 270.

It is said that the sale under the execution was *void;* the property not having been sold in distinct parcels. We have had occasion to dicide that when property was put up in distinct parcels, and not sold for want of bidders, the *whole* might be sold together. The proceeding in the present case may have been irregular, and the defendants in the execution, or perhaps a third person claiming under them might have moved the circuit court to set aside the levy and sale, but it certainly does not become the defendant, after the having entered into a solemn agreement, with a full knowledge of all the circumstances, to set up this irregularity to defeat equitable rights acquired under that agreement. The same remark will apply to all the objections urged against the regularity of the sale. It is apparent from the whole case made by the pleadings and proofs, that the defendant was fully advised of the existence of the impediments which he now urges as a ground of defence, for a long period previous to the making of the agreement set out in the bill. He cannot complain that he was ignorant of any important fact in connection with the levy and sale. The means of knowledge were at hand; and if he did not avail himself of those means with a view to ascertain his legal rights, it was his only folly, and courts of equity do not sit to extend relief to parties who do not exercise common prudence and diligence in protecting their own interests and rights. It would seem to me highly inequitable and unjust to permit the defendant, after having entered into an agreement with his eyes open, and after that agreement had been ratified by him subsequently, and repeated promises made to fulfil it, to come into a court of equity

and alledge his own laches and folly as a reason why he should not be held to a strict performance of all its stipulations. After a careful review and examination of the proofs taken in the case, I am satisfied, that an agreement was entered into between the parties, substantially as set out in the bill, and that it is the duty of this court to enforce its specific execution, unless some stern and inflexible rule of law stands in the way.

The principal ground assumed by counsel in favor of reversing the decree of the chancellor, is, that the agreement is void by the statute of frauds. The agreement was by parol, and unless there have been such acts of part performance, as take the case out of the operation of the statute, the decree below cannot be sustained. The 10th section of the chapter of the Revised Statutes of 1838 which treats of fraudulent conveyances and contracts relating to lands, is as follows: "Nothing in this chapter contained, shall be construed to abridge the powers of courts of equity to compel the specific performance of agreements, in cases of part performance of such agreements." Was there, then, a part performance of the agreement set out in the bill, and supported by the proofs. An answer under oath was waived, and by recurring to the positive testimony of Knight, Hunt and McConnell, I think it is shown very conclusively, that possession was taken by the complainants under the agreement, with the knowledge and assent of Terry. At the time the property was divided, Terry was in possession, and it would argue a singular disregard of his own interests to permit Knight to lease the premises and receive the rents and profits, without interposing an objection. His whole conduct can only be reconciled upon the supposition that he was satisfied with the agreement he had made, and that possession was given up pursuant to its terms. Again; the taxes upon the property were paid by the complain-

ants, and a few dollars expended in repairs. I think it is fully established that in order to carry out the agreement the defendant; first, made choice of an individual to divide the property; second, actually attended and took part in the division; third, delivered up possession of that portion which was set off to the complainants; and fourthly, permitted the complainants to make repairs, lease the property, receive the rents and profits, and pay the taxes. Shall it be permitted to him now to insist that the agreement should not be carried into specific execution? What acts in part performance of a parol agreement for the sale of lands, will take it out of the operation of the statute of frauds, has been a fruitful source of discussion, both in England and in this country. The adjudged cases on the subject are very numerous, and it has been asserted by eminent persons who have practised much in courts of equity, that the decisions of some of the courts have tended to defeat the object and purpose for which the statute was passed; that a new door had been opened to fraud and perjury. It is not my purpose to review these decisions, or to vindicate their policy or impolicy. It may be that a rigid adherence to the provisions of the statute would have led to fewer evils than have been entailed upon us, by so great a departure from its terms. The rule as established by the great majority of cases, is, that the delivery of possession, pursuant to an agreement, is such an act of part performance as will avoid the statute. *Willis* v. *Stradling*, 3 Ves. 378; *Boardman* v. *Mostyn*, 6 Ves. 467; *Gregory* v. *Mighell*, 18 Ves. 328; 1 Sugd. on Vend. 116. Per. *Marcy*, J., in *Harris* v. *Knickerbacker*, 5 Wend. 638. The general rule, says Fonblanque, is, that the acts must be such as could be done with no other view or design than to perform the agreement, and not such as are merely introductory and ancillary to it. The giving of possession is, therefore, to be considered as an

act of part performance. In this case, possession was not only given, but other acts are shown to have been done by the defendants in pursuance of the agreement; such as the selection of an individual to make division of the property, and being present and agreeing to the division when it was actually made. These acts of part performance, taken in connection with the other circumstances, such as expending money upon the premises; the payment of taxes; the subsequent express promise to and execute a deed of that portion of the premises allotted to the complainants, bring the present case clearly within the principles of the English and American decisions on this subject. Under this state of facts, it would operate as a *fraud* upon the complainants, if the relief prayed for can be successfully resisted. We do not wish to be understood as affirming that part performance of a parol agreement for the sale of land, will, in all cases, entitle a party to appeal to a court of equity to enforce its specific execution. It must not only appear by unequivocal proof that an agreement was made, such as is stated in the bill, but the acts of part performance must refer to, and result from the agreement so stated. If from the whole case a doubt should exist in respect to either of these facts, a court of equity will refuse to interfere; or, if it should appear that it would be inequitable or unjust to enforce an agreement, a court of equity will withhold its aid, and leave the party to his redress at law. In other words, courts of equity will exercise a sound discretion in granting or refusing a decree for a specific performance; they will apply, with great caution, the principles which have been long established, to the circumstances of each particular case that may come before them; and, while on the one hand, they will sustain the true spirit and object of the statute, they will also see that it is not made the instrument of fraud and perjury.

But it is urged that the complainants were not bound by the agreement of Knight; he having no *written* authority to contract for them. The proofs show that the proposition made by Terry was not assented to by Knight, but communicated by him for the acceptance or rejection of the complainants; that afterwards, the complainants accepted the proposition, and Knight was simply authorized to carry it into execution. All that Knight did was to communicate the proposition; he did not undertake to make the agreement with the defendant in behalf of the complainants. The deed from the complainants was executed by them, and not by Knight. All the latter did, was to agree with the defendant upon some person to appraise and set off to each, his proportion, according to the terms of the agreement entered into between the parties. But even if Knight had no authority to do this much, his acts were ratified by the complainants, who executed a deed founded on the division made by McConnell.

I discover nothing in the proofs to warrant the belief that any fraud was practiced upon Terry by Knight, or that any was designed. There is nothing in the testimony to indicate that Terry did not possess all the information necessary to put a prudent man on his guard. If he did not possess all the knowledge and sagacity necessary to an understanding of his rights, it was his duty to resort to those who could enlighten him. All the facts from which a knowledge of those rights might have been obtained were accessible to him, and if he did not choose to avail himself of the means of information within his power, and take counsel of those in whom he confided, it is his own folly, but not the fault of the complainants. But it does appear, affirmatively, that all the facts and circumstances in any way material were within his own knowledge, and that he did consult others in respect to the propriety of entering into the agreement.

It is next objected to the decree, that it directs the defendant to procure his wife to join in a deed with him, or to release her right of dower. It is charged in the bill that the defendant agreed that both he and his wife would execute a quit claim deed of the portion of land set off to the complainants. The only proof in support of this allegation is, that Knight called at the house of the defendant, with an officer, with a view to procure the execution, by Terry and his wife, of a deed which had been prepared; that not finding Terry in, they returned to the village of Pontiac, and, meeting with Terry, informed him that they had been to his house and the object of the visit. After some conversation, Terry requested that the deed be left with the officer, who might call at any time, and that he and his wife would execute it. This may be considered as sufficient proof of the allegation in the bill.

The authority of the court to direct the husband to procure a release of the dower of his wife may be well doubted. It is a question of much interest, and in respect to which there exists a diversity of opinion. Mr. Justice *Story* has discussed the subject with great ability; and, after a careful review of the leading cases, came to the conclusion that the authority did not exist. 2 Story's Eq. Jur. § 731 et seq. Cases are to be found, where a specific performance of a covenant entered into by the husband, that his wife shall levy a fine, or execute any other lawful conveyance, to bar her right in his estate, or in her own estate, have been decreed. In the case of *Hall* v. *Hardy*, 3 P. Will. 189, Sir *Joseph Jekyl* said: "There have been a hundred precedents, where, if the husband, for a valuable consideration, covenants that the wife shall join in a fine, the court have decreed the husband to do it; for that he has undertaken it, and must lie by it, if he does not perform it." In a note to this case it is said, "that the husband, when he covenants that his wife shall levy a

fine, has first gained her consent for that purpose;" and this presumption seems the foundation on which rests the authority of the court to direct such a decree. 2 Story's Eq. Jur. § 732. "But this reason," (says Mr. Justice *Story*,) "is a very insufficient one for so strong a doctrine; for it may be a presumption entirely against the fact; and, if correct at the time, the wife may subsequently withdraw her consent, and refuse, upon very proper grounds, to comply with the covenant. Let us suppose a case, in which either there has been no consent, or it has been withdrawn; it may then be asked, and, indeed, it has been asked, with the earnestness of just doubt, whether, if it is impossible for the husband to procure the concurrence of his wife in such a proceeding, a court of equity, acting according to conscience, will decree the husband to perform what it is morally impossible for him to perform." Lord *Cowper* refused to adopt the doctrine, saying: "It is a tender point to compel the husband, by a decree, to compel his wife to levy a fine, though there have been some precedents in the court for it. And it is a great breach in the wisdom of the law, which secures the wife's lands from being aliened by the husband without her free and voluntary consent, to lay a necessity upon the wife to part with her lands, or otherwise to be the cause of her husband lying in prison, all her days." *Outram* v. *Round*, 4 Vin. Ab. 203. Lord *Eldon* condemned the doctrine in strong and pointed language, saying: "The policy of the law is, that the wife is not to part with her property, but by her own spontaneous and free will. If this was perfectly *res integra*, I should hesitate long, before I should say the husband is to be understood to have gained her consent, and the presumption is to be made, that he obtained it before the bargain, to avoid all the fraud, that may be afterwards practised to procure it. I should have hesitated long in following up that presumption, rather than

the principle of the policy of the law; for, if a man choose to contract for the estate of a married woman, or an estate subject to dower, he knows the property is her's altogether, or to a given extent. The purchaser is bound to regard the policy of the law; and what right has he to complain, if she, who according to law cannot part with her property but by her own free will, expressed at the time of that act of record, takes advantage of the *locus penitentiæ:* and why is he not to take the chance of damages against the husband? If the cases have determined this question so that no consideration of the absurdity that must arise, and the almost ridiculous state in which this court must, in many instances, be placed, can prevail against their authority, it must be so." *Emery* v. *Wase*, 8 Ves. 515, 516. It certainly would be highly impolitic, to place the husband in a position where he would have to adopt means to obtain a surrender of the wife's estate, "inconsistent with the harmony, peace and confidence of conjugal life." 2 Story's Eq. Jur. § 733. By our statute, the wife has an estate in dower in all the lands of which the husband may be seized during coverture. The manner in which she may devest herself of such an interest is provided for in clear intelligible language. It contemplates that every surrender of such interest, shall be the free and voluntary act of the wife, uninfluenced by any threats or coercion on the part of the husband. The justice, policy and equity of such a statute cannot be questioned; and this court cannot lend its sanction to a proceeding that may, in any wise, defeat its wholesome and salutary provisions. Numerous illustrations of the iniquity which might be practised upon the wife, if the doctrine contended for by the Master of the Rolls in 3 P. Will. 189, is to be supported, might be furnished. Suppose a husband is desirous of disposing of a valuable estate of which he is seized, either in his own right, or in

right of his wife. A deed is executed by him, in which the wife refuses to join. No earthly power can coerce her to execute the deed. To achieve his object, however, the deed is destroyed, and an agreement is entered into, by which he covenants that both he and his wife shall convey the estate upon certain conditions: the conditions being fulfilled, the wife still refuses to join in the conveyance: a bill for a specific performance of the covenant is filed against husband and wife: the former shows, by answer, his inability to comply with the covenant, and the wife's firm refusal to execute a release of her interest. Can it be that a court of equity will enforce such a covenant by compelling the husband to procure the wife's release? If it will, then the policy of the law, which will not sanction a violation of conjugal duties, and the express provisions of our statute, are both overthrown by force of a *presumption* entirely against the fact. Can it be that a *court of equity*, in such a case, would resort to chains and imprisonment to compel the wife to join in a conveyance? Such a course of proceeding may have the desired effect; for, a wife, bound to her husband by the ties and sympathies which ordinarily unite man and wife, would execute the conveyance, rather than that he should perish in a dungeon; but it is apprehended that a coveyance, executed under such circumstances, would hardly be regarded as a free, voluntary act on her part, but an act rendered necessary by the situation in which a court of equity has placed her husband. That court have said, that you, (the wife,) must execute the conveyance, or we will imprison him, (the husband,) until you do. The wife may appear before the court, and acknowledge the conveyance, and may say that she does so freely and voluntarily, but who does not know that she acts under a *moral necessity?* Who does not feel that such a proceeding is a mere mockery of justice? And who does not see that it

is an engine by which either the interest or feelings of the wife are crushed? I desire to see a law which protects the rights of the wife, maintained in its full spirit and vigor. I would not relax a hair's breadth, the rule by which the wife is protected against the fraud or indiscretion of the husband. I would not impair rights which secure her against the folly, vice or extravagance of the husband. I would not extinguish the hope, that that folly, vice or extravagance, cannot wrest from her and her children, a support in the night of adversity.

The decree is affirmed, except that portion which compels the husband to procure a release of the wife's right of dower.

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## WARNER v. PORTER, STREET COMMISSIONER OF THE VILLAGE OF JACKSON.

SECTION 119 of the justices act of 1841, (S. L. 1841, p. 81,) which provides that "in *all cases* of judgments rendered before a justice of the peace, either party thinking himself aggrieved, may remove the same by writ of *certiorari* into the circuit court," must be construed to apply to such judgments, only, as are rendered in the exercise of the *original* jurisdiction in *civil actions*, conferred upon justices by section 1, of the same act.*

*Held*, accordingly, that *certiorari* would not lie to remove into the circuit court, a judgment for the *penalty* imposed by a by-law of the village of Jackson for neglect to perform highway labor, rendered by a justice of the

*See R. S. 1846, p. 385, § 45, p. 378, § 3; S. L. 1848, p. 237, §§ 4, 5; R. S. 1846, p. 387, §§ 1, 2, p. 406, § 140.

peace, in a summary proceeding by *complaint*, under by-laws of the village, in the exercise of the *special* jurisdiction conferred by the 16th section (S. L. 1843, p. 122) of the village charter.

*Semble*, That such judgment might be removed into this court by *certiorari*.

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HENRY N. WALKER, ATTORNEY GENERAL, *v.* THE PRESIDENT, DIRECTORS AND COMPANY OF THE MICHIGAN STATE BANK.

In pleading it is not necessary for a party to allege any more than will constitute, *prima facie*, a sufficient cause of action or defence; all beyond this is *surplusage*.

To an information in the nature of a *quo warranto* requiring a corporation to answer by what warrant it claimed to have, use and enjoy certain corporate powers, &c. which it was therein alleged to have usurped, a plea setting forth the charter of the corporation, by which the powers claimed were conferred, *in presenti*, is a *prima facie* defence; for the commencement of a legal existence being thus shown, it will be presumed that the corporation continued to exist, and to perform its duties, until the contrary is alleged.

And where, in addition to this, the plea contained allegations intended to show, either a continued existence of the corporation down to the filing of the information, or that the state was estopped from insisting upon forfeiture of the corporate franchises for causes which arose prior to a certain period, *it was held*, that these allegations were surplusage, and, on motion, they were ordered to be stricken out.

THE case is stated in the opinion of the court delivered by

WHIPPLE, J. An information in the nature of a *quo warranto* was filed against the defendants, by the Attorney General, on the 14th October, 1845. The information in substance states, that the defendants, "for the period of six months now last past, have used, and still do use, without any warrant, grant, or charter, the following liberties, pri-

vileges and franchises, to wit: that of being a body politic and corporate in law, fact and name, by the name of," &c.; "and the following liberties, privileges and franchises, to wit: of being and becoming proprietors of a bank, or fund for the purpose of issuing notes, receiving deposites, making discounts, and transacting other business which incorporated banks may lawfully transact," &c.: Whereupon, the said Attorney General prays the advice of the court in the premises, and due process of law against the President, Directors & Co. of the Michigan State Bank aforesaid, in this behalf, to be made to answer to the said People, by what warrant they claim to have, use and enjoy the liberties, privileges and franchises aforesaid.

To this information the defendant appeared, and on the 14th November, 1845, filed a plea, which, after stating, in substance, that by an act of the legislative council, passed March 16th, 1835, they were constituted a body politic and corporate for a period of twenty years from the passage of the act, and that, by force of the act, they become entitled to, and used the liberties, privileges, and franchises of becoming proprietors of a bank, or fund for the purpose of issuing notes, receiving deposites, making discounts, &c., proceeds at great length to state among other things that, in the years 1838 and 1839, the bank became the depositors of the funds of the state; that in consequence of the embarrasments of the country &c., they were unable to pay a debt of about $500,000 due the state; that on the 1st February, 1840, the legislature passed an act, authorizing a settlement with the bank; that negotiations were had between the parties, which eventuated in a settlement, the terms of which are stated; that the state, professing to be dissatisfied with the terms of the settlement, on the 17th February, 1842, sanctioned the settlement, except the portion thereof by which the state was bound to indemnify the bank against certain liabilities,

&c.; that the bank, feeling aggrieved by this act, instituted proceedings in chancery against the trustees of the property assigned by the bank, and the trustees instituted in the same court proceedings against the bank and others, charging upon the bank insolvency. The plea then gives a history of these suits and their final determination, and then refers to negotiations by which the difficulties between the bank and the state were eventually settled.

A motion was made by the Attorney General to strike out as surplusage, all that part of the plea relating to the condition of the bank in the years 1838 and 1839, the negotiation and settlement with the state, and the several acts of the legislature in relation to such settlement, and the history of the several suits instituted by and against the bank &c.

If that portion of the plea, to which exception is taken, is mere surplusage, the motion is appropriate. Whether the motion is well founded or not, must depend upon the application to the matter objected to as surplusage, of a few elementary rules of pleading. "It is not necessary in pleading to state matter which would come more properly from the other side." Steph. Pl. 350. The true meaning of the rule is, "that it is not necessary to anticipate the answer of the adversary, which, according to Lord *Hale*, is like leaping before one comes to the stile." It is sufficient, says the same author, that each pleading should in itself contain a good *prima facie* case, without reference to possible objections not yet urged. *Gould* thus states the rule: "In general, it is not necessary for either party to alledge more than will constitute, *prima facie*, a sufficient cause of action or defence. It is therefore, in general, unnecessary for a party to deny, or avoid by *anticipation*, all or any of the possible facts, which might furnish sufficient answers in law to his own allegations." Gould's Pl. 167. The same rule is affirmed by *Chitty*,

who says that, "in general, whatever circumstances are necessary to constitute the cause of complaint, or ground of defence, must be stated in the pleadings, and all beyond is surplusage." 1 Chitty's Pl. 246. This rule, like all others in the law of pleading, is founded in sound logic; and, in practice, it is both reasonable and convenient, as a contrary practice would lead to confusion and prolixity. Illustrations of the rule are to be found in the examples given in the elementary works from which I have quoted, and numerous adjudicated cases might be cited to show its extent and application. Let us apply the rule to the case before us. The information alledges that the defendants have used, without any warrant, certain liberties, privileges and franchises. The defendants answer by setting out a charter, by which they are warranted in using the liberties, privileges and franchises, they are charged with having usurped. Does this constitute a good *prima facie* defence to the information, without reference to the other matters set out in the plea? This question may be tested by supposing a general demurrer to be interposed to the plea; the demurrer would admit the truth of the matter pleaded, and the judgment of the court cannot be doubted; the defence would be regarded as perfect and conclusive. The same result would follow if issue were taken upon the plea, and the same facts proved on the trial of the issue, which would be admitted if a demurrer were interposed. The only possible purpose of the other allegations in the plea must be either; 1st, to show that the state is estopped from insisting upon any cause of forfeiture, which might have accrued anterior to the acts of the legislature referred to in the plea, and the contracts therein stated to have been made between the state and the bank; or 2d, to show a continued corporate existence down to the time of the usurpation alledged in the information.

That the plea cannot be sustained on the first ground, seems to me very clear from what has already been stated. It is anticipating matter which should properly come from the other side, and thus involves a violation of a fundamental rule of pleading. The charter would prove that the corporation was legally created, and the law will intend that it performed all its duties. Besides, it is making an issue when no issue is tendered. The plea not only avers matter, which if true would constitute a full answer to the information, but purports, also, to answer matters not averred in the information; in other words, it *presumes*, that the Attorney General will insist upon a forfeiture of the charter by the corporators, for causes arising anterior to a certain period; and the object of setting out the acts of the legislature, and the contracts before refered to, is to answer such a *supposed* state of facts. But I have said that this court will intend that the defendants have performed all their duties until the contrary be shown. 9 Wend. 379. We cannot *presume* that the defendants have done any acts which will involve a forfeiture of chartered rights, or draw down upon them the infliction of a heavy penalty. It may be that the Attorney General will not reply facts, which if found true, would constitute a ground of forfeiture; or if a forfeiture is urged, it may be for causes occurring *subsequent* to the acts and contracts spread out in the plea; in such a case the matter objected to would be inapplicable, as it purports to be an answer to causes of forfeiture arising *anterior* to these acts and contracts. This reasoning illustrates the propriety of the rule I am seeking to enforce; it shows, that the portion of the plea which we are called upon to reject as surplusage, might be good or bad, according to circumstances. Whether it be good or bad, we will determine when the Attorney General alledges upon the re-

cord, causes of forfeiture, to which the plea would be a legal answer.

In respect to the second ground upon which the objectionable matter is sought to be sustained, a satisfactory answer may be given. By their plea, the defendants show the commencement of a legal existence, under a valid charter, not yet expired. From this the law will *presume* their continued esistence down to the period of the filing of the information. *People* v. *The President, &c. of the Manhattan Co.*, 9 Wend. 379; 3 Ph. Ev. by Cow. & Hill, 295. The defendants, have, therefore, alleged what the law will presume; this was unnecessary, and therefore surplusage. Steph. Pl. 354.

The views I have expressed in regard to the appropriate mode of pleading in cases like that under consideration, are strongly fortified by the precedents to be found in the elementary works, and in reported cases. *People* v. *Bank of Niagara*, 6 Cow. 196; *People* v. *Washington and Warren Bank*, Id. 211; *People* v. *Bank of Hudson*, Id. 217; *People* v. *Utica Insurance Co.*, 15 John. 358.

It was insisted in argument, that the case of the *People* v. *The Manhattan Co.*, 9 Wend. 351, furnishes an authority in favor of the validity of the plea in this case. I have given to that case a critical examination, and am unable to discover the analogy that was said to exist between it and the one before us. The information charged the defendants "with using, without lawful warrant or charter, the franchise of being *a body politic and corporate*, and of *carrying on banking operations*, without being authorized so to do. The defendants pleaded the act incorporating the company, and subsequent acts of the legislature recognizing their continued existence. The original act of incorporation contained a *proviso* that the company should, within ten years from the passing of the act, furnish and continue a supply of pure and wholesome water, sufficient

for the use of all such citizens dwelling in the city of New York, as should agree to take it on the terms to be demanded by the said company; in default whereof, the corporation should be dissolved. There was a further provision authorizing the company to employ its *surplus capital* in the *purchase of public or other stock, or in any other monied transactions or operations*, &c. Now, it is clear that the Attorney General regarded the charter as forfeited in consequence of a breach of the condition upon which the continuance of the corporation depended. The proviso was treated as a condition in *deed*. The defendants may have supposed that a compliance with the proviso was a *condition precedent* to their existence as a corporation. An averment in the plea, therefore, that the condition was performed, would, in such a case, be proper; or, if the condition was not performed, then it would be competent to spread upon the record facts which would amount to a waiver of its performance by the legislature. The act of incorporation, it is very true, created the individuals therein named, a corporation *in presenti*, and the proviso was strictly a *defeasance;* but still the counsel might desire to test the true character of the proviso, and for that purpose, and from abundant caution, embodied in the plea several acts of the legislature. Again: It was said by the Attorney General in argument, "that the information asserts no right on the part of the People, but calls on the corporation to show their title—*a present title, embracing, of course, a performance of every condition.*" And further, that "the grant is made upon a condition, and in default of performance, the act declares that the corporation shall be dissolved." If this view of the case was correct, it was not only competent, but necessary, that the defendants should aver in their plea a performance of the condition precedent, or facts from which a waiver might be implied. But there exists a still more conclusive reason,

why no objection was taken to the plea in that case. The defendants claimed that they had the right to carry on *banking operations;* the right was based on the original act of incorporation; but it was quite manifest from the whole case, that it might have been dangerous to rest this right on so slender a foundation. Hence several acts of the legislature were referred to in the plea, recognizing the existence of the corporation, and that they were endowed with banking powers. These acts might have been referred to for two purposes: 1st. To show a legislative construction of the original act which gave them a legal existence; and, 2d. It might be well argued, that if the original act did not confer on the defendants the faculties which usually appertain to banking incorporations, the several acts set forth in the plea did. The case shows that this was the great object and purpose of embodying in the plea the several acts of the legislature therein set forth, and from which the conclusion was almost irresistible, that banking powers were originally granted, or if not, that these powers were enlarged so as to sanction the defendants in using the franchises alleged in the information.

Upon the whole, we are of opinion that the motion of the Attorney General must be granted.

*The Attorney General* and *S. T. Douglass*, in support of the motion.

*J. F. Joy*, contra.

## PEOPLE *v.* GAY.

A CONSTABLE has authority, under the statute of forcible entry and detainer, (R. S. 1838, p. 490, Ch. 5, §§ 3, 13,) to execute a writ of restitution.*

* R. S. 1846, p. 543, § 10, provides, *in express terms*, that this writ shall be directed to the sheriff *or any constable* of the county.

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## *In re*, DETROIT AND PONTIAC RAIL ROAD COMPANY.

CASE reserved. The charter of the Detroit and Pontiac Rail Road Company, (S. L. 1834, p. 44, § 11,) provides for the summoning of a jury of eighteen freeholders of the county to assess the value of property required in the construction of the railroad, in cases where the corporation cannot agree with the owner; and that, on the attendance of the jury in obedience to the summons, each party, or, in the absence of either party, the sheriff for such absent party, may strike from the panel the names of three of the jurors, and the remaining twelve, being duly sworn, shall act as a jury of inquest of damages, &c.

On an inquest had under this provision of the charter, after six jurors had been stricken from the panel of eighteen—three of them by the corporation, and three by the sheriff, for the owner of the property, who did not attend—one of the remaining twelve stated that he was not a freeholder; and thereupon he was set aside, and one of the six who had been previously stricken from the panel

was re-summoned by the sheriff, and, with the other eleven, proceeded to make inquest of the damages, &c.

*Held*, that the inquest was irregular, and ought not to be confirmed by the circuit court; the sheriff having exceeded his authority in re-summoning the juror who had been previously stricken from the panel. *Gilbert* v. *Columbia Turnpike Co.*, 3 John. Ca. 107; *Rex* v. *Croke*, 1 Cowp. 32; *Rex* v. *Manning*, 1 Burr. 377; *Rex* v. *Mayor, &c. of Liverpool*, 4 Id. 2244.

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## Daniel Latimer and Philander D. Freese *v.* Arthur F. Woodward.

On complaint of forcible entry and detainer, made before two justices of the peace under R. S. 1838, p. 490, ch. 5, a warrant and venire were issued and served, and, on the return day, the parties and most of the jurors summoned appeared: the cause was then adjourned to a future day, and the justices thereupon issued another venire by which a second jury was summoned, before whom the cause was tried: *Held*, that the justices had no power to direct the second jury to be summoned; but should have required the jurors who appeared in obedience to the first venire, to appear on the adjourned day of the cause; and if their number was insufficient to complete the panel, the deficiency should have been supplied by the summoning of additional jurors by virtue of the same venire.

The evidence to sustain a complaint, under R. S. 1838, p. 490, ch. 5, § 2, for unlawful and forcible entry and detainer of premises, must show force or violence in making the *entry*, as well as the subsequent detention.

Certiorari to two justices of the peace of Lenawee county. This was a proceeding under the statute of forcible entry and detainer. R. S. 1838, p. 490, Ch. 5.

Woodward made complaint before the justices, alledging that, on December 6, 1845, he was the owner, and in the lawful and peaceable possession of a certain ware-

house and lot in Tecumseh, and that on that day Latimer and Freese made an unlawful and forcible entry into said ware-house, and detained the same with strong hand from the possession of the complainant. Thereupon, the justices issued a warrant for the arrest of the defendants below, returnable on the 16th December, 1845; and a venire for a jury was also issued, returnable on that day. Both the warrant and venire were served, and, on the return day, the parties, and most of the jurors summoned, appeared. The defendants below plead the general issue, and, on their application, the cause was adjourned until the 26th of December. On the 19th of December, the justices issued a second venire, which was likewise duly served and returned. By virtue of this second venire, some of the jurors sumoned on the first, were re-summoned, but others were omitted, and other persons summonin their stead. The parties again appeared on the return day, and, the jury being called, the defendant below moved to set aside the panel of jurors, on the ground that the justices had no power to issue the second venire. This motion was denied by the justices and the cause proceeded to trial.

It appeared from the evidence adduced on the trial, that Woodward was in possession of the premises in question, on the 6th December, 1845, and had been for several months previously, under a deed from Latimer; that on that day, and while Woodward was absent, Freese entered the ware-house, and asked for, and obtained the key, of the outer door, from one Brown, who was there, and in possession of the key, with the knowledge and assent of Woodward; that Freese then proceeded to nail down the windows, after which all present, including Brown, went out of the ware-house, and Freese locked the door; that Brown then requested Freese to return the key, but this the latter refused to do; that after-

wards, on the same day, Woodward came to the ware-house and endeavored to get in, but found the door locked, and was told by a man inside, who was in the employ of Freese, that he would not be permitted to enter the building; whereupon Woodward made a breach in the door by knocking out one of the panels, through which he went in, and directed the man to give him the key, and then leave the building, but the man refused to do either; that a scuffle ensued, in which Woodward attemed to put the man out, but without success; that he then went away, and soon afterwards the defendants below both came into the ware-house; that Woodward then returned, and requested of them (they being inside of the building) to open the door, but Latimer told him he could not come in, and he was kept out.

Upon this evidence as to the entry and detainer, the jury found a verdit of guilty, and judgment of restitution and for costs was afterwards rendered in favor of Woodward, and a fine of one dollar imposed on the defendants below. The certiorari was sued out by the defendants below, to reverse this judgment.

*C. A. Stacy*, for the plaintiffs in error.

*P. Morey*, for the defendant in error.

Ransom, C. J. delivered the opinion of the Court.

It is contended that the judgment below ought to be reversed, because,

1. The justices erred in refusing to set aside the second panel of jurors. The statute provides that justices of the peace, to whom complaint may be made of any unlawful and forcible entry or detainer, shall issue a warrant for the apprehension of the person complained of, and shall also issue a *precept*, to the same officer, commanding him to cause to come before them twelve discreet men, &c.,

at the same time and place appointed for the trial or hearing of the said complaint; and if a sufficient number of persons summoned do not attend, said justices may *order* the officer to complete the number *by returning others forthwith*. R. S. 1838, p. 491, § 3. The statute no where authorizes the justices to dispense with one jury and direct a second to be summoned in their stead. If a sufficient number of the persons summoned do not attend, the deficiency is supplied by immediately returning others; but those who may attend are not to be discharged; nor is it necessary to issue a new venire; the officer returns the additional jurors upon the precept first issued.

The record here shows that most of the persons first summoned *did attend*, and they should have constituted the jury to try the cause, unless set aside by the challenges, or discharged by consent of both parties. On the adjournment of the cause, the justices should have directed the jurors in attendance, to have again attended on the day to which the trial was adjourned, and it would have been as much their duty to have done so, as it was to appear in obedience to the venire.

2. Again, it is contended by the counsel for the plaintiffs in error, that the verdict of the jury was against the evidence adduced on the trial. The complaint charged a *forcible entry*, as well as detainer; and this, it is contended, is not sustained by proof of a forcible detainer, only.

Upon this point, too, the counsel for plaintiffs in error is clearly right. The evidence on both sides, all tends to show, beyond controversy, that the *entry* was entirely peaceful, without any force or violence whatever. The detention alone was forcible.

The statute makes it our duty, in reviewing these proceedings, upon certiorari, to review the facts, as well as the matters of law. R. S 1838 p. 493, § 12; *Chamberlin v. Brown*, ante. p. 120, note.

Upon both the grounds, (the error of the justices in directing a second jury to be summoned, and the erroneous finding of the jury upon the evidence before them,) the judgment below must be reversed.

The justices having awarded to Woodward restitution of the premises, it is furthered ordered that the same be restored to the plaintiffs in error, and a writ is awarded for that purpose.

*Judgment below reversed and restitution awarded.*

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Following are reports of cases arising under the statute of forcible entry and detainer, which were decided by the Supreme Court prior to 1843, and which have never been previously reported.

DAVIS v. INGERSOLL.

A complaint under § 2, of Ch. 5, Tit. 3, Pt. 3 of R. S. 1838, for unlawful and forcible entry into lands, &c. should contain the same substantive allegations, which would be requisite in an indictment under § 1 of the same chapter; and the complainant should be held to the same proof, substantially, that would be necessary to justify a conviction upon such an indictment.

Where the evidence to sustain such a complaint showed merely an *unlawful* entry and detention, but did not show that they were accompanied with *violence*, or a breach of the peace, it was *held* insufficient.

CERTIORARI, brought by Davis, to reverse a judgment which Ingersoll had recovered against him, in proceedings before three justices of the peace of Wayne county, under the statute of forcible entry and detainer, R. S. 1838, p. 490, ch. 5. The cause was argued and determined at the January Term, 1840, of this court.

*James A. Van Dyke*, for the plaintiff in error,

——— ———, for the defendant in error.

WHIPPLE, J., delivered the opinion of the Court.

Ingersoll instituted proceedings against Davis before three justices of the peace, for an alleged forcible entry and detainer; and the case is brought here by a writ of certiorari to those justices, that the facts, as well as the matters of law, may be reviewed by this court. Upon an inspection of the justices' return, it appears that the parties, on the 1st of September, 1838, entered into a contract, in writing, by the terms of which Ingersoll undertook to build for Davis a house agreeably to the specifications contained in the contract. Ingersoll agreed to enclose the building and finish the inside, in a good and workmanlike manner, for the sum of $227. Davis agreed to furnish the materials, and do the painting and mason's work, and to pay Ingersoll the money for the work as it should progress. And he also agreed that Ingersoll "should *have the house, and use of the lot, as his own*, until he should pay

him the whole amount of the contract price for doing the work." Ingersoll entered upon the performance of his contract, and, on the 28th day of December, 1838, had completed it to the satisfaction and acceptance of Davis, who then informed Ingersoll that he intended to move into the house on the following day. To that Ingersoll replied that he must not do so; that he, (Ingersoll,) should retain the possession of the house until he was paid for the work. On the 29th December, Davis was found in the house, and appeared to have gone into it during the previous night. Ingersoll then directed Davis immediately to quit the premises, and redeliver possession of the house to him; which Davis refused to do, but said he would try and pay, or make some arrangement for the work.

Ingersoll averred in the complaint preferred to the justices, that Davis, "with strong hand made unlawful and forcible entry into and upon a certain tenement and dwelling house, of right in the occupation and possession" of the complainant.

Upon this complaint being made, the justices issued their warrant for the apprehension of Davis, who was taken and brought before the justices; a trial was had, and a verdict of guilty returned against Davis, on which judgment of restitution was awarded.

The plaintiff in error insisted on the trial, and now contends that, to entitle the complainant to a verdict, he should have proved that Davis either took or kept possession of the premises described in the complaint, with violent menaces, or actual force and arms, or with some circumstances of actual violence or terror; that any entry or possession which had no other force than such as is implied by law in every trespass, was not within the meaning of the statute under which this proceeding was instituted; and that, unless the jury were satisfied from the testimony submitted to them, that Davis took and kept possession of the premises with violent menaces, or actual violence or terror, or some circumstances of force and arms, they should have returned a verdict for the defendant below.

This proceeding is predicated upon the second and third sections of the act touching forcible entry and detainer. R. S. 1838, p. 490. By the provisions of that act, a prosecution and conviction under the sections referred to, are made to accomplish a two-fold object: to make restitution of the premises wrongfully taken or held from the aggrieved party, and to punish the wrong-doer for the offence to the public. Hence the same rules and principles which would regulate and govern the prosecution of an indictment for a similar act, are applicable to this case. The complaint should contain the same substantive allegations that would be requisite in an indictment predicated upon the same statute; and the complainant should be held to the same proof, substantially, that would be necessary to justify a conviction upon an indictment. If I am right in this view of the case, it is clear that the complainant was not entitled to a verdict upon the evidence submitted. As far as I have had an opportunity to examine the authorities cited in argument, they all concur in maintaining the position I have taken; (see 10 Mass. R. 403, 409; 8 Cow. 226;) and I apprehend no case can be found, English or American, in which a contrary doctrine is held.

The judgment below must be reversed, with costs.

Wm. A. Fletcher, C. J. and Ransom and Morell, Justices, concurred.

*Judgment reversed.*

CASWELL v. WARD.

Suits pending before justices of the peace under the statutes of forcible entry and detainer, (R. S. 1838, p. 490, ch. 5, and S. L. 1840, p. 83,) may be continued on cause shown; the power to continue, although not expressly conferred, being incident to the jurisdiction to hear and determine.

In order to give the justices jurisdiction in such suits, the complaint should allege all the facts necessary to show a case in which the remedy is provided by the statute.

A complaint alleging merely that "*B. holds over and unlawfully detains*" certain premises, &c. is not sufficient.

The complainant, in his evidence, is confined to proof of the facts alleged in his complaint.

No declaration is necessary in such suits; the complaint standing in lieu of a declaration.

Where, in a suit under the statute of forcible entry and detainer, (R. S. 1838, p. 490, ch. 5, and S. L. 1840, p. 83,) a purchaser of mortgaged premises on a statutory foreclosure, seeks to recover possession of a person holding over after the equity of redemption has expired, he must prove the regularity of all the proceedings on the foreclosure.

CERTIORARI, brought by Caswell, to reverse a judgment which Ward had recovered against him in proceedings before two justices of the peace of St. Clair county, under the statutes of forcible entry and detainer. R. S. 1838, p. 490, ch. 5, and S. L. 1840, p. 83. The cause was argued and determined at the January Term, 1842, of this court.

*Van Dyke & Harrington*, for the plaintiff in error.

*J. F. Joy*, for the defendant in error.

WHIPPLE, J., delivered the opinion. Upon examination of the transcript returned into this court, it appears that, on the 26th of November, 1841, Ward entered a complaint before the justices, alleging that Henry A. Caswell holds over and unlawfully detains from him, the said Samuel Ward, certain premises, which are particularly described, and requested the justices to issue a writ against Caswell, for the trial of the right of possession thereof. A summons was accordingly issued, and made returnable on the 2d day of December following. Upon the return day the parties appeared, when the complainant filed a declaration stating, substantially, that Caswell "unlawfully detained" from him, the premises described in the complaint; to which the defendant below plead the general issue, and gave notice that the title to land would come in question; and thereupon tendered a bond which the justices refused to receive. Caswell then applied for a continuance of the cause for ten days, and supported his application by an affidavit. The application, also, was refused by the justices, upon the grounds, 1st. That the defendant did not state that he had a good defence to the action; 2d. Nor what he expected to prove; 3d. Nor that the application was not made for delay merely, and that justice might be had in the case; 4th. For that no diligence appeared to have been used to obtain the attendance of the witnesses. The parties then proceeded to trial, and the plaintiff offered in evidence a paper purporting to be a copy of a demand made upon Caswell to deliver up the possession of the premises to Ward. This notice is dated and was served on Caswell, on the 15th November, 1841, by Reuben Warner, a constable, who was sworn, and testified that

he served the notice, and that Caswell was in the possession of the premises set out in the complaint. The plaintiff then offered in evidence a deed purporting to have been executed to him by Reuben Moore, sheriff of the county of St. Clair, dated 13th November, 1841, by which it appeared that the premises in question had been mortgaged by Caswell and one Helm to Ward, and that, upon a statutory foreclosure, the same were bid off by Ward, upon a sale of the premises by the sheriff of St. Clair, on the 21st day of September, 1839; which deed appeared to have been acknowledged and recorded pursuant to the provisions of law. To prove the execution of the deed, a witness was sworn, who testified that the subscribing witnesses thereto resided without the jurisdiction of the court, and then proved in the usual manner the genuineness of their signatures, and the deed was read in evidence. It is also certified that the above was all the testimony in the case. The return exhibits the further fact, that after the testimony was closed, a motion was made by the defendant below for a nonsuit, which was refused by the justices; upon what ground the nonsuit was moved, does not appear. The cause having been committed to the jury upon the testimony above stated, a verdict was, by them, returned for the plaintiff, upon which a judgment was entered according to the statute; and to reverse which, the defendant below brought the cause to this court by *certiorari*. It may be here stated that it is admitted by the counsel for the defendant in error, that, upon the trial before the justices, it was insisted upon that the deed from the sheriff to Ward was not sufficiently proved, and that to enable the plaintiff to recover, he was bound to show the regularity of the proceedings under the foreclosure. It is further admitted that it was stated in the affidavit for the continuance of the cause for ten days, that one of the witnesses would prove that the advertisement of the sale of said mortgaged premises was published in a paper of which he was editor, and that said advertisement was not published for "twelve successive weeks," as required by law.

The plaintiff in error insists that, for various reasons, the judgment below should be reversed. Those upon which reliance is principally had, however, are, 1st. That the justices should have granted a continuance of the cause; and 2d. That the proof was insufficient to entitle the plaintiff to recover. I will consider these questions in the order in which they are stated.

1. It is contended by the defendant in error, that the justices had no power to continue the cause, and this proposition is sustained by an adjudged case reported in 8 Cow. 13. It is a sufficient answer to say, that this decision was expressly overruled by this court in the case of *Disbrow* v. *Gillett*, and we see no reason for reconsidering that decision. The general rule relied upon by the counsel for the defendant in error, and by the supreme court of New York, that justices of the peace are confined to the powers and jurisdiction expressly conferred by statute, has, I think, no application to the present question. There is an obvious distinction between the case where courts of limited and special jurisdiction assume to take cognizance of a *subject matter* not expressly coming within the scope of the law by which they are created, and which bounds their powers, and the case where the *subject matter* is clearly within their jurisdiction, and resort is simply had to the practice of other courts to enable them to exercise that jurisdiction. Keeping in view this distinction, is it not clear that the right to continue, is an incident to the power to hear and determine causes like that under consideration? If not, it is certain that the grossest injustice might be done. Did, then, the justices exercise a proper discretion in overruling the motion to continue? I think they did not. The facts to be proved by the witness were material to the issue, and the motion was made on the return day of the process, and at the time the issue was made up. Under these circumstances, it appears to me that the court below should have granted the motion.

2. It is also insisted upon by the plaintiff in error, that the evidence did not sup-

port the complaint, and for this reason the judgment should be reversed. Upon a close examination of the statute, I am satisfied this ground is well taken. The statute directs the justices, upon a return to a certiorari, to state "the facts appearing on the trial," and upon the hearing of the cause, it is further enacted, that this court "shall determine the same according to the right and justice of the case, on a review of the facts, as well as of matters of law." These provisions clearly indicate that this court not only have the power, but it becomes their duty, to examine into the facts, as well as the legal questions which arose on the trial below. *Chamberlin* v. *Brown*, ante, p. 120, note. In order to give the court below jurisdiction of a case under the chapter respecting "forcible entry and detainer," and the acts amendatory thereto, it is necessary that the complaint should embody such a statement of facts as brings the party clearly within some one of that class of cases for which a remedy is provided. Now, the statute gives a remedy, 1st. Against those who make unlawful and forcible entry into lands, and with strong hand detain the same. 2d. Against those who, having made lawful or peaceable entry into lands, unlawfully, and by force, detain the same. R. S. 1838, p. 490, § 2. 3d. Against those who, with or without force, hold over lands after the time for which they are demised or let, or contrary to the conditions or covenants of any lease or agreement, or after any rent shall have become due. Id. p. 492, § 6; S. L. 1840, p. 83, § 1. And 4th. The purchasers upon sale of mortgaged premises, or under execution, are entitled to institute proceedings, in like manner as in cases where a tenant holds over after the expiration of a lease. S. L. 1841, p. 85, § 5. Under which of these four heads does the case in question come? If under either, it is the second; but in that case, it should have been averred that the premises were entered peaceably or lawfully, and that the detention was not merely *unlawful* but *forcible*. Without determining, however, whether such a case was presented by the complaint as entitled the party to the summary remedy provided by the statute, it is quite manifest that the *proof* does not support either the complaint, or the declaration, (which it is proper here to remark, was entirely unnecessary.) If the party intended to avail himself of the remedy provided for by the act of 1840, all the facts necessary to give the court below jurisdiction, and to entitle him to the remedy it provides, should have been fully and clearly set out in the complaint. It is a right which a defendant has, to be advised, before *pleading*, of the nature and cause of this summary proceeding against him; and, upon issue being joined, the complainant is confined in his proof to the case he has made. It would certainly be an innovation upon the well established rules of both pleading and evidence, to permit a party under the general allegation that his premises are "unlawfully detained," to show that he was a purchaser, either of mortgaged premises, or under an execution. We, moreover, are of opinion, that such purchaser is bound, in such a proceeding, to show the regularity of all the proceedings under the sale. In an action of ejectment, this certainly would be required before the deed under which he claims could be offered in evidence. If so, it would be difficult to determine why less proof should be required before justices of the peace, where the proceedings are summary. The statute intended to give a new remedy, but not to alter the rules of evidence.

The judgment below must be reversed with costs.

WM. A. FLETCHER, C. J., and RANSOM and MORELL, Justices, concurred.

*Judgment reversed.*

ROYCE v. BRADBURN.

The complaint, in a proceeding under the statute of forcible entry and detainer, (R. S. 1838, p. 490, ch. 5,)and the act amendatory thereto, (S. L. 1840, p. 83,) should allege all the facts necessary to give the justices jurisdiction.

The summary remedy which the statute, (S. L. 1840, p. 84, § 5,) provides for obtaining possession, after redemption expired, of premises sold on mortgage foreclosure, or under execution, applies only where there is a *privity* between the parties; and not where the grantee of a purchaser on sale under execution, seeks to recover possession from a person holding adversely to the judgment debtor.

CERTIORARI, brought by Royce, to reverse a judgment which Bradburn had recovered against him in proceedings before two justices of the peace of Washtenaw county, under the statutes of forcible entry and detainer. R. S. 1838, p. 490, ch. 5; S. L. 1840, p. 33. The cause was heard and determined at the January Term, 1842, of this court.

*E. Mundy*, for the plaintiff in error.

*Hawkins & Lawrence*, for the defendants.

WHIPPLE, J. delivered the opinion. From the return of the justices to the writ of certiorari in this cause, it appears that Bradburn filed a complaint with the justices before whom this cause was tried, setting forth, that, on the 14th November, 1837, a judgment was rendered in the circuit court of the county of Washtenaw, against William Mead, Kenneth Davidson, and Olney Hawkins, in favor of Enoch Jones, for the sum of $312.60 damages, and $10.12 costs of suit; that on the 1st of December following, an execution was sued out upon said judgment; that the sheriff, on the 3d January, 1838, levied on the interest of Mead in and to a certain piece of land described in the complaint, and sold the same, on the 16th June following, to Edwin Lawrence, for the sum of $256.93; that the sheriff, on the same day executed to Lawrence the certificate provided for by statute, and filed the same in the office of the register of deeds; that the premises not being redeemed, the sheriff executed to Lawrence a deed of the same, on the 19th June, 1840, and that, on the same day, Lawrence conveyed the premises to Bradburn. The complaint then sets forth that Bradburn, by reason of the facts in said complaint stated, is legally entitled to the possession of the premises, and that Royce unlawfully detains the possession thereof from him. The complainant then sets forth that, being owner of the said premises and entitled to the possession of the same, he gave notice to Royce to quit and deliver up to him the possession of said premises, which he neglected and refused to do; and avers that Royce "unlawfully, and with strong haad, continues, wrongfully, and wilfully to hold possession of the same;" and concludes with a prayer for process.

The complaint indicates that the proceedings were had by virtue of the provisions of the act of 1840, (S. L. 1840, p. 83,) the fifth section of which provides, "that after the expiration of the time for redemption upon any sale of mortgaged premises, or under execution, the purchaser or purchasers at such sale, his or their heirs or assigns, may proceed to obtain possession of the premises in the same manner, as near as may be, as proceedings are or may be in cases where a tenant holds over after the expiration of a lease."

We have already decided, during the present term, in the case of *Caswell* v. *Ward*, that where the proceedings were instituted under the section above referred to, the complaint should, on its face, contain all the necessary facts and averments

showing that the court below have jurisdiction of the case; and if our construction of that section be right, this complaint is defective. It is clear that no party is entitled to the benefit of the provisions of the act of 1840, unless there is a *privity* between him and the party sought to be ejected. A judgment debtor, in possession of premises after sale, becomes *quasi tenant* to the purchaser; and a mortgagor in possession after the sale, sustains the like relation to the purchaser. Does it appear, then, on the face of the complaint itself, or in the proceedings, that this relationship existed between the parties in this cause? It actually does not. On the contrary, it is shown that Royce was in by virtue of a title derived from the same person, under whom the defendants in the execution claimed title. His possession, therefore, was adverse; and it will hardly be contended, that it was ever contemplated by the legislature to invest a justice's court with a jurisdiction so enormous, or with the investigation of questions of title, involving some of the most intricate, delicate and subtle principles known to the law. This never could have been intended; and such was the construction put upon a similar statute in New York, by the courts of that state.

The conclusion, then, is, that the fifth section of the act of 1840, was only intended to apply to those cases where a privity existed between the party who institutes the proceedings, and the party sought to be ejected. As the record shows that, in point of fact, no such privity existed, the judgment below is reversed.

Wm. A. Fletcher, C. J., and Ransom and Morall, Justices, concurred.

*Judgment reversed.*

# CASES

ARGUED AND DETERMINED

IN THE

# SUPREME COURT

OF THE

# STATE OF MICHIGAN,

## In July Term, 1846.

PRESENT:

HON. EPAPHRODITUS RANSOM, CHIEF JUSTICE.
HON. CHARLES W. WHIPPLE,
HON. DANIEL GOODWIN,
HON. WARNER WING,
} JUSTICES.

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### THE PRESIDENT, DIRECTORS AND COMPANY OF THE FARMERS AND MECHANICS' BANK OF MICHIGAN *v.* JAMES KINGSLEY.

Assumpsit by the endorsee against the endorser of a promissory note. Plea that the defendant endorsed the note for the accommodation of the maker, of which the plaintiff had notice; and that the plaintiff had recovered judgment upon it, against the maker, on which execution had been issued, and levied upon goods of the maker sufficient to satisfy the same. *Held*, on demurrer, that the plea was a good bar to the action.*

CASE reserved from Washtenaw Circuit Court. Assumpsit upon a promissory note, made by William R. Thompson and Daniel B. Brown, payable to the order of James Kingsley, the defendant, and by him endorsed to the plaintiffs.

The defendant plead specially in bar, that he endorsed the note for the accommodation of the makers, without consideration, and that the plaintiffs had notice thereof;

* See *Spafford* v. *Beach*, ante, 153.

that, on the 28th of October, 1837, the plaintiffs commenced an action on the note, against the makers, in the Washtenaw circuit court, and, on the 11th of May, 1838, recovered a judgment thereon; that, on the 8th of June thereafter, they sued out a *fi. fa.* on the judgment, &c., and on the 16th day of July, delivered it to the sheriff of Washtenaw county; and that on the 4th of August in the same year, the sheriff, by virtue of said *fi. fa.*, levied upon the personal property of Thompson, to the amount of five thousand dollars, and sufficient to satisfy said judgment, &c.

To this plea the plaintiffs demurred, and the defendant joined in the demurrer.

*S. T. Douglass*, in support of the demurrer. The plea demurred to is clearly bad, unless, as it assumes, the *levy* upon personal property, of the execution against Thompson and Brown, the makers of the note on which the defendant is now sued as endorser, satisfied the debt; or was, at least, *prima facie*, a satisfaction of it.

1. *Now the mere levy upon personal property is never a satisfaction of a debt.*

It does not divest the property of the debtor in the goods levied upon. They are in the custody of the law. The sheriff holds them, as bailee, *virtute officii*. The plaintiff has not, properly speaking, even a lien upon them. Per *Story* J. in *ex parte Foster*, 6 Law Reporter, 65, '6, '7; *Giles* v. *Grover*, 6 Bligh's R. 279; S. C. 23, Eng. C. L. R. 277; *Cooper* v. *Chitty*, 1 Burr. R. 20; *Rex* v. *Wells*, 16 East. 279; *Samuel* v. *Duke*, 3 Mees. & Welsb. 622; *Churchill* v. *Warner*, 2 N. Namp. R. 298; *Browning* v. *Hanford*, 5 Hills R. 58. It is not essential to constitute a levy that the debtor should even be deprived of the possession of the goods. *Green* v. *Burke*, 23 Wend. 492, '3, '4 and 5, and cases there cited; *Bullett* v. *Winstons*, 1 Mumf. 260.

An act of this nature ought not to work a *satisfaction* of the debt. It would be unjust and unreasonable, that the official act of the mere instrument of the law, over whom the judgment creditor has no control, except by application to the court to compel a return of the writ; which does not in *fact* satisfy the creditor's demand; which vests neither in him, nor any one else for his benefit, (for the sheriff is not even a trustee for his benefit, Per *Story* J. in 5 Law Reporter 57) any property, or lien, or security upon, or interest in property; from which *alone* he derives no benefit, and may, without fault of his own, never derive any; which does not deprive the debtor of any property he before had in the goods, and does not, *necessarily*, deprive him of even the temporary possession and enjoyment of them, should operate to discharge the debtor, and deprive the creditor of all remedy against him.

The rule that a levy satisfies a debt cannot be applied in many cases without manifest injustice. Thus it has been held that a levy, valid in its inception, may be defeated by a subsequent *extent* on behalf of the crown, *Rex* v. *Wells*, *Giles* v. *Grover*, and *ex parte Foster*, supra; Wat. Shff. 7 Law Lib. 181; or by bankruptcy of the defendant, *Cooper* v. *Chitty*, and *ex parte Foster*, supra; or the loss of the property by inevitable accident, while in in the hands of the sheriff, *Browning* v. *Hanford*, supra; or by the debtors eloigning the property, in which case it has been held a second levy could be made, *Wood* v. *Torrey*, 6 Wend. 526; or by the levy becoming dormant as to junior executions. The plaintiff may release the property out of humanity to the debtor, *Churchill* v. *Warner*, supra; or abandon it on account of adverse claims which he does not choose to litigate; or the levy may be lost by the mere neglect of the officer, without the debtor being damnified or deprived of his property, as in *Caldwell* v. *Eaton*, 5 Mass R. 399. Now in none of these instances

where the levy is lost, defeated, or abandoned, could it be held that the levy satisfied the debt.

The reasons which have always been assigned for the rule contended for, wherever it has been asserted, are insufficient to support it. In *Clerk* v. *Withers*, 1 Salk. 322; 2 Ld. Raym. 1072; *Ladd* v. *Blunt*, 4 Mass. R 402, and *Shepherd* v. *Rowe*, 14 Wend. 260, the leading cases in support of the rule, a reason assigned is that "by the levy, the debtor loses his property in the goods." We have already shown that this is not the effect of a levy. In *Clerk* v. *Withers* it is assigned, as a further reason, that the plaintff has a remedy against the sheriff. Several instances are referred to above, where the plaintiff has no such remedy. And, even if he had, this would be no reason for depriving him of his remedy against the defendant. Courts have refused to deprive a party of his remedy for similar reason, in analagous cases. 3 Com. Dig. 538, Escape E; *Jackson* v. *Bartlett*, 8 John. R. 281. We know of no other instance where a party has been deprived of one remedy, *merely* because he had acquired another.

The doctrine that a mere levy upon goods satisfies the debt has never been established by any direct adjudication; it has rested upon *dicta* from the begining of its existence. *Clerk* v. *Withers*, *Ladd* v. *Blunt*, and *Shepherd* v. *Rowe*, contain *dicta* only on this subject. The two latter cases decide merely, that a levy upon *land* will not satisfy the debt; and if, as we have attempted to show, there is really no essential difference between levies upon real, and personal property, these very cases are authorities in our favor.

But whatever *dicta* may be found in the earlier cases, and in elementary works, the current of modern dicisions is clearly in favor of the doctrine, that, even as *between the plaintiff and the defendant* in the execution, a mere levy does *not* satisfy the debt. *Peploe* v. *Galliers*, 16 E.

C. L. R. 371; *Green* v. *Burke*, 23 Wend. 490, approved in 5 Hill 592; *Taylor* v. *Ranney*, 4 Hill 619, 621; *Duncan* v. *Harris*, 17 Serg. and Rawle, 436.

2. Admit, however, that, as between the parties to the judgment, the levy upon sufficient personal property of the defendant is a satisfaction; it is not so as to *third persons*, who, like the defendant in this case, are collaterally liable for the same debt, and never has been so held in any of the cases, but the contrary. *Whitacres* v. *Hamkisson*, 3 Cro. Ch. 75; *Dyke* v. *Mercer*, 2 Show. 394; 2 Saund R. 47, n. *(a)*; *Rutland Bank* v. *Thrall*, 6, Vt. R. 237, cited 4 Ph. Ev. by Cow. and H. 985; *Churchill* v. *Warner*, 2 N. Hamp. R. 298, *Poole* v. *Ford*, 18 Eng. C. L. R. 273; *Ontario Bank* v. *Hallett*, 8 Cow. 194; *Dalton* v. *Woodburn*, 24 Pick. R. 259; *Walker* v. *Bradley*, 2 Pike. 578.

It may be said that the principle of *Dyke* v. *Mercer* will not apply where the defence is set up by a *surety*: but, in some of the cases last cited, the defendant was a surety; and I am utterly unable to preceive how there can be "*satisfaction*," which would discharge a person standing in the relation of surety, and yet would not have equally discharged him, had he been a mere co-obligor, or joint debtor.

3. It may be contended that the pleas show at least a *prima facie* defence; that, *prima facie*, the debt was satisfied by the levy; and that the plaintiffs were bound to reply, showing that, for some good cause, the debt was not *in fact* satisfied. But this ground cannot be sustained. 2 Ev. Pothier 144; 3 Cow. & Hill's Ph. Ev. 477, 289; 1 Chitt. Pl. 427; Story Pl. 336; 6 Com. Dig. 398; and *Peploe* v. *Galliers*, *Taylor* v. *Ranney*, and *Shepherd* v. *Rowe*, before cited.

To conclude: It appears to me that the effect of a *mere* levy is simply this: that while it actually subsists, and the property is in legal custody, and the execution re-

mains unexecuted, the other remedies of the creditor *upon the judgment* are suspended: not because the judgment is *satisfied, per se*, or *prima facie*, as has been often asserted, but for obvious reasons of public policy; and that until *actual satisfaction*, by sale or otherwise, the creditor is at liberty to pursue his remedies against any other party collaterally liable with the defendant in the execution, for the same debt.

*James Kingsley*, in person, and *H. T. Bakus* contra.

*Kingsley* contended: 1. That a levy upon sufficient personal property to satisfy a *fi. fa.*, is an extinguishment of the judgment on which it issued. *Mountney* v. *Andrews*, 4 Leonard 150, S. C. Cro. Eliz. 237; Wat. Sheriff, 7 Law Lib. 191, and cases cited in note *n*; *Slie* v. *Finch*, 2 Roll. R. 57, S. C. Cro. Jac. 514; *Clerk* v. *Withers*, 6 Mod. R. 292, '9, S. C. 2 Ld. Raym. 1072; 2 Saund. R. 46*c*, 47, *n* 1; *Ladd* v. *Blunt*, 4 Mass. R. 403; *Bayley* v. *French*, 2 Pick. 588; *Reed* v. *Pruyn*, 7 John. R. 428; *Hoyt* v. *Hudson*, 12 Id. 208; *Denton* v. *Livingston*, 9 Id. 98; *Sherman* v. *Boyce*, 15, Id. 443; *ex parte Lawrence*, 4 Cow. 417; *Cutler* v. *Colver*, 3 Id. 30; *Jackson* v. *Bowen*, 7 Id. 13, 21; *Cornell* v. *Cook*, 7 Id. 313; *Ontario Bank* v. *Hallett*, 8 Id. 194, '5; *Wood* v. *Torrey*, 6 Id. 563; *Shephrrd* v. *Rowe*, 14 Id. 262; *Wood* v. *Van Ansdale*, 3, Rawle, 401; *Webb* v. *Bumpass*, 9 Porter's (Alab.) R. 201; 2 Bac. Abr. 719, 720; 1 Cow. 47, note; Roll's. Abr. 902; *Troup* v. *Wood*, 4 John. Ch. R. 255; 2 Cow. Treat. 1073, (Ed. 1841;) Edw. Treat. 133; 6 Am. Com. Law. 256.

This is the general rule. There may be exceptions to it, but the exceptions tend to establish the existence of the rule. *Prima facie* then the debt was satisfied as to Thomson and Brown by the levy upon their property.

2. The defendant was an endorser for their accommodation. His contract, as such, is that of a surety. Theob.

Pr. & Sur. 1, 2; Chitt. on Bills, 448. And the obligation of a surety being accessory to that of the principal, becomes extinct by the extinction of the latter. The surety may avail himself of any defence which would be available for the principal. Theob. Pr. & Sur. 2, 115, 125, 127, 74 note *s*; *Jones* v. *Lewis*, 4 B. & C. 506; 3 Ph. Ev. by Cow. & H. 985. And Thompson and Brown, the principals, being discharged by the levy, the defendant is discharged also.

3. But even if the judgment was not *satisfied* by the levy, the defendant is discharged. The claim against a surety is *strictissimi juris*. And it is well settled that if the creditor does any act prejudicial to the surety, without his consent, the surety is discharged. Thus it has been held that the surety is discharged if the creditor takes out execution against the principal, and waives it. *Mayhew* v. *Cricket*, 2 Swanst. 185; Theob. Pr. & Sur. 143; *Lathrop* v. *Briggs*, 8 Cow. 171; see also, *Bullett's Exrs.* v. *Winstons*, 1 Mumf. R. 269. Again, where the creditor has the means of satisfaction in his hands, and does not choose to retain it, the surety is discharged. *Commonwealth* v. *Vaderslie*, 8 Serg. & Rawle. 425; *Same* v. *Miller's Ex'rs.* Id. 450; *Finny* v. *Commonwealth*, 1 Penn. R. 240; *Letchenthaler* v. *Thompson*, 13 Serg. & Rawle 157; Theob. Pr. & Sur. 143; *Collum* v. *Hinkley*, 9 Vt. R. 143. Further, a surety, on paying, has a right to be subrogated to all the rights, actions, and hypothecations of the creditor, against the principal debtor. *Craythorne* v. *Swinburne*, 14 Ves. 162; Theob. Pr. & Sur. 252, ch. 10. And any neglect of the creditor, occasioning loss of securities, to the benefit of which the surety is entitled, will discharge the surety. Id. 146; Pothier on Ob. 245. Now by the levy upon the property of the principal debtors, the plaintiff has had the means of satisfaction in his hands. The legal presumption is that the debt is thereby satisfied. Suppose the defendant in this

case now pays the debt: where would be his remedy? He would have paid a debt already satisfied. He could not look to the principal.

It is said that the debt is not, or may not be, *in fact*, satisfied. But we have seen that the facts alledged in the plea show, that *prima facie*, at least, if not *per se*, it is satisfied. Now a defendant in pleading is only bound to make out a *prima facie* defence. 1 Ch. Pl. 222, 224. If from any good cause the debt is not in fact satisfied, the plaintiff should have shown it by replication.

It is admitted that the plaintiff cannot now bring debt or *scire facie* on the judgment against Thompson and Brown. Can this action then be maintained against the defendant for the same debt? But it is said that, at all events, the doctrine that a levy is a satisfaction, does not apply in favour of a person collaterally liable for the same debt. This cannot be law, and is not established by the cases cited. We have seen before that whatever discharges the principal, discharges the surety; and that whatever defence can be made by the former, may be made by the latter also.

Ransom, C. J., delivered the opinion of the Court.

The first question presented by the demurrer is, whether a levy of an execution upon personal property of the debtor, sufficient to satisfy the judgment, shall be deemed so far an extinguishment of the debt, as to constitute a good plea in bar, to an action brought for the recovery of such debt. Were to we consider this question and decide it upon general principles, irrespective of judicial precedent, we should look, of course, to the rules of pleading and evidence, for light to guide us to its proper resolution.

In setting out a cause of action or defence, two things are especially requisite: 1. That *the facts alleged*, on which the pleading is predicated, be sufficient in law to

constitute a good cause of action or defence; and 2. That those facts be set forth according to the forms of law. Gould's Pl. 48. In the present case, we have only to enquire whether the facts averred in the defendant's plea, furnish a defence to the plaintiffs' declaration.

It is a fundamental rule of pleading, "that it is not necessary to state matter which would come more properly from the other side. It is sufficient that each pleading should, in itself, contain a good *prima facie* case, without reference to possible objections not yet urged." Steph. Pl. 394. As Chitty expresses it: "It is enough, for each party to make out his own case in defence." 1 Chit. Pl. 222. The party sufficiently substantiates the charge or answer, for the purposes of pleading, if his pleading establish a *prima facie* charge or answer. He is not bound to anticipate, and, therefore, is not compelled to notice and remove, in his declaration or plea, every possible *exception*, answer, or objection, which may exist, and with which the adversary may intend to oppose him. Nor is it necessary to allege implications of fact, or presumptions of law. Steph. Pl. 397.*

Applying these rules to the pleas under consideration, are they to be adjudged a sufficient answer to the plaintiffs' declaration? In other words, should a jury, with evidence before them, of the levy of an execution upon sufficient personal effects of the debtor to satisfy the judgment, *presume* that the judgment had been satisfied? Such evidence is to be weighed, of course, under the application of the rules of law, which define the rights and liabilities of parties, after levy made, and prescribe the duties of the sheriff, in the disposal of property levied upon.

The creditor has an absolute right to have the property

* See *Attorney General* v. *Michigan State Bank*, ante, 360

sold, converted into money, and applied to the payment of his judgment; and the debtor is liable to the sheriff in trespass, if he interfere with his possession of it. The law declares it the imperative duty of the sheriff, having seized the goods of a debtor in execution, to proceed, within the time prescribed, to sell them, and produce the money for the satisfaction of the debt, unless he be excused therefrom by the consent or acts of the parties, or by inevitable accident.

What, then, should be presumed from the averment in question?

A levy being shown to have been made upon the debtor's goods, sufficient in value to satisfy the debt, should it be presumed, in the absence of any other or further proof, that the sheriff had performed the duty enjoined upon him by law, and followed his levy, by a sale of the goods, and a satisfaction of the judgment; or, should the fact of a levy *only*, be the ground of *no* presumption whatever? Or, should it be presumed from the allegation of a levy *merely*, without an averment of sale and satisfaction, that no sale and satisfaction had been made; that the property was returned to the defendant by consent of all parties; was eloigned by him; belonged to some third person; was destroyed by the elements; or was in some other way disposed of, so as to relieve the creditor and sheriff from liability, and still leave the execution unsatisfied?

The answer to these enquiries, it seems to me, perfectly settles this case, so far as the rules of pleading are to govern its decision. Because, if, from proof of a levy *alone*, a presumption of sale and satisfaction *should* arise, that is enough for the defendant; he is bound to allege nothing further. He thus makes a good answer to the plaintiffs' cause of action, *prima facie;* and he may well leave it for the plaintiff himself to bring upon the record,

by replication, any fact which would rebut such presumption.

And now let us examine the adjudged cases, and learn, if we can, from them, the proper resolution of the question. And, in doing so, it seems best, to comport with order and convenience, to consider, first, the authorities relied upon, in support of the rule for which the counsel for the defendant contends, as theirs is the affirmative side of the question.

The earliest decision to which our attention has been called, is that of *Mountney* v. *Andrews*, Cro. Eliz. 237; 4 Leon. 150, decided in 1591, during the reign of Queen Elizabeth; and it is thus: "In *sci. fa.* upon a judgment in debt, the defendant pleaded, that heretofore, a *fi. fa.* at the suit of the now plaintiff, issued, directed to the sheriff of Leicester, by force of which the said sheriff took divers sheep of the defendant, and still doth detain them. It was holden by the court a good plea, although he doth not say that the writ was returned; for the execution is lawful, notwithstanding that, and the plaintiff hath remedy against the sheriff." This case establishes the rule that a second execution cannot properly issue, while a former one is outstanding, with a levy unaccounted for.

The leading English case, however, is *Clerk* v. *Withers*, 2 Ld. Raym. 1072; S. C. 1 Salk. 323; 6 Mod. R. 270; Holt's R. 303, decided in 1704. The facts as reported were, that one Dives, as administrator of another, had recovered judgment against Clerk, the plaintiff, and sued out a *fi. fa.* and placed it in the hands of the defendant, Withers, sheriff of Middlesex. The Sheriff returned that he had seized the goods to the value of the debt, and that they remained in his hands for the want of buyers. Afterwards, and before sale of the goods, Dives, the plaintiff, died. Clerk then brought *sci. fa.* against the sheriff, to show cause why the goods should not be restored to

him, as there was nobody, (the plaintiff being dead,) to receive the fruits of the execution. On demurrer to the writ, in the common pleas, the defendant had judgment, and the cause was removed to the King's bench by writ of error. There the cause was twice fully argued by counsel on both sides, and Lord *Raymond*, in his report of the case, says it was argued *seriatim* by all the judges. Three points were made upon the argument, and the first was, that the *property*, notwithstanding the levy, remained in Clerk, the execution debtor. The counsel for Clerk insisted in argument, that the property in the goods was not altered by the service, and that if, after the service, the debtor had paid the money, he might have taken his goods again; and that trover would lie against the sheriff for the goods, if he detained them. The *special* property, he said, might be in the sheriff. Again: it was urged that the party was not discharged by the sheriff's return that he had seized the goods to the value, &c.

*Raymond*, contra, contended that the defendant was discharged by this service, and therefore there was no reason that he should have his goods again. If the sheriff seize to the value of the debt, the defendant is discharged, though the sheriff do not satisfy the plaintiff; and the plaintiff cannot sue out a new execution; for the sheriff, by the seizure, becomes liable to him.

I have quoted from the arguments of counsel, to show that the precise question now before this court, was presented, argued, and decided, in the case under review.

Each of the judges delivered an opinion.

*Gould*, Justice, said he was of opinion that judgment ought to be affirmed, for these reasons: 1. Because Clerk, by the seizing of his goods in execution, was not discharged of the judgment; and, therefore, when upon a *fi. fa.* the defendant paid the debt to the sheriff, this was held to be a good plea to an action of debt upon the judgment.

So in *sci. fa.* upon a judgment the same plea was held well. As soon as the sheriff seizes the goods by virtue of the writ of *fi. fa.* he gains a *special property* in them, and may maintain *trespass* against the defendant, if he take them away. So he may maintain *trover* against a stranger that takes them away.

Chief Justice *Holt*, was also of opinion that the judgment of the common pleas should be affirmed; 1. Because, after seizure of the goods by the sheriff, he had nothing to do but to bring the money into court. 2. Though the sheriff is out of office, yet he is bound to sell the goods; and, 3. The plaintiff has no further remedy against the defendant, against whom he recovered his judgment, but must go on against the sheriff. For, the defendant having lost his goods, may plead, *levied by fi. fa.* in bar to an action of debt, or *sci. fa.* upon the judgment; citing *Atkinson* v. *Atkinson*, 3 Cro. 390, where, in a *sci. fa.* on a judgment in *detinue*, the defendant pleaded that, upon a *distringas* upon that judgment to the sheriff, he delivered the goods to the sheriff; and the seizing the goods upon the *distringas* is the same thing in that action, as levying the money upon a *fi. fa.*, in other cases; and, as my brothers say, it has been held to be a good plea, that the defendants goods were seized upon a *fi. fa.*"

The same doctrine is held in 2 Bac. Abr. 335, where it is said, "If the sheriff take goods in execution, by virtue of a *fi. fa.*, whether he sells them or not, yet, being taken from the party against whom the execution was sued, he may *plead* that taking, in discharge of himself, and shall not be liable to a second execution, though the sheriff hath not returned the writ."

The first case we find in which this question was agitated in this country, is *Ladd* v. *Blunt*, 4 Mass. 402, decided in 1808. There the doctrine of *Clerk* v. *Withers*, that a levy of sufficient *personal* property is a good plea,

in debt on judgment is directly recognized, although it was held otherwise as to an *extent* upon land. One of the pleas was the same as the defendants' plea in this case. Chief justice *Parsons* announced the opinion of the court.

The ruling in *Ladd* v. *Blunt*, was reaffirmed by chief justice *Parker* in *Bayley* v. *French*, 2 Pick. 590, so late as 1824.

This subject seems to have first come up for consideration in the state of New York, in *Denton* v. *Livingston*, 9 John. R. 98, decided in 1812, in which case *Kent*, then chief justice, fully recognised the rule in *Clerk* v. *Withers*, to be sound law. So again, three years later, in *Hoyt* v. *Hudson*, 12 John. 207, he says "where an officer, under an execution, has once levied upon the property of the defendant sufficient to satisfy the execution, he cannot make a second levy."

Again, in *Troup* v. *Wood*, 4 John. Ch. R. 418, when chancellor, the same learned jurist, reaffirming the rule laid down in the previous cases, said: "This is the just principle of law."

*Ex parte Lawrence*, 4 Cowen. 417, re-asserts the doctrine of all the former decisions, citing them with approbation. *Jackson* v. *Bowen*, 7 Id. 13, 21, and *Cornell* v. *Cook*, Ibid. 312, and *Wood* v. *Torrey*, 6 Wend 562, are to the same effect.

In *Shepherd* v. *Rowe*, 14 Wend. 262, decided as late as 1835, the defendant plead a levy upon *real estate*, and his plea was for that reason adjudged bad; but the court said expressly that it would have been otherwise had the levy been upon *personal* property.

In Ohio, also, this question has been adjudicated. *Cass* v. *Adams*, 3 Ham. R. 223, was debt upon an appeal bond: Plea, levy upon goods *to a large amount*: On demurrer and joinder the plea was sustained. The court say, "the

levy of an execution upon goods or land, whilst the levy is in force and *undisposed of*, is a satisfaction."

In *Webb* v. *Bumpass*, 9 Port. (Alab.) R. 201, decided in 1839, the doctrine was fully discussed, and the rule of *Clerk* v. *Withers*, and the subsequent cases, was expressly affirmed by the supreme court of Alabama.

The elementary treatises all declare and approve the principle of these decisions. In *Watson's Sheriff*, 138, it is said that "the defendant is discharged from the judgment, and all further execution, if the sheriff has taken goods to the amount of the debt, although he does not satisfy the plaintiff; or if the sheriff has levied goods to the amount of *part* of the debt, no further execution can issue until the writ is returned." Edw. Tr. 133, and 2 Cow. Tr. 1073, (Ed. 1841,) are to the same effect.

In most of the cases cited above, the point we are now considering, was brought directly before the court, as in this case, by the defendant's plea; and in all of them, the rule contended for by the defendant here, is recognised as settled law. And, it may be added, that they were tried and decided, at various times, in a period of more than two and a half centuries, during which, the best and ablest jurists that have ever lived, presided in the tribunals where those trials were had and decisions made, including a *Holt*, a *Buller*, a *Kenyon*, and a *Mansfield*, in England, and a *Parsons*, a *Kent*, and a *Spencer*, in our own country.

Great as is the weight of these authorities, however, it is encountered by the plaintiffs' counsel, and sought to be overbalanced, by what he declares to be the preponderating weight of the later cases.

And he first refers us to the case of *Peploe* v. *Galleirs*, 16 Eng. C. L. R. 371. That was a *sci. fa.*, on a judgment in replevin. The declaration averred that a *fi. fa.*, had been duly issued and returned *nulla bona* by the sheriff, and an *al. fi. fa.*, with a like return. The judgment was

for £274, 13s. 4d. The defendant plead that a *fi. fa.* had been issued to the sheriff of Hereford, and that he had seized and taken divers goods and chattles of the defendant, of the value of £37, 13s. as by the writ of *fi. fa.* in the court remaining, &c. To this plea there was a special demurrer, and the grounds were, 1. That the plea began and concluded as an answer to, and *professed* to answer the whole declaration, and to bar the plaintiff from having execution of all or any part of his damages, whereas, in truth, it answered only as to the £37, 13s.—2. That it was not set forth in the plea, that execution of the residue of the damages did not remain to be made to the plaintiff; and also that the taking *part* of the damages in execution was no bar to an execution for the residue.

The opinion is *per curiam*, and I give it entire: "The defendant has merely stated in his plea, that the sheriff seized his goods, and took them in execution, and has not proceeeed to state that he had returned the writ. The goods might have been restored to the defendant, and on this ground the plaintiff is entited to judgment."

Now it will be seen that the court decided neither of the points made in the case; but did decide, that the plea was insufficient, because it did not state a *return* of the *fi. fa.*, and that the goods had not been restored to the defendant.

The doctrine of *Clerk* v. *Withers* was not in terms, questioned; nor was it even alluded to by court or counsel. The counsel for Peploe, relied upon *Weeks* v. *Peach*, 1 Salk. 179, which merely decided, that, if a plea to the whole declaration answers but part, it is demurrable. *The King* v. *Wells & Allnutt*, 16 East. 282, was also refered to in support of the demurrer, which decides this point, and no other, that goods taken in execution under a *fi. fa.*, at the suit of a subject, are, before sale, liable to be seized by virtue of the King's *extent*, although

the latter be *tested*, *after* the delivery of the *fi. fa.* to the sheriff.

The first of these cases fully sustains the first ground of demurrer taken by Peploe's counsel, but neither, has any tendency to support the opinion of the court.

*Peploe* v. *Galliers* was decided in 1820, and can the dignity be claimed for it, of having overruled the venerable case of *Clerk* v. *Withers*, which had stood unquestioned, for more than a century,—a century, too, which had poured a continual flood of light and learning upon legal science and civil jurisprudence? It aspires to no such consequence itself. No English case was referred to, nor have we found any, which, in terms, nor as I think, by implication, overturns the doctrine of that case.

*Giles* v. *Grover*, 23 Eng. C. L. R. 277, was also cited. Only the head note of the case, is found in the condensed report, referred to, and that is thus: "Goods of the debtor already seized under a *fi. fa.*, but not sold, may be taken under an *extent*, in chief, or in aid." Simply reaffirming the principles laid down in *Rex* v. *Wells & Allnutt*.

The late American cases, cited by the plaintiffs' counsel, present an aspect of this question, seeming to differ from the earlier decisions; and of this class *Green* v. *Burke*, 23 Wend. 490, is the leading case. The facts were, that the plaintiff and another took out an execution against the defendant, and placed it in the hands of one Stevenson, a constable; he went to the residence of the defendant, who told him to levy on three colts, which he did, and made an endorsement thereof on the execution, but left the property in the possession of the defendant. In a few days after, he returned the execution to the justice, and informed the defendant of his having done so, saying that he was under 21 years of age, and had abandoned the levy. A new execution was then issued and levied

upon a quantity of growing wheat of the defendant, which was sold to the plaintiff. The defendant subsequently undertook to harvest the wheat, and the plaintiff took it by a writ of replevin.

The defendant insisted, that the judgment was satisfied by the first levy on the colts, and that the second execution and levy, were, consequently void.

The plaintiff contended that the acts of Stevenson, under the first execution, did not constitute a levy.

The court held that the plaintiff acquired no right under the first levy, and that though Stevenson made himself a trespasser, by his assumed levy, yet he had a right to abandon it. "The result is plain," said Justice *Cowen*, in pronouncing the opinion of the court. "Stevenson was a trespasser, and after the plaintiffs in the execution had been informed that he was an infant, they, by urging him on, would have brought themselves to participate in his peril." "The upshot is, that this young man prudently chose to do before hand, what the law would have forced him to do, in another form; and however stringent the rule of satisfaction by levy, this case made a plain exception." The opinion of the learned judge contains a long and sifting criticism upon *Mountney* v. *Andrews*, and *Clerk* v. *Withers*, and the later cases, which had been supposed to establish the rule, "that a judgment was *unqualifiedly* satisfied by a levy, merely." He strenuously contended, that "*satisfaction*," in all those cases, is spoken of under many qualifications and exceptions; and, alluding to Stevenson's levy upon the colts of the defendant, he remarked: "*Prima facie*, then, the debt was, or might have been, according to the event, satisfied by the levy." "Admitting that the constable had the power to levy, then, so long as he kept the act good, and followed it up, something near the consequence contended for, undoubtedly followed; but he withdrew, without the consent or knowl-

edge of the plaintiffs, and I am not prepared to admit that, in such a case, the creditor is bound to look to the officer alone for his remedy." He concludes his review of this branch of the case thus: "What, then, after all, does the rule amount to? Merely this: that the levy is a satisfaction, *sub modo*. It may operate as a satisfaction, and must be fairly tried; but if it fail, in whole or in part, without any fault of the plaintiff, he may go to his farther execution. He must fairly exhaust the first, and while that is going on, he can neither sue on the judgment, nor have another *fi. fa.*, nor a *ca. sa.*"

Now, can it be insisted, that this case overturns the doctrine of *Clerk* v. *Withers*, and establishes a new rule? I think not, clearly. It conflicts with that case, and those which have followed and been based upon it, so far only as they are supposed to uphold the proposition that a naked levy is, of itself, an absolute and unqualified satisfaction of a judgment. The object of Justice *Cowen* seemed to be to show that such a rule was not of universal application; that there were many exceptions to it; and that the case he was discussing, fell within them. This is apparent from the whole course of his reasoning.

*Taylor* v. *Ranney*, 4 Hill's R. 620, is also referred to. That was *sci. fa.* to revive a judgment. The second plea of the defendants was, that a *fi. fa.* had been issued, by virtue of which the damages, costs and charges, were levied on the goods, *lands and tenements* of the defendants. The plaintiffs replied, and the defendants demurred to the replication. Justice *Bronson* delivered the opinion of the court in these words: "The second plea does not show a satisfaction of the judgment. The allegation is, that by virtue of the *fi. fa.*, the damages were levied *on* the goods and chattels, *lands* and tenements, of the judgment debtor. It should have been, that the damages were levied *of* the goods, &c. A mere levy upon *lands*, *never* amounts to

satisfaction; nor does a levy upon goods, even where they are of sufficient value to pay the debt, *necessarily* amount to satisfaction. Here the levy was upon lands, as well as goods, and there is no averment that *either*, or *both* of them were of sufficient value to pay the debt, or that any sale or satisfaction has followed. The plea is clearly bad." No cases were referred to in support of this decision, except *Shepherd* v. *Rowe*, to show that a levy upon *lands* was not a satisfaction of a judgment, and *Green* v. *Burke*, to show that a levy of sufficient *personal* property, was not *always* a satisfaction. It will be observed here, that there was no averment that the property levied upon was sufficient in amount to pay the debt.

*Browning* v. *Hanford*, 5 Hill's R. 588, was an action by the creditor, against the sheriff, for not collecting an execution. The execution had been levied upon sufficient goods to pay the debt, but they had been consumed by fire, without fault of the sheriff. It was held that he was not responsible for their value.

*Duncan* v. *Harris*, 17 Serg. & Rawle, 436, was a writ of error to reverse a *testatum fi. fa.* issued from the common pleas. A former *fi. fa.*, issued upon the same judgment, had been levied upon two hundred hogs, the property of the defendants, and the levy released by the plaintiff's attorney. The plaintiff in error, the debtor in execution, prayed that the execution might be reversed and set aside, on the ground that the judgment was satisfied by the first levy. The court refused to set aside the execution, but affirmed it, saying: "The hogs were levied on by the sheriff, and were released, for what cause does not appear, nor is it necessary to appear, by the plaintiff's attorney, with directions that the writ should not be executed. The property never went to the use of the plaintiff, but was *returned to the defendants.* It would be a strange perversion of a principle to convert such a

transaction into the satisfaction of a debt." This case, it will be observed, differs essentially from the one at bar. The levy was released with the consent of the debtor, obviously, as it is said the property was returned to him.

*Whiteacres* v, *Hamkinson*, Cro. Chas. 75, was next referred to, and is to the effect that, if one joint obligor be taken in execution, and the sheriff suffer him to escape, the plaintiff may sue the other obligor, and is not confined to his remedy against the sheriff. Unquestionably, a party may pursue each and every *joint* obligor, till he obtains *actual* satisfaction. Every presumption of payment in that case, was positively excluded, by the escape of the debtor.

*Dyke* v. *Mercer*, 2 Show. 394, was, like the last case, debt on a joint and several bond. The defendant pleaded that his co-obligor was sued to judgment, and thereupon a *fi. fa.*; and that the money was levied by the sheriff. The plaintiff demurred, and had judgment; and, says the report, "a difference was taken between this case and where a *sci. fa.*, or debt is brought on the judgment, against the party himself, for *there* such a plea may be good, for he shall not pay twice, but a co-obligor can plead nothing but satisfaction actually made of the debt." A case clearly distinguishable from the one before us, as will hereafter be shown.

*Rutland Bank* v. *Thrall*, 6 Verm. R. 237, cited also by the plaintiffs, was where the joint maker of a promissory note was sued. Although he was a joint maker, yet he, *in fact*, signed as surety for another. Thrall, being an attorney, sued the principal debtor, Holmes, in the name of the bank, and collected a large part of the money, but refused to apply it to the payment of the note. The court say: "Thrall became the principal debtor, having the funds in his hands for the payment of the debt." "Had not the plaintiffs their election to proceed against him,

either as maker of the note, or for money had and received?"

Several other cases were cited, which I deem it unnecessary to comment upon; they do not vary the aspect of the question from that exhibited by those already referred to.

And what do these authorities prove? Do they not show, very clearly, that the ruling in *Mountney* v. *Andrews*, and *Clerk* v. *Withers*, has been regarded as settled law, from the times those cases were severally decided, until the present day?

The doubts which seem to have arisen in the minds of some judges of later times, evidently have proceeded from the language used by the courts in announcing their decisions. Although, as we have seen, the question before the court, was not, in a single case cited by the counsel of either party, whether a levy *merely*, upon personal property sufficient, &c. absolutely, and *per se*, satisfied a judgment, yet the courts have very frequently asserted that broad proposition without qualification. Such proposition it is, that judges have so often and so strenuously combatted. The defendant does not seek here to maintain that proposition, nor is it at all necessary that he should do so, to sustain his plea.

The question really presented by every case to which reference has been made, has been, whether a levy upon personal property, sufficient in value to pay the debt, was good ground for opposing a motion for further execution, or a good plea to a *sci. fa.*, or action of debt upon judgment;—whether, from the allegation of such levy, with nothing further, a satisfaction should be presumed, and thus the allegation should constitute a *prima facie* defence. That is the only question here. Under the rules of pleading before alluded to, can any other than an affirmative answer to the question be extracted from the numerous

cases which have passed under review? I think not. To that effect, substantially, is *Green* v. *Burke*, the case most confidently relied upon, in support of the demurrer.

The counsel for the plaintiffs insisted, that the rule in *Clerk* v. *Withers*, could not be sustained, because the reasons upon which it was based were unsound. It will be remembered, that in many of the cases, the judges assigned as a reason for their opinions, that the defendant lost his goods by the levy, and, *therefore*, his debt should be deemed to be discharged. If, however, the rule itself be sound, it matters not what reasons were assigned for its adoption.

But, I apprehend the effect of the levy to be substantially as stated in the cases. Without stopping to define a levy more particularly, it is sufficient to say, that a *valid levy* deprives the debtor immediately of the control, and if the sheriff elect, of the possession, of his goods; and ultimately, if pursued, absolutely divests him of his property in them. Precisely as stated in *Clerk* v. *Withers*, by *Gould*, Justice, "as soon as the sheriff seizes the goods by virtue of the writ of *fi. fa.*, he gains a *special property* in them, and may maintain trespass against the defendant, if he takes them away." "So, he may maintain *trover* against a stranger that takes them away."

The plaintiffs' counsel also contended, and cited numerous authorities to show, that in many instances, the principle on which the defendants' plea rests, cannot be applied; as, if the defendant become a bankrupt after the levy; or, if the property be destroyed by inevitable casualty before sale, as by fire; or if it be restored to the defendant by his consent; or eloigned by him; or, if it belong to a third person, &c.

In none of these instances, it was argued, could the levy be a satisfaction of the judgment. The counsel was right, beyond question. But these, the defendant insists,

are only exceptions to the rule, and tend, therefore, to establish it. Finally, upon the most thorough investigation I have have been able to make of this question, I am brought to the conclusion, that, as between the creditor and principal debtor, the rule of law is that for which the defendant contends, viz: that a levy outstanding and unaccounted for, upon personal property sufficient in amount to pay a judgment, is *prima facie* evidence of satisfaction, and, therefore, constitutes a good plea to *sci. fa.*, or an action of debt on judgment. That such levy is *conclusive* evidence of satisfaction, is not pretended. A plea setting up such a levy, therefore, if false in fact, may be traversed; or, if a levy have been made, but not followed by sale and satisfaction, for any sufficient reason, the levy may be confessed, and its legal effect repelled by an allegation of any fact, which, by law, should withdraw it from the operation of the general rule. Thus, simple and direct issues would be formed, easy to be comprehended and tried, and the rights of both parties protected.

It now remains to enquire whether the defendant can avail himself of such a defence.

The fourth plea avers, that the defendant endorsed the note declared on, for the accommodation of the makers, and without consideration, and that the plaintiffs had notice of such facts.

Whenever a note or bill is made, drawn, accepted or endorsed, by or on account of a person who has received no consideration for the same, it is said to be drawn, accepted or endorsed for accommodation. Bayl. on Bills, 438. And if such note or bill be negotiated, the maker, or other party for accommodation, and the person who has received value for the note or bill, are considered as standing in the relative situation of surety and principal. 3 B. & P. 363; Chitt. on Bills, 443; Theob. Pr. & Sur. 180; Chitt. on Contr. 534. The defendant, then,

stands in the relation of a surety to Thompson and Brown, the makers of the note in suit.

A surety promises to pay the debt of another person, who is in the first instance liable, in case of the failure of payment by such person. His undertaking, though it may be contemporaneous, is not joint, with that of the principal debtor, but is merely accessory and collateral to it.

Therefore, if the obligation of the principal debtor be extinct, that of the surety, or accessory, is extinguished also. Theob. Pr. & Sur. 1, 2. The surety, consequently, may avail himself of any defence which could be set up by the principal debtor, (except it be merely personal, as a discharge in bankruptcy;) and, in this respect, there is a wide distinction between sureties and joint contractors. Each and every maker of a joint contract, promises, absolutely and unconditionally, to pay the *whole* debt; therefore, nothing short of actual payment or release, will constitute a good defence to an action against any of them. But very different, as we have shown, is the undertaking of a surety. He promises to pay, *only* upon condition that the principal does not. If, therefore, for any reason, except as just stated, a recovery cannot be had against the principal, no more can it against the surety. And a contrary doctrine would, to my mind, be equally absurd and unjust. If the original debt be *satisfied*, no action can be maintained against the surety, of course; and whatever, in contemplation of law, makes a satisfaction of the debt, and thereby discharges the principal, necessarily extinguishes the liability of the surety. It would be as difficult for me to conceive of a surety's liability continuing after the principal obligation was discharged, as of a shadow's remaining after the substance was removed.

Many cases were referred to by the counsel of the

plaintiff in support of his position upon this branch of the case; but none of them, in my judgment, are sufficient for his purpose.

The first to which our attention was called, was *Whiteacres* v. *Hamkinson*, Cr. Chas. 75, already noticed while considering the other branch of this case. That, it will be remembered, simply decides that an escape of one joint obligor, though suffered by the sheriff, is not a bar to an action against his *co-obligor*. *Dyke* v. *Mercer*, 2 Show. 393, also cited, was, like the last case, debt on a joint bond, and therefore not in point. *Rutland Bank* v. *Thrall*, 6 Vt. R. 237, was relied upon in the argument of this point also, but I cannot preceive its tendency to fortify the plaintiffs position. *Thrall*, we shall recollect, as attorney of the bank, collected the money of the principal, and judge *Phelps* held him liable on the express ground that he had thereby become himself the principal debtor; applying the familiar principle that as the surety is one who obliges or binds himself on behalf of another, his obligation as surety is destroyed by his becoming *himself* the principal debtor; for a man cannot be his own surety, say the books. Theob. Pr. & Sur. 2.

*Churchill* v. *Warner*, 2 N. Hamp. R. 298, it seems, to me aids the plaintiff, as little as the case last refered to. It was an action upon a receipt made jointly and severally by the defendant, and one Turner, for a quantity of hay taken on an attachment against Warner himself. Turner was sued upon the receipt and judgment had against him, and execution levied on his property, but it was never sold or taken from his possession. Warner, the joint receiptor, and in fact the principal debtor, was then sued, and sought to defend the action on the ground of the execution and levy against Turner. That such a defence could not avail *him*, the *principal*, as well as *joint* debtor, is most obvious, and so the court held.

In *Poole* v. *Ford*, 18 Eng. C. L. R. 273, the acceptor and drawer of a bill had *both* been sued, and judgment recovered against each; the plaintiff took out a *fi. fa.* and levied on the goods of the acceptor, which he abandoned by agreement with the acceptor, and received from him another security to pay at a future time. The drawer contended that this discharged him. The court doubted, but, "finally determined, that the withdrawing the *fi. fa.* against the acceptor did not discharge the drawer; and that the rule, that giving indulgence to an acceptor, without the consent of the drawer, discharges such drawer, does not apply after judgment. Here, it will be observed, the execution was withdrawn, with the express consent of the principal debtor, and the goods levied upon, returned to, and received by him; so that there could be no pretence of a satisfaction, either by the principal or surety.

*Ontario Bank* v. *Hallett*, 8 Cow. 194, was next cited. That was an action of debt for an escape from the defendant, who was sheriff of Herkimer county, of one Graves and another. The commitment and escape of the debtors were shown. The defendant then proved that one Sharpe had confessed judgment as collateral security, to the Bank, for the debt; and that, prior to the commitment of the principals, (Graves and the other,) an execution was taken out against Sharpe, and the under sheriff went with it to Sharpe's residence to make a levy. Sharpe said the farm and property upon it were not his. The under sheriff did not remove the property, or make an inventory even, but told Sharpe he had levied. He informed the plaintiffs agent, that he should proceed no further then, unless indemnified. Nothing further was done under the execution. The defendant insisted that here was a levy on personal property, sufficient to pay the execution; that the judgment against Sharpe was thereby satisfied; and,

consequently, the judgment on which the *ca. sa.* issued, by which Graves had been committed, was extinguished. The plaintiff had judgment against the sheriff, and on a motion for a new trial, the court say: "As to the levy, it is apparent that none was made, or intended to be made; and, if there had been, the sheriff was so well satisfied of an adverse claim, that he demanded an indemnity." "Whatever may have been the state of the title, it can never be permitted to a defendant, who denies that he is the owner of property levied on, to take the benefit of the rule, which considers the levy on sufficient property, *unquestionably* belonging to the defendant, a satisfaction of the debt." Again, in the same case, it was said: "On the collateral security, the plaintiffs might proceed at their election, but were not obliged to hazard litigation for the benefit of the original debtor. They might cease, in their discretion, to pursue such security. The *real* debtors have no just cause to complain, for *they* are the persons who ought to pay."

Thus I have briefly run through the cases, on the authority of which, we are called upon to determine, that the defendant cannot set up, by way of defence, an execution and levy upon the goods of the principal debtors, although it might avail in an action against them. As I remarked, at the outset, I think they fall very far short of maintaining the position assumed in behalf of the plaintiffs.

The counsel for the defendant cited upon this point, *Jones* v. *Lewis*, 4 B. & C. 506. That was an action against a party, who, like the present defendant, had indorsed a note for the accomodation of the maker. The indorsee received from the maker five shillings in the pound, in full of his demand; and he was told by the maker, that the indorser would continue liable for the residue of the debt. The court held the endorser discharged of the entire debt and

justice *Holroyd* said: "Althongh this be a case where the action is brought against a surety, it must be considered in the same light as if it was brought against the principal. If the original debt be satisfied and gone, no action will lie against the surety." And *so* held all the judges. What is the principle of this case? Not, that the indorser was discharged by giving time to the maker, for that was not done. Nor, that the debt was fully satisfied, for only *one fourth* part of it had been paid. No, the principal is, that the *principal debtor* having been discharged by the compromise, no action could be prosecuted against him, and *therefore* none could be maintained against the surety. The *substance* was taken away, and the *shadow* vanished at the same time.

*Mayhew* v. *Crickett*, 2 Swanston, 185, was where the creditor took out execution and levied upon the property of the principal debtor, and afterwards, without the knowledge or consent of the surety, withdrew the execution and restored the property to the debtor. Lord *Eldon*, chancellor, said, "I think it clear, that, though the creditor might have remained in possession if he chose, yet if he takes the goods of the debtor in execution, and afterwards withdraws the execution, he discharges the surety, both at law and in equity.

*Bullitt's Executors* v. *Winstons*, 1 Mumf. R. 269, arose upon a motion to set aside an execution, on the ground that a former one, for the same debt, had been regularly issued and levied upon the goods of the movers, who were only sureties for the debt, and the property then taken released and discharged, by one of the plaintiffs, under a compromise with the principal debtor; to which compromise they were not parties, or in any manner consulted with respect to the same. The court decided that the indulgence granted to Littlepage, the principal debtor, without the consent or privity of Winstons, amounted

to a release as to him; the property once taken upon the execution, being, by the act and consent of the plaintiff, put out of the custody of the law, in which it had before been.

It is laid down in 3 Ph. Ev. by C. & H., 985, citing 7 Mart. Lou. R. 193, that "there is no rule in our laws better understood, than that which allows the surety the right of availing himself of the same means of defence, (save those that are merely personal, as a discharge by the bankruptcy or insolvent laws, &c.,) which the principal debtor could resort to."

The rule to be extracted from all these cases seems to me clearly to be the one already alluded to, that whatever, in legal contemplation, extinguishes the debt, as against the principal debtor, is a good defence in a suit against the surety.

Having shown, conclusively, as I think, that a levy upon personal property sufficient to pay the execution, is *prima facie* evidence of satisfaction, and therefore a good plea in an action against the principal, it follows, of course, that the surety may interpose the same defence, when he is sought to be charged.

Our conclusion, then, is, that the demurrer to the defendant's plea ought to be overruled.*

GOODWIN, J. dissented.

*Ordered certified that the demurrer should be overruled.*

* The recent case of *Kershan* v. *Merchants' Bank*, 7 How. Miss. R. 386, seems to sustain the ruling of the court in the foregoing case. The abstract of it, contained in U. S. Dig. Supp. Vol. 1, p. 782, § 1112, is as follows: "The acceptor of an inland bill in Mississippi, became the surety of the payee on a forthcoming bond, which was forfeited, and an execution levied on sufficient" (personal?) "property of the surety. The payee of the bill assigned the same, but the execution was levied before notice of the assignment. In an action by such assignee, against such acceptor, the defendant filed as a set off the amount of such levy. *Held*, that the levy was *prima facie* satisfaction of the judgment, and entitled the surety therein to his action against the principal, and rendered the amount of the judgment a good set off against the bill of exchange. *Held*, also, that if actual satisfaction was not had, owing to a legal discharge of the levy, it should have been shown in avoidance, and

that the plea need not have averred that the property levied upon had been sold." To the last point, see also, *Walker* v. *McDonnell*, 4 Smedes & Marsh. 118.

For other recent cases in which it has been asserted that a levy upon sufficient personal property is a *satisfaction*, see *Young* v. *Read*, 3 Yerg. 297; *Camp* v. *Laird*, 6 Id. 246; *Carroll* v. *Fields*, Id. 305. In *Ordinary* v. *Spann*, 1 Richardson's R. 259, it was said to be an *implied* satisfaction; and in *Porter* v. *Boone*, 1 Watts & Serg. 101, it was held to be a satisfaction if the levy be released and become lost to the defendant; but otherwise if the release is made at the request of the defendant. And in *Ex parte King*, 2 Dev. 341, and *Binford* v. *Alston*, 4 Id. 351, it was held that where the defendant has recovered possession of the goods, either with or without the consent of the sheriff, the seizure is no payment, and a new execution may issue.

In *The People* v. *Hopson*, 1 Denio, 577, '8, (recently decided by the supreme court of New York,) the question before the court was as to the authority of a justice of the peace to renew an execution after sufficient property to satisfy it had been levied on, and was held under the levy, and there was not time enough remaining to advertise and sell. *Bronson*, C. J., in delivering the opinion of the court, uses the following language: "It is said that the levy upon sufficient personal property to pay the debt was a satisfaction of the judgment; and consequently that the renewal was void. We have repeatedly held that such a levy does not always satisfy the judgment. *Green* v. *Burke*, 23 Wend. 490; *Ostrander* v. *Walter*, 2 Hill, 329. And if the broad ground has not yet been taken, it is time it should be asserted, that a mere levy upon sufficient personal property, without any thing more, never amounts to a satisfaction of the judgment. So long as the property remains in legal custody, the other remedies of the creditor will be suspended. He cannot have a new execution against the person or property of the debtor, nor maintain an action on the judgment, nor use it for the purpose of becoming a redeeming creditor. But without something more than a mere levy, the judgment is not extinguished. There is no foundation in reason for a different rule. The mere levy neither gives any thing to the creditor, nor takes any thing from the debtor. It does not divest a title: it only creates a lien on the property. It often happens that the levy is overreached by some other lien, is abandoned for the benefit of the debtor, or defeated by his misconduct. In such cases there is no color for saying that the judgment is gone; and yet they are included in the notion that a levy satisfies the debt. And where, as in this case, the officer omits to sell within the life of the execution, I see no reason why the debt should be deemed paid, nor why the creditor should not have a renewal of the process. The true rule I take to be this: the judgment is satisfied when the execution has been so used as to change the title, or in some other way deprive the debtor of his property. This includes the case of a levy and sale; and also the case of a loss or destruction of the goods after they have been taken out of the debtor's possession by virtue of the process. When the property is lost to the debtor, in consequence of the legal measures which the creditor has pursued, the debt is gone, although the creditor may not have been paid. He must take his remedy against the officer, if he has been in fault; and if there be no such remedy, the creditor must bear the loss. But until the debt is paid, or the debtor has lost his property in consequence of the levy, the judgment remains in force."

These views of C. J. *Bronson* are not referred to as conflicting with those expressed in the foregoing opinion, delivered by Justice *Ransom*. It is admitted in that opinion, that a levy upon goods is not, *per se*, satisfaction. The ground taken is, that it is satisfaction *prima facie*: that is, that from the mere fact that a levy has been made upon sufficient personal property, the presumption arises that such further proceedings have been had, or acts done, as have resulted in the actual satisfaction

of the debt, or in the extinguishment of the debtor's liability. From this, the conclusion at which the court arrive seems inevitable; and it seems to me, that the court must have arrived at the same result, even if the defendant had not stood in the relation of *surety* to the persons whose property was levied upon, but had been a mere co-obligor or joint debtor.

It may not be improper here to suggest, whether the facts alleged in the plea in this case were properly pleadable in *bar;* or whether they ought not rather to have been pleaded *in suspension of the action* merely? A plea in bar must be "a substantial and *conclusive* answer to the action." 1 Steph. Pl. 51. It bars the action *forever.* Now suppose that, at the time the plea was filed in this case, the levy alleged to have been made had been actually subsisting—the property remaining undisposed of. What answer could the plaintiffs have made to the plea? Certainly none. They must, therefore, have allowed judgment to go against them. But suppose afterwards, and before sale of the property, the defendants in the execution had become bankrupt, and the property had passed to their assignees, or that for any other good reason the levy had proved unavailable to the plaintiff. Would the remedy against the defendant have been gone? Would the judgment in the action have been a conclusive answer to a second action for the same cause? It seems to me not. See remarks of *Cowen,* J, in *Green* v. *Burke,* 23 Wend. 497, 500, 501. It is proper to add that this question was not raised on the argument, (all objection to the form of the plea being waived,) and was not, therefore, considered by the court. —*Reporter.*

# CASES

ARGUED AND DETERMINED

IN THE

# SUPREME COURT

OF THE

# STATE OF MICHIGAN,

**In January Term, 1847.**

PRESENT:

HON. CHARLES W. WHIPPLE,
HON. WARNER WING,
HON. GEORGE MILES,
} JUSTICES.

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MEMORANDUM.—The HON. EPAPHRODITUS RANSOM, Chief Justice, did not participate in any of the decisions of this term, having been absent, during most of the time, on account of illness.

In October, 1846, the Hon. DANIEL GOODWIN, Associate Justice of this court, having resigned, the HON. GEORGE MILES was appointed to fill the vacancy, and to hold the Circuit Courts in the Second Circuit; and the HON. WARNER WING, was, at the same time, transferred to the First Circuit.

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## GORDON *v.* FARRAR AND OTHERS, INSPECTORS OF ELECTION, &C.

Whether a person offering to vote at an election, has the requiste qualification as to color or descent, (the Constitution, Art. II. § 1, conferring the right to vote, upon "*white* male citizens" only,) must, on challenge for the want of such qualification, be inquired into and determined by the inspectors of election.

In determining this question, the inspectors act *judicially*, not ministerially; and therefore they are not liable in an action on the case for damages, for improperly refusing a vote because the person offering it was partly of African descent.

CASE reserved from Wayne Circuit Court. This was a special action on the case, brought by Gordon against

Farrer and others, inspectors of election for the Second Ward, in the city of Detroit, for refusing to receive the plaintiffs vote, at an election for the purpose of choosing a representative in congress for the first congressional district of Michigan, and certain other officers, held Nov. 4, 1844.—Plea not guilty.

The cause was tried at the November term 1845, of the circuit court, before the Hon. D. Goodwin Presiding Judge. At the trial, the jury returned the following special verdict:

"The jury empanneled in this cause find for the plaintiff, and assess his damages at 12½ cents; subject to the opinion of the court upon the following state of facts, viz: The plaintiff is partly of Saxon and partly of African descent; but the Saxon blood in him greatly predominates over the African. He is of a complexion as white as, or whiter than many persons decended from European nations; but there is a mixture of African blood in his composition, though he has less than one half. The plaintiff offered his vote to the defendants, sitting as inspectors of election, which was refused. He then offered to take the oath required by the statute, which was also refused. If the court, on such a state of facts, are of the opinion that the plaintiff, possessing all the other qualifications of a voter under the laws of Michigan, is entitled to vote, or to be sworn according to the statute as an elector of the state of Michigan, then the verdict above given is to stand; otherwise the jury find for the defendant."

The Presiding Judge reserved the question as to what judgment should be rendered upon this verdict, for the opinion of this court.

*E. C. Walker*, for the plaintiff.

*W. A. Howard*, for the defendants.

MILES, J. delivered the opinion of the court.

The qualifications of electors in this state are fixed by the constitution. Art. II. § 1, as amended in 1839, provides that, "In all elections, every *white male citizen*, above the age of twenty-one years, having resided in the state six months next preceeding any election, shall be entitled to vote at such election; and every white male inhabitant who may be a resident of this state at the time of the signing of the constitution, shall have the right of voting as aforesaid; but no such citizen or inhabitant shall be entitled to vote, except in the township or ward in which he shall actually reside at the time of such election."

The only statutory provisions in relation to challenges of electors, and the duty of inspectors of elections when an elector shall be challenged as unqualified, are contained in the act passed in 1841, entitled "An act to preserve the purity of elections," &c. S. L. 1841, p. 185. Sec. 1. provides that one of the inspectors shall tender to every challenged person, an oath that he will faithfully and truly answer all such questions as shall be put to him *touching his qualification as an elector*, "and the inspectors, or one of them, shall then proceed to question the person challenged in relation to his age; his then place of residence; how long he has resided in the state; whether he was an inhabitant of this state on the 24th day of June, A. D. 1835, and whether a native or naturalized citizen; and if the latter, when, where, and in what court, or before what officer, he was naturalized; whether he came into the town or ward for the purpose of voting at that election; how long he contemplates residing in the town or ward; and all such other questions as may test his qualifictions *as a resident of the town or ward, his citizenship, and his right to vote at that poll.*"*

*This statute was repealed by R. S. 1846, (p. 725, 730) which contains other and somewhat different provisions on the same subject. See Ch. 5, p. 43.

It will readily be perceived that in all this, no provision is made for testing the qualification of the elector, as to his color, or descent. The enquiry is, by the statute, to be confined to the qualifications enumerated, and in which this is not included; and we are not aware that any provision is made by law, for the mode of determining whether a person who offers a vote at an election is possessed of this qualification. The duties of the inspectors upon a challenge as to any other qualification are clearly pointed out. They are required to administer the preliminary oath, and make the specified enquiries, and if the party answers them fully, no matter what may be the character of the responses, they are, if he still persists, required to administer another oath, that he possesses the qualifications named in the statute, and if he will take such oath they must receive his vote.

But it is only *white* male citizens who are entitled to vote; and when a question arises whether an elector possesses this qualification, to whom must it be submitted? We know of no other tribunal than the inspectors of the election.

If a colored person should offer his vote, and be challenged for that cause, although the inspectors are not authorized by statute to institute an examination of the party under oath, as in case of other alledged disqualifications, still it would not be competent for them to receive the vote without determining, in some way, by inspection or otherwise, whether he came within the description of persons in this respect qualified. That would be a direct and palpable violation of their duty, resulting from the nature of their office, and the requirements of the constitution.

It is true the evidence proper to be introduced, or whether any evidence is competent for that purpose, is no where prescribed or fixed by law; still, in our judg-

ment, defective and deficient as the law is, the question must be decided by the inspectors, when the vote is offered.

If we are correct thus far, (and so far we are sustained by plaintiff's counsel, who insists the defendants are liable for rejecting the plaintiff's vote on the sole ground that he was not a white person within the meaning of the constitution, thereby conceding to them the right to determine the question,) then the next enquiry is, are the defendants liable in this action?

The plaintiff relies upon the point that, under the statute, the act complained of was not a judicial, but a ministerial act. In this we think he is mistaken. The statute has nothing to do in the matter. The only enquiries under the statute are such as we have enumerated; but before the oath can be administered, or the enquiries made, the other more important enquiry is to be answered, "Is this person white?" He is not by the statute permitted to establish the affirmative of this by his own oath, as he can his other qualifications, and thus compel the inspectors to receive his vote, leaving them no discretion, no opportunity for the exercise of their judgment, in the matter. Conceding, then, as the plaintff in this case does, to the inspectors, the right to adjudicate upon this enquiry, and requiring them to do so, and relying, as he does, upon the facts found by the special verdict as showing the plaintiff to possess the necessary white qualification, we cannot come to any other conclusion, than that the inspectors, in passing upon those facts and determining the plaintiff's right in this respect, acted judicially.

This brings us to the question of judicial responsibility.

"The doctrine which holds a judge exempt from a civil suit or indictment for any act done or omitted to be done by him as a judge, has a deep root in the common law." Per *Kent*, Ch. J. in 5 John R. 291. "Courts of special

and limited jurisdiction, while acting within the line of their authority, are protected as to errors of judgment." *Cunningham* v. *Bucklin*, 8 Cow. 183. In the case of *Vanderheyden* v. *Young*, 11 John. R. 159, which was an action of trespass against the members of a court martial for imprisoning the plaintiff, *Spencer*, J., in concluding the opinion delivered, says, it would be most mischievous and pernicious to subject men acting in a judicial capacity to actions, when their conduct is fair and impartial, when they are uninfluenced by any corrupt or improper motives, for a mere mistake in judgment.

Authorities might be multiplied upon this subject, but it cannot be necessary to cite cases to sustain a proposition so well etablished.

In this view of the case, it is unnecessary to examine the cases referred to by plaintiff's counsel, to show that an action could be maintained against the inspectors of an election, acting ministerially, and without malice, for rejecting a lawful vote, as we put the judgment of this court upon the distinct ground that the inspectors, in determining the plaintiff's qualification to vote as a white person, acted judicially, and are therefore not liable to this action.

*Ordered certified that the Circuit Court should render judgment for the defendants.*

## THAYER v. THE PEOPLE.

Grand jurors drawn, and appearing upon summons, are presumed to be legally qualified and properly returned, and the circuit court will not interfere to set aside the panel, or any part of it, unless upon cause shown by a person having a right to question its legality.

The grand jury is formed under the direction of the court; and a challenge, either to the array or to the poll, can only be made by a person *under prosecution*, and whose case is about to be brought before the jury.

One who makes such challenge must show to the court that he is so under prosecution.

ERROR to Calhoun Circuit Court. The case appears in the opinion.

*P. Farrand*, for the plaintiff in error.

*H. N. Walker*, Attorney General, for the People.

MILES, J. delivered the opinion of the court.

Thayer, the plaintiff in error, was indicted at the May Term, 1846, of the circuit court, for burglary; and, before the grand jury by whom the bill was found were sworn, moved, by his counsel, to quash the array of grand jurors for the reason assigned, 1. That six of the towns of the county made no returns of jurors for the year 1845, and 2dly. That the fourteen towns who made their returns, made them irregularly. Which motion was resisted by the prosecuting attorney, and overruled by the court. This proceeding has, by writ of error, been brought into this court.

At common law, if a man who was returned as a grand juror was disqualified, or was not returned by a proper officer, he might be challenged by any person *under prosecution*, before the bill was presented. 1 Chit. Cr. Law, 307; Burn's Jus. Ch. 25, § 16; Hawk. Pl. C. b. 2, c. 25, § 16. In the place of the common law mode of selecting and returning the jurors by the sheriff upon a venire issued to him, our statute provides that the ju-

rors to be summoned, both grand and petit, shall first be drawn from a list of names previously returned to the office of the county clerk, by the assessors and township clerk of each town in the county, in imitation of the ancient practice, which required the sheriff to select some of the persons returned by him from every hundred.

The grand jury is formed under the direction of the court, and a challenge, either to the array or to the polls, is properly confined to those who are *under prosecution* and whose case is about to be submitted to the consideration of the jury.

In this case, it does not appear that any evidence whatever was offered to the court below, to show that the defendant had a right to take this objection to the empanneling of the jury. It is true he was subsequently indicted by the grand jury then empanneled, but he made no showing to the court, so far as appears from the return, that he was then under prosecution, and that his case was about to be brought before that jury.

Neither does it appear upon what grounds the motion was resisted; whether the prosecution took issue upon the facts relied upon by the defendant, as the ground of the application, or whether the same were upon demurrer submitted to the judgment of the court. The most that appears is from an order entered by the clerk, in which it is said that the court, upon examination of the record and returns, found that three of the towns of the county did, for the year 1845, make regular returns, and that, from their number, so regularly returned, of the present panel of the grand jurors, fourteen were regularly drawn; and then follows this language: "And further, the court now here overrule the motion to quash the array of grand jurors." Whether this motion was overruled, because enough of qualified jurors who had been duly returned, to find a bill of indictment, appeared; or because the defendant did

not show, by evidence, that he was in the predicament which authorized him to make the motion, does not appear, and cannot appear from the record. We are bound to presume the court below decided the motion upon legal grounds until error therein manifestly appears.

This precise question arose in the case of *Hudson* v. *The State of Indiana*, 1 Blackf. R. 317, upon the following state of facts: Upon the calling of the grand jury, a gentlemen of the bar informed the court that he was of counsel for Hudson, who was in custody of the sheriff upon an indictment found at the last term, and still pending; and that the grand jury were about to investigate his conduct touching a certain murder lately committed in the county. He offered to prove that the clerk, when issuing the venire, said he would select for grand jurors, such men as were disqualified to serve as traverse jurors on the trial of the defendant, on the said indictment, and that the clerk did make such selection, and that the panel of grand jurors was not selected by the commissioners. The circuit court decided that under the circumstances stated by his counsel, Hudson had no right by law to the challenge which he claimed; and, on error, the supreme court affirmed the judgment. In the opinion delivered in the supreme court by *Blackford* J. the law is recognized as laid down in *Hawkins* before refered to; and he says that the facts stated by the defendant's counsel, are no kind of evidence that he was, at the time, *under a prosecution* for a crime of which the grand jury were about to take cognizance. See also 8 Mass. R. 286. This doctrine is again recognized and adopted in the same court, in the next year, in the case of *Ross* v. *The State*, 1 Blackf. R. 390, and in which it is said this right of challenge should be claimed either by the accused himself, or by his counsel. It appears, then, from these cases, that a court will not entertain a challange to a grand jury, at the instance of any other than

the person described in the rule in Hawkins; and that evidence must be given of the right to make such challenge.

The jurors being duly drawn, and appearing upon the summons of the sheriff by virtue of his writ, are presumed to be good and lawful men, and in all other respscts legally qualified and properly returned; and it is only upon good cause shown, by a party having a right to question the legality of the proceeding, that the court will interfere, and set aside the pannel, or any part of it; and the defendant not having shown that right, the circuit court would have erred in sustaining the challenge.

The judgment must be affirmed.

*Judgment affirmed.*

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## George W. Moore v. The People.

**The survey of a road from its commencement to its termination is an entire thing; and a part of the record of such survey giving the course and distance across a particular section only, cannot be read in evidence, without permitting the whole record of the survey to go to the jury.**

**Parol evidence of the existence of certain marked trees and monuments not called for in the survey of a road, is inadmissible to establish, by these marks and monuments, a line of the road variant from that called for by the courses and distances, by which alone such line is designated in the survey.**

Error to Wayne District Court. The case is fully stated in the opinion.

*H. T. Backus*, for the plaintiff in error.

*A. W. Buel*, for the People.

Miles, J., delivered the opinion of the Court.

Moore, the plaintiff in error, was indicted in the court below for a nuisance in obstructing a highway, by erecting a fence across the same, on section 19, in the township of Wayne.

It appears from the bill of exceptions, that the prosecution, to prove the existence of a highway on said section 19, and where the fence erected by the defendant stood, offered in evidence, in connection with the testimony of Eli Bradshaw, a witness for the prosecution, the township record of the township of Huron, containing the record of the laying out and survey of a public highway in that township, as established 17th March, 1831; and then, after showing that the township of Huron, at the time of the survey, comprised the present townships of Wayne and Van Buren, read from the record of the survey of the road, one course and distance, to wit: "North 88 degrees east, 80 chains," (being the course and distance in the township of Wayne, from among the courses and distances contained in the record of the survey in other townships, and only a part of said record,) without giving, by the record, any point of beginning or termination of the course of the road as actually laid out and opened. It appears, also, that the western end or beginning, and the eastern end or termination of the road on section nineteen, were proved by the witness, without reference to the record of the road, to have been found and fixed by him, on the day of the trial, or the day previous thereto, under the direction and instruction of the commissioners of Highways, by fixing permanent monuments. The witness also stated that he actually run the line of the road and caused trees to be marked, designating its precise location across said section. To the introduction of this evidence the defendant below objected; but the objection was overruled, and the evidence received.

The prosecution also offered to show, by parol, by the

surveyor and one of the highway commissioners who surveyed and laid out the road described in the record, the point of commencement and termination of said course and distance, by certain stakes on the west and east sides of said section nineteen; to which evidence, the defendant also objected; but the objection was overruled and the evidence received.

The defendant offered to read the whole of the record in evidence to the jury; which evidence being objected to by the counsel for the prosecution, and rejected, the defendant then offered to prove, that if the highway described in the record were protracted and actually run out, following the courses and distances, from its commencement to its termination, as described in the record, it would not touch said section nineteen; which evidence was objected to by the plaintiff, and rejected by the court.

The defendant having excepted to the ruling of the court below upon these several questions, now assigns the same for error in this court.

By the statute of 1827, under which this road must have been laid out, the commissioners of highways are authorized and required to lay out new roads upon actual survey. R. L. 1827, p. 388.

The doctrine that the whole of a document when offered in evidence, or so much as is material to the question, must, if required, be read, is well settled, and is not questioned by the counsel for the prosecution in this case; but it is insisted, that, as it was proved by the witness Bradshaw, that he surveyed the part of the route of the road commencing at the quarter post standing between the N. W. and S. W. quarters of section nineteen, and running easterly to the opposite quarter post on the east side of the section, this course and distance are, therefore, completely independent of all the others mentioned in the survey; that it was incompetent to introduce any evi-

dence respecting them, and that the principle that the whole of a document must, if required, be read, does not apply.

We think this is a mistaken view of the statute. It declares that "the course and distance of the commencement and termination of all roads to be hereafter laid out and established, shall be ascertained from the nearest corner or quarter section stake." R. L. 1827, p. 388, §1. This makes the quarter section post the starting point: from this point the course and distance is to be ascertained, or all the courses and distances, between the commencement and the termination of the road.

The survey of a road is an entire thing, with a given point for its commencement, and by which all the courses and distances are to be governed. Can it be said that any single course and distance is independent of the others, and that a surveyor could survey that part of the route, *as required by the first section of the act*, by commencing at any other quarter post than that at the commencement of the survey? By the copy of the survey which is made a part of the bill of exceptions in the case, it appears that the course and distance testified to by the witness, is the sixteenth course from the commencement of the survey. The starting point is, then, at the commencement of the survey, at the N. E. angle of section twenty-eight, town two south, range eight east; thence first north, three chains ten links, and so on.

The case of *Catt* v. *Howard*, 14 Eng. C. L. R. 144, referred to by the plaintiff, is not applicable. That was a case where the plaintiff, having read in evidence an entry from the defendant's day book, the defendant was not entitled to read distinct entries in different parts of the book, *unconnected with the entry read.* In the case at bar there is the most intimate connection between the different courses and distances in the survey; they form the parts of which

the survey is the whole; and the prosecution had no right to read a part, without the whole, if required; much less to insist that the starting point of any one of the corners, was the point contemplated in the statute as the *commencement of the road*. The prosecution having read this part of the survey, it was clearly competent for the defendant to read the whole of it, for the same purpose for which it was offered by the prosecution.

In this view of the case it is entirely unnecessary to enquire whether the paper offered, was or was not on record. It was offered by the prosecution as evidence, and being so offered, the defendant, upon every principle of law and of fairnes, was entitled to have the whole of it go to the jury.

The prosecution were also permitted to show, by parol, the existence of certain marked trees and monuments, not called for in the survey, and to establish the line of the road by these marks and monuments, variant from the survey.

In the case of *Bruckner's Lessee* v. *Lawrence*, decided in this court, (1 Doug. Mich. R. 19,) it was expressly declared that parol evidence, that a line was found marked upon the trees upon the land, but variant from the call of the patent, and not indicated by the monument called for in the patent, will not be admitted to alter or vary the boundary as described by *course and distance* in the the patent; and that when there is nothing in the conveyance to control the call for course and distance, the land must be run according to the course and distance given in the description of the premises.

We think the principle of that case is clearly applicable to the case before us upon this point.

The court below having erred in these particulars, their judgment must be reversed.

*Judgment reversed.*

## SPIES *v.* NEWBERRY.

Notice to the endorser of a foreign bill of exchange, that the bill, describing it, has been *protested* for non-payment, and that the holder looks to him for payment thereof, is a sufficient notice of dishonor; the term *protested*, when thus used, implying that payment had been demanded and refused.

*Platt* v. *Drake*, 1 Dougl. Mich. R. 296, commented on, and distinguished from the present case.

CASE reserved from Wayne Circuit Court. Assumpsit, by Spies, as endorsee, against Newberry, as endorser, of a foreign bill of exchange. Plea, the general issue. The notice of dishonor proved, on the trial, to have been given, was directed to the defendant, and stated that the bill, (describing it,) "has this day been *protested* for non-payment, and the holder looks to you for payment thereof." The Presiding Judge of the circuit court instructed the jury that this was not a sufficient notice of dishonor. Whereupon, the plaintiff submitted to a nonsuit, and afterwards moved to set the same aside, and for a new trial, on the ground that the above instruction to the jury was erroneous. The question arising upon this motion was reserved for the opinion of this court.

*J. M. Howard*, in support of the motion.

*J. S. Abbott*, contra.

MILES, J. delivered the opinion of the Court.

The question which this case presents is, whether the notice to the defendant, that the bill had been *protested* for non-payment, &c., was a sufficient notice of dishonor.

The rule upon this subject, as laid down in Chitty, and which seems to be the result of the adjudged cases, is, "that the notice shall inform the party to whom it is ad-

dressed, either in express terms, or by necessary implication, or at all events by reasonable intendment, what the bill or note is that has become due, and that it has been duly presented to the maker or drawer, and that payment has been refused." Chitt. on Bills, 466.

In *Hartly* v. *Case*, 10 Eng. C. L. R. 350, the court say: "There is no precise form of words necessary to be used in giving notice of dishonor; but the language used must be such as to convey notice to the party, what the bill is, and that payment of it has been refused by the acceptor." This point was again in judgment in the celebrated case of *Solarte* v. *Palmer*, 8 Bligh N. S. 874; (42 E. C. L. R. 737.) In the Exchequer Chamber, Lord Chief Justice *Denman* laid down the rule, that the notice of dishonor "should, at least, inform the party to whom it was addressed, either in express terms or by necessary implication, that the bill had been dishonored, and that the holder looks to him for payment." This case went finally to the House of Lords, and *Parke*, J., when delivering the opinion of the judges present, nine in number, omits the latter clause, and merely says, "such a notice ought, either in express terms, or by necessary implication, to convey full information that the bill had been dishonored." In both these cases the notices were held insufficient,—they stating merely that the bill was *unpaid*.

As the notice in the case at bar does not state, in so many words, that the bill had been presented and dishonored, we are to enquire if, by necessary implication or reasonable intendment, that is its effect? And herein we shall receive much assistance from the adjudged cases, as to the form of words which has been held sufficient for that purpose.

We have seen that notice of non-payment alone is insufficient; and for the reason that such a notice contains nothing to put the party receiving it upon enquiry, or up-

on his guard in procuring indemnity; the bill might remain unpaid by the laches of the holder.

In *Grugeon* v. *Smith*, 6 Ad. & E. 499, (33 E. C. L. R. 128,) it was held that the dishonor of a bill was sufficiently notified by the phrase, "The bill is this day returned with charges." In that case, Lord *Denman* said: "The *effect* of this is, that the bill has been dishonored." *Littledale*, J., concurred. *Patterson*, J., said: "In *Solarte* v. *Palmer*, there was no notice of the fact of dishonor; here there is." And *Coleridge*, J., concurred in this.

I am aware that in the case of *Boulton* v. *Welch*, 3 Bing. N. C. 688, (32 E. C. L. R. 283,) the common pleas determined that a notice of dishonor, which stated that the note "became due yesterday, and was *returned* to me unpaid," was insufficient; but the correctness of this decision came afterwards to be doubted, and it was finally expressly overruled in *Robson* v. *Curlewis*, 1 Carr. & Marsh. 378, (41 E. C. L. R. 209,) in which case the words, "is *returned* to us unpaid," were held sufficient. It appears from the report of this case, that before it was submitted, the case of *Hedger* v. *Steavenson*, 2 Mees. & Wels. 799, (a later case than *Boulton* v. *Welch*,) had been decided; and the counsel for the plaintiff undertook to distinguish this case from that, because the notice in that case was, that the note "became due yesterday, and was returned to me unpaid, and I have to request you will please remit the amount thereof, *with* 1*s*. 6*d*. *noting*;" and insisted that the charge for *noting*, clearly showed that the note had been dishonored. But Lord *Denman*, in delivering the opinion, says: "I have no doubt this is a sufficient notice." Baron *Parke* disclaims the distinction as to the charge for noting. In a note, Baron *Parke* is represented to have said in *Hedger* v. *Steavenson*, that the word *returned*, is almost a technical term in matters of this nature, and means

that a bill has come to maturity, has been presented, and has not been paid.

Numerous other subsequent English cases have been examined, none of which, however, at all vary the rule recommended by such great authority, so often asserted, and so well established; nor do they in the least interfere with the meaning given to the words used in the form of notice in the cases already cited.

These cases show that while upon the one hand the courts have avoided requiring great strictness and nicety in the form of the notice, they have at all times insisted upon the use of such language as would clearly and fully express the idea that the bill had, upon due presentment, been dishonored.

Do the words, "*protested for non-payment*," express this idea?

A protest is a constituent part of a bill of exchange, indispensibly necessary to be made, to entitle the holder to recover the amount from the other parties to the bill; is by law made evidence of presentment and dishonor; is made only upon such presentment and dishonor. The words, *protested for non-payment*, in this way, have come to have a technical meaning in matters of this nature. In them is included, not only the idea that the bill is past due, but that payment of it has been demanded, and not being paid, it is therefore dishonored. They mean that the process necessary to dishonor the bill, to wit, demand, refusal of payment, and the drawing up of a formal protest, has been gone through with. All this is included in and meant by the term *protested*. The meaning of this word as applied to bills of exchange is well known; well understood; and as the main object of the notice is to put the party upon enquiry—upon his guard—it seems to me this is all that is necessary for that purpose.

This form of notice has been held sufficient in New

Hampshire, in case of a foreign bill. *Smith* v. *Little*, 10 N. Hamp. R. 520. In New York, both before and since the statute making a notarial certificate of protest of a promissory note evidence of presentment and non-payment, and of notice, if stated therein to have been given, this form of notice seems to have been used without objection; and in one case, (*Ontario Bank* v. *Petrie*, 3 Wend. 456,) where the notice was in the same form as in the case now under consideration, though objections were taken to its sufficiency in other respects, none was made for the reason now urged here.

The case of *Platt* v. *Drake*, 1 Dougl. Mich. R. 296, decided in this court, and referred to by the defendant, does not apply here. That was an action on a promissory note. The form of the notice was the same as here. We can repeat what was then said, that no "protest is necessary in case of a promissory note, or is evidence of its dishonor." "It is in such a case an act entirely unnecessary, and even nugatory."

We conclude, then, that these words, when applied to a bill, mean all that is claimed for them; they mean all that the words, "returned," or "returned with charges," can mean; and, though these last words may possibly leave some doubt upon the mind as to what is meant, the others cannot leave any.

We are, therefore, of opinion that the motion to set aside the nonsuit in the court below, should be granted, and that it should be so certified to the circuit court for the county of Wayne.

*Certified accordingly.*

Note. The reader will find a very complete and valuable collection and review of the cases, English and American, on the subject of the form of notice of dishonor, in 1 American Leading Cases, 231—7, a work which has appeared since the foregoing opinion was delivered. To the cases there cited may be added *Coddington* v. *Davis*, 3 Denio, 16, and *La Fayette Bank* v. *McLaughlin*, 4 Western Law Journal, 70. Also, the very recent case of *Armstrong* v. *Christiana*, decided by the

English Common Pleas in 1843, of which I find the following abstract in 6 Western Law Journal, 44: "Where the notice of dishonor of a bill was as follows: 'I am the holder of a bill drawn by you on M. M. L. for £98. 15s. which became due yesterday and is unpaid; and I have to state that unless the same is paid to me immediately, I shall proceed against you without delay for the amount. Amount of the bill £98. 15s.—noting 5s.—total £99.,' *Held*, that the word 'noting' must be taken as a part of the notice; that it implied presentment and non-payment; and that the notice, therefore, was sufficient."—*Reporter.*

## HAINES, BY HIS NEXT FRIEND, SEELEY *v.* OATMAN.

Where an infant prosecutes by *prochein amy*, the *prochein amy* must be regularly appointed by the court; and if the suit is commenced by declaration, without such appointment, it will be dismissed on motion.

The proper practice in our courts, where an infant sues by *prochein amy*, indicated.

MOTION by the defendant to dismiss the suit, reserved from Oakland Circuit Court.

*Draper*, in support of the motion.

*Wisner & Hosmer*, contra.

WHIPPLE, J., delivered the opinion. This is an action of ejectment. Upon the return of the declaration served, a motion was made by the defendant to dismiss, on the ground that Seeley had no authority to prosecute as next friend of Haines, who is an infant. Nothing appeared on the record of the court showing that any application was ever made for the appointment of a *prochein amy;* or that, in point of fact, any appointment was made.

An infant, not having the power to appoint an attorney, must sue by a *prochein amy*. In order to constitute a *prochein amy*, the practice in England is, for the person intended as such to go with the infant before a judge at chambers; or present a petition, in behalf of the infant,

stating the nature of the action, and praying that a *prochein amy* may be assigned to prosecute the action. If the proceeding is by petition, it should be accompanied by an agreement signifying the assent of the person whom it is intended should be admitted as such; evidence should also be adduced showing that the petition and agreement were duly signed. If the petition is granted, the judge grants his fiat, upon which a rule or order is drawn up with the clerk of the rules, in K. B. for the admission of the *prochein amy*. 2 Sell. Pr. 66.

Our statute leaves the mode of appointment of a *prochein amy* to prosecute, or a guardian to defend, as it exists at the common law. If this be true, it is clear that the proceedings adopted in this case were irregular. Before the service of the declaration, it is the duty of the person desirous of instituting a suit in behalf of the infant, either to bring the infant into court, or present a petition, setting forth the cause of action; upon which, the court will appoint such person as will be most likely to take care of the infant's interest, and who would be responsible for costs, in the event that judgment should be rendered against the infant.

It may be well to state what the practice should be in our courts. If it is proposed to commence the suit by issuing process, it ought to go out in the ordinary way; after its return, and before declaration is filed, application should be made to the *court*, in one of the modes indicated in the English practice, to allow a *prochein amy*. If the suit is intended to be commenced by declaration, the *prochein amy* must be appointed by the court, before the filing and service of the declaration. In either case, a copy of the order appointing a *prochein amy*, must be served on the opposite party, before the plaintiff will be entitled to a plea.

*Ordered certified that the motion should be granted.*

BROWN *v.* COWEE.—*Case reserved.*

S. L. 1844, p. 11, § 2, provides that "inquests or assessments may be taken in all actions upon contract, unless the defendant, his agent or attorney shall, on or before the first day of the term at which the cause is noticed for trial, file with the clerk an affidavit, setting forth that such defendant has a good and substantial defence on the merits, to the action of the plaintiff, or to some portion of the plaintiff's claim therein, as he is advised by his counsel and verily believes."

*Held*, that the person who makes the affidavit required by this statute, whether the defendant, or his agent or attorney, must swear to a defence upon the merits, *from his own knowledge* of the facts constituting such defence, and not from information and belief.

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MALONY *v.* MAHAR.—*Case reserved.*

The deputy county treasurer, has power, in the absence of the treasurer, to administer the oath which § 9 of R. S. 1838. p. 87, requires the township collector to make "before the county treasurer, or in his absence, before a justice of the peace," on return of unpaid taxes on lands in his township. The language of this section does not restrict the general power of the deputy "to perform all the duties of the treasurer, in his absence," conferred by R. S. 1838, p. 42, § 22.

## THOMAS PALMER AND THREE OTHERS *v.* THOMAS J. OAKLEY.

It is not necessary that the guardianship bond, required by R. S. 1827, p. 59, § 5, should be *executed* by the guardian; it is sufficient if *a* bond, with sufficient securities, is given.

*It seems* that where a married woman, appointed guardian, unites with her sureties in the guardianship bond, the bond will be good, notwithstanding her incompetency to execute it.

The giving of the guardianship bond, under R. S. 1827, p. 59, § 5, is not a condition precedent to the execution of the trust of guardian.

*It seems* that the decree of a probate court, appointing a *feme covert* guardian, who was incompetent to execute the trust on account of the coverture, would bind until reversed; and the acts of such guardian would be valid.

Both at the common law, and under the statute of 1827, (R. S. 1827, p. 57,) a married woman is competent to be a guardian, with the assent of her husband; but not without such assent.

*It seems*, that letters of guardianship granted to a wife, without the husband's assent, would be *voidable* merely; not *void*.

The husband's assent may be presumed from his joining with his wife in the bond which R. S. 1827, p. 88, § 2, requires a guardian to give, before sale of the ward's real estate.

*It seems* that where a *feme covert* takes upon herself the office of guardian, during coverture, it will be presumed that it is with the husband's assent, unless his dissent expressly appears.

R. S. 1827, p. 57, § 1, defines, and limits to the cases therein specified, the jurisdiction of the probate court over the appointment of guardians for minors, conferred in general terms by R. S. 1827, p. 55, § 1.

Under these statutes, the probate court has no power to *appoint* a guardian for a minor over fourteen, and within the territory, without first *citing* him to appear and choose his own guardian; *aliter*, if the minor is under fourteen.

And an *ex parte* application, representing that the minor is under fourteen, will not confer the jurisdiction to *appoint*, without citation, if, in fact, the minor is over that age.

If, however, upon a hearing, after citation, the court find the minor to be under fourteen, and appoint a guardian for him as such, *it seems* that the decree will be valid until reversed, even though he was over that age.

But a decree of the probate court, appointing a guardian for a minor, who is over fourteen, without citation, is *void*, for want of jurisdiction; and a sale of land, by such guardian, will not divest the title of the minor.

Where the decree appeared, on its face, to have been made upon an application representing the minor to be under fourteen, and did not show citation of the minor, *it was held*, that it might be impeached, in a collateral action, by evidence showing that the minor was, at the time, over fourteen.

*It seems*, that in support of such decree, citation might be shown by evidence *aliunde*.

*Held*, also, that such decree was valid until impeached by evidence showing want of jurisdiction, although it did not show, on its face, any formal finding of the fact that the minor was under fourteen.

A *feme covert*, who is guardian, can convey the real estate of her ward, without her husband joining in the deed.

Non-compliance, by a guardian, with the requirements of the statute relative to the notice to be given of the sale of real estate of the ward, under license of the probate court, will not invalidate the title of a *bona fide* purchaser.

EJECTMENT, brought by Thomas Palmer and three others, against Thomas J. Oakley, to recover lot number 6, in section number 4, in the city of Detroit.—Plea the general issue.

The cause was tried at the November term, 1845, of the circuit court, before the Hon. D. GOODWIN, Presiding Judge.

Both parties derived title from John Palmer, who died seized of the premises in 1826.

The plaintiffs were his children and heirs at law, and as such claimed each one sixth (in all four-sixths) of the premises.

The defendant claimed through a sale made February 4th, 1832, in pursuance of a decree of the probate court for Wayne county, by one Archange Simmons, as guardian for the plaintiffs, who were then minors. Said Arch-

ange was the mother of the plaintiffs, and widow of John Palmer.

The controversy was, as to whether the decree of the probate court appointing said Archange guardian, and the subsequent proceedings, which resulted in the sale, were valid, and the sale conveyed a good title to the purchaser.

The statutes applicable to these proceedings were the following, viz:

"*An Act*" (of April 12, 1827,) "*for establishing Courts of Probate.*"

"Sec. 1. *Be it enacted by the Legislative Council of the Territory of Michigan*, That a court of probate shall be held in each of the several counties in this territory, and there shall be some able and learned person appointed in each of the said counties, as judge of said courts, respectively, for taking the probate of wills, and granting administration on the estates of persons deceased, having been inhabitants of, or residents in the same county, at the time of their decease; *for appointing guardians to minors*, idiots, and distracted persons; for examining and allowing the accounts of executors, administrators, and *guardians*; and for such other matters as the laws of this territory do or may direct."

Section 2, of the same act, provided for the appointment of a register, whose duty, among other things, was to record the orders and decrees of the court of probate, and have custody of the papers, seal, &c. It also confers authority upon the courts of probate to punish for contempts. R. S. 1827, p. 55.

"*An Act*" (of April 12th 1827,) *empowering the Judge of Probate to appoint guardians to minors and others.*

Sec. 1. *Be it enacted*, That the judge of probate in each county, respectively, when and so often as there shall be occasion, be, and hereby is, empowered to *allow* of guar-

dians, that shall be chosen by minors of fourteen years of age, and to *appoint* guardians for such as shall be within or under that age, *taking sufficient security* of all such guardians for the faithful discharge of their trust, and to account, either with the judge, or minor, when such minor shall arrive at the age of twenty-one years, or at such other time as the judge, upon complaint made to him, shall direct; and when any minor, above the age of fourteen years, shall be cited by the judge of probate to choose a guardian, and such minor shall refuse or neglect to appear, or, when appearing, shall refuse to choose a guardian, or any guardian chosen by such minor shall be unable to give sufficient security, or shall refuse the trust, or when any minor above the age of fourteen years shall be without this territory, in every such case, the judge of probate shall have the same power to appoint a guardian, as though such minor were under the age of fourteen years: *Provided nevertheless*, That when a minor above the age of fourteen years, living more than ten miles distant from the dwelling house of the judge of probate, shall choose a guardian, such minor may have the choice certified to the judge, by any justice of the peace of the same county, which choice, so certifed, shall be deemed as good and valid as if done in the said judge's presence.

"Sec. 5. That the guardian or guardians appointed as aforesaid, shall *give bond* to the judge of probate for the time being, in a reasonable sum, *with sufficient securities*, for the faithful discharge of the trust reposed in them, and more especially for the rendering a just and true account of their guardianship, when, and so often as they shall be thereunto required." R. S. 1827, pp. 57, '9.

"*An act*" (of April 12, 1827,) "*directing the settlement of the estates of deceased persons and for the conveyance of real estate in certain cases.*"

Sec. 1. Authorized the Supreme and County Courts, in

certain cases, to license any executor and administrator to sell so much of the real estate of the deceased as might be necessary for the payment of his debts, and empowered such executor or administrator, on sale under such license, to execute a conveyance of the premises sold, which instrument should make as good a title to the purchaser, as the testator or intestate in his life time could have given: "*Provided always*, That the executor or administrator, before sale be made as aforesaid, give *thirty days'* public notice, *by posting up notifications of such sale*, in the township where the lands lie, as well as where the deceased person last dwelt, and in the two next adjoining townships, and also in the county town," &c.

"Sec. 2. And whereas, by the partial sale of real estates for the payment of debts or legacies, as aforesaid, it often happens that the remainder thereof is much injured: *Be it therefore enacted*, That whenever it shall be necessary that executors and administrators shall be empowered to sell some part of the real estate of testators or intestates, *or for guardians to sell some part of the real estate of minors*, or persons non compos mentis," &c., "and by such partial sale the residue would be greatly injured, and the same shall be represented and made to appear to either of the aforesaid courts, on petition and declaration, filed and duly proved therein by the said executors, administrators *or guardians*, the aforesaid courts respectively may authorize and empower said executors, administrators, *or guardians*, to sell and convey the whole, or so much of said real estates, as shall be most for the interests and benefit of the parties concerned therein, at public auction, and good and sufficient deeds of conveyance to make and execute; which deed or deeds, when duly acknowledged, and recorded in the registry of deeds for the county where the real estate lies, shall make a complete and legal title, in fee, to the purchaser or purchasers thereof:

"*Provided*, The said executors, administrators, or guardians, give thirty days' public notice of such intended sale, *in manner and form herein before prescribed:*

"*And provided also*, That they first *give* bonds, *with sufficient sureties*, to the judge of probate for the county where the deceased testator or intestate last dwelt, and his estate was inventoried, that he or she will observe the rules and directions of law for the sale of real estate by executors or administrators; and the proceeds of such sale, after the payment of just debts, legacies, taxes, *and just debts for the support of minors*, and other legal expenses and incidental charges, shall be put on interest, on good securities, and that the same shall be disposed of agreeably to the rules of law.

"Sec. 5. That when it shall fully appear to either of the courts aforesaid, by petition and representation of the friends or guardians of minors, interested in the real estate of any deceased testator or intestate, that it would be for the benefit of such minors, or persons non compos mentis, that their interest should be disposed of, and the proceeds thereof be put and secured to them, on interest, the said court, on full examination, on oath, of the petitioner, or otherwise, may authorize some suitable person to sell and convey such estate, or any part theref, by deed duly acknowledged and recorded in the registry of deeds, as aforesaid:

"*Provided*, such person or persons first *give* bond, with sufficient sureties, to the judge of probate of the county where the said deceased person last dwelt, *to observe the rules and directions of law in the sale of real estate by executors and administrators*, in the first enacting clause herein prescribed, and to account for, and make payment of the proceeds of said sale, agreeably to the rules of law," &c. R. S. 1827, pp. 87, 88, 90.

*An act of September* 23, 1829, enacted, "That the judges

of the probate courts respectively, in the several counties within this territory, shall have the same authority to empower and license any executor, administrator, or guardian of any minor, idiot, *non compos*, or lunatic person, to make sale of all, or any part of the houses, lands or tenements of any deceased person, or of any minor, idiot, *non-compos*, or lunatic person, as the supreme, circuit, or county courts now have, or shall hereafter have," &c. R. S. 1833, p. 323.

*Act of July* 27, 1818.—"And whereas, executors and administrators, upon their obtaining license to sell real estate for the payment of debts or legacies, are by law directed, before sale made, to give thirty days' notice, by posting up notifications of such sale in the town or plantation where the lands lie, as well as where the deceased person last dwelt, and in the two adjacent towns, but no particular method is provided for perpetuating the evidence that such notice was given, by reason whereof disputes may arise, respecting the legality of such sales: therefore,

"Sec. 6. Be it further enacted, That the affidavit of the executor or administrator, or the affidavit of such person or persons as may be by them employed to post up such notifications, taken before the probate court, where such executor or administrator derived his authority to administer, within seven months next following the sale of the real estate, and there filed and recorded, together with one of the original advertisements of the time, place, and estate to be sold, or a copy of such advertisement, are hereby declared to be one mode of perpetuating the evidence that such notice was given, and also to make the originals or copies thereof admissible evidence, in any court of law; and when the person employed by such executor or administrator to post up such notifications, resides more than ten miles distance from such probate

office, his deposition respecting that matter, taken before a justice of the peace, and filed in such probate court, within the seven months aforesaid, shall have the same force and effect as if the same was taken before such probate court; and the printing a notification, three weeks successively, in such gazette or newspaper as the court who may authorize the sale, shall order or direct, shall be deemed equivalent to the posting up of notifications as aforesaid.

"Sec. 7. And be it further enacted, That *guardians* and others, who, upon obtaining a license for the sale of real estate, are or shall be directed to give public notice, before sale be made, are hereby authorized to perpetuate the evidence that such notice was given, in the probate court, where the guardian or other person selling is directed to account for the proceeds arising from the sale, in the same way and manner herein before provided for executors and administrators." R. S. 1827, pp. 77, '8.

"*Act*" (of April 12, 1827,) "*direeting the descent of intestate estates*," *&c.*—"Sec. 18. That whereas it sometimes happens that, for want of prudent management in executors, administrators, or *guardians*, who are empowered to sell real estates, such estates are disposed of below their true value, to the great injury of the heirs and creditors; therefore, every executor, administrator or *guardian*, who may obtain a legal order for selling real estate, shall, previous to the sale, before the judge of probate or some justice of the peace, take the following oath: 'I, A. B. do solemnly swear, that in disposing of the estate lately belonging to ——, now deceased, I will use my best skill and judgment, in fixing on the time and place of sale; and that I will exert my utmost endeavors to dispose of the same, in such manner as will produce the greatest advantage to all persons interested therein, and that without any sinister views whatever.' And the said executor, ad-

ministrator, or guardian, shall return to the judge of probate a certificate of the same under the hand of the justice before whom the oath was taken." R. S. 1827, p. 71.

The decree of the probate court appointing Archange Simmons guardian of the plaintiffs, &c., as of record, was as follows:

"At an adjourned session of the court of probate for the county of Wayne, held at" &c., "on Monday the 28th day of February, A. D. 1831. Present: *Jos. W. Torry*, Judge of Probate, *R. S. Rice*, Register.

"In the matter of the estate of the minor heirs of John Palmer, deceased.

"Upon the application Archange Simmons, late Palmer, and widow of the deceased John Palmer, to be appointed guardian to *Thomas*, Oliver Perry, Ruth Ann, and Mary Ann Palmer, *minors under the age of fourteen years*, and children of said John Palmer, deceased;

"It is ordered, adjudged and decreed, that the aforesaid application be, and it is hereby granted: And that the said Archange give a bond with two sureties in the sum of fifteen hundred dollars:

"And whereas, John Hale and Robert Abbott, Esq. were offered as sureties aforesaid, It is ordered and decreed, that they, the said Hale and Abbott be, and are hereby approved as such."

On the same day, the guardianship bond required by R. S. 1827, p. 59, § 5 (ante p. 433, § 5) was filed and approved, executed by said Archange, (her husband not joining therein) and by said Hale and Abott.

On the same day, also, said Archange presented an account as guardian for said minors, duly verified, and a petition representing that it would be for the benefit of the minors, that their interest in certain real estate therein described, (being the same premises in controversy in this suit) should be sold, and the proceeds thereof put at in-

terest, for the purpose of furnishing means for their support, and praying that she might be licensed to sell the same &c.; whereupon the court made the following order.

"*Ordered*, that the consideration of said account and petition be, and is hereby continued to the 4th day of April next, and that notice of the same be published in a newspaper published in the city," &c.

On the said 4th day of April, 1831, proof that the notice required by the foregoing order had been given, having been filed, the probate court made the following further order.

"In the matter of the estate of the minor heirs of John Palmer, deceased.

"Upon the filing of the notice, as published in a newspaper, pursuant to the order of the court on Monday, the 28th day of February last, upon the oath of Archange Simmons, guardian of Thomas," &c., "children, and heirs of said deceased, the account of guardianship of said heirs was examined, sworn to, allowed, and ordered to be recorded. And, it appearing by the representation of Archange Simmons, late Palmer, guardian to Thomas," &c., "minor heirs of the estate of John Palmer, deceased, that their interest in the real estate of the deceased" (describing it) "should be sold for the support and education of said minor heirs, of which notice has been given to all persons interested:

"*Ordered*, that the said Archange Simmons, late Palmer, and guardian of said minors, be, and she is hereby empowered and licensed to sell and convey all of the interest of said minors in the aforesaid estate, for the purposes aforesaid; the said guardian, previous to said sale, to *take the oath by law prescribed*, and to give *notice of such sale*, by causing an *advertisement* thereof to be published in a newspaper, printed in said city of Detroit, *three weeks successively*, at least thirty days before the day appointed for said

sale, and *give bond with two sureties*, according to the statute, in the sum of three thousand dollars."

Notice that the premises would be sold in pursuance of of the foregoing license, on February 4, 1832, at 3 o'clock P. M. at, &c., was published for three weeks successively (the first publication having been December 28, 1831,) in the Detroit Journal, a newspaper printed in the city of Detroit, and an affidavit of the publication &c., was filed and recorded in the probate office, pursuant to the act of 1818, (ante p. 439) on the 3d February, 1832.

It will be observed that the notice, though in accordance with the requirements of the licence to sell, was not such as was prescribed by the act of 1827, (ante p. 437, § 1,) but was such notice as the act of 1818, (ante p. 440, § 6,) authorized the probate court to direct executors and administrators to give, &c.

A bond to observe the directions of law respecting the sale, &c., required by the foregoing licence to sell, and by the act of 1827, (ante p. 438, § 5) was filed and approved by the judge of probate, on the said 3d day of February, 1832. The bond was executed by the said Archange, and by William H. Simmons, therein recited to be her husband, as principals, and by two sureties.

On the same day the said Archange made the oath to use her best skill and judgment in fixing the time and place of sale &c., required by R. S. 1827, p. 71, § 18, (see ante p. 440, § 18) and returned the same duly certified to the judge of probate.

On the day following, which was the time specified therefor in the notice of sale, the premises in question were sold, pursuant to the notice, to ———, through whom the defendant in this case derived title, he being the highest bidder; and a guardian's deed was thereupon executed to him accordingly, by said Archange, in which said William H. Simmons, her husband, did not join.

No affirmance by the probate court of sales by guardians was required by the statute.

On the trial, it was insisted on the part of the plaintiffs, that the defendant had failed to establish a valid title under these probate proceedings; because,

1. It did not appear, on the face of the decree appointing Archange Simmons guardian, nor was it shown by evidence *aliunde*, that the plaintiffs, (the alleged minors,) were under fourteen years of age, or that they were cited to choose a guardian.

2. The decree was void, because, as appeared on its face, said Archange was, at the time, a married woman; a *feme covert* being incompetent to be a guardian.

3. The guardianship bond executed by said Archange and her sureties, was void; said Archange being incompetent to execute a bond, by reason of her coverture, and her husband not joining therein.

4. The notice of sale of the premises in controversy, by said guardian, was not in accordance with the requirements of the statute, and was given before said guardian had taken the oath to use her best skill and judgment in fixing the time and place of sale, &c., (ante, p. 440, § 18,) and before the execution and approval of the bond to observe the rules and directions of law in making the sale, &c., (ante, p. 438, § 5.)

5. The deed of the said Archange, in consummation of the guardian's sale, was executed by her while a *feme covert*, without her husband joining therein.

These several objections to the validity of the title shown by the defendant, were overruled by the circuit court.

6. The plaintiffs also, during the trial, offered to introduce evidence to show, that, at the time of the decree appointing the said guardian, Thomas Palmer, one of the alleged minors, was over fourteen years of age. To this

evidence the defendant objected, and the objection was sustained by the court below.

The case went to the jury, who found a verdict for the defendant; whereupon, the plaintiffs moved that the verdict be set aside, and for a new trial, on the ground that the ruling of the circuit court, upon each of the several points above mentioned, was erroneous. The questions arising upon this motion were reserved, by the Presiding Judge, for the opinion of this court.

*Walker, Douglass & Campbell* and *H. T. Backus*, for the plaintiffs.

1. Archange Simmons, being a *feme covert*, was not competent to be a guardian, and her appointment, and all her acts as guardian were therefore void. A *feme covert* is not competent to execute the bonds which the statute, (ante, p. 436, § 5, p. 438, § 5,) required a guardian to give, with sureties; such bond executed by her would be void, 2 Steph. Com. 302; 1 Peters, 338; 1 Hill R. 242; and a sale of real estate by a guardian without giving bonds, would be void. *Williams* v. *Reed*, 5 Pick. 479; 1 Denio, 184. True, it has been held in England that a *feme covert* might be an administratrix, but this was before 22 and 23 Car. II, which required administrators to give bonds. 1 Com. Dig. Tit. Admr. B. 6, n. (o.) p. 487.

2. The circuit court erred in refusing to permit the plaintiffs to prove, that, at the time Mrs. Simmons was appointed guardian, Thomas Palmer, one of the alleged minors, was over fourteen years of age.

R. L. 1827, p. 57, § 1, required that before the probate court should *appoint* a guardian for a minor over fourteen years of age, and within the territory, the minor should be cited to appear and choose his own guardian. The probate record shows that the guardian was appointed

without citation of any of the minors, and upon the assumption that they were all under fourteen.

Whenever parties to, or who are affected by, judicial proceedings, whether *in rem*, or *in personam*, are by law entitled to notice of such proceedings, by service of process, citation, or otherwise, such notice is *essential to jurisdiction*. *Bloom* v. *Burdick*, 1 Hill's R. 139, 141, 142; *Matter of Underwood*, 3 Cow. 59; *Chase* v. *Hathaway*, 14 Mass. R. 222; *Dunning* v. *Corwin*, 11 Wend. 647; *Wait* v. *Maxwell*, 5 Pick. 217; *Hathaway* v. *Clark*, Id. 490; 4 C. & H. Ph. Ev. 865, 999; *Hollingsworth* v. *Barbour*, 4 Peters, 472; 18 Pick. 116.

The evidence offered, then, went to show, that as to Thomas Palmer, the probate court had, in fact, no jurisdiction to make the decree appointing the guardian.

It will not be denied that the decree of a court which has not jurisdiction, is *void*.

It is well established that "the jurisdiction of any court, exercising authority over a subject matter, may be inquired into in every other court where the proceedings of the former are relied upon and brought before the latter by the party claiming the benefit of such proceedings." *Elliott* v. *Piersol*, 1 Pet. R. 340; *Hickey's Lessees* v. *Stewart*, 3 Howard, 750. It makes no difference whether the judgment is sought to be impeached in an action directly upon it, or in a collateral action like the present. Ibid.; *Holyoke* v. *Haskins*, 5 Pick. 20; *Bloom* v. *Burdick*, 1 Hill's R. 139; *Bigelow* v. *Stearnes*, 19 John. R. 40; 4 Ph. Ev. by C. & H. 910, '11, '12, '13, and other cases post. Or whether the validity of the judgment is drawn in question in the courts of the state where it was rendered, or of a sister state. Ibid. Or whether the judgment be that of a court of inferior or limited, or of superior or general jurisdiction, (except as to the burden of proof of want of jurisdiction;) or whether it be the judgment of a court of

record or not. 4 Ph. Ev. by C. & H. 1021; *Bloom* v. *Burdick*, 1 Hill's R. 139, and 17 Wend. 483, there cited.

All the cases agree, that where a want of jurisdiction *appears on the face of the record*, the judgment will be treated as a nullity, whenever sought to be enforced, or any rights are claimed under it. 1 Hill, 139; 11 Ohio R. 442.

And the general rule is, that a judgment may be impeached by evidence *aliunde*, showing a want of jurisdiction. Thus, all the cases hold that want of jurisdiction over the person may be shown *aliunde*. *Bigelow* v. *Stearnes*, 19 John. R. 40; *Aldrich* v. *McKinney*, 4 Conn. R. 380; *Shumway* v. *Stillman*, 6 Wend. 447; *Tenny* v. *Filer*, 8 Id. 569; *Starbuck* v. *Murray*, 5 Id. 148; *Bradshaw* v. *Heath*, 13 Id. 407, 408; *Colvin* v. *Luther*, 9 Cow. 61; *Clark* v. *Holmes*, 1 Dougl. Mich. R. 390. So where jurisdiction depended upon the character or occupation of the party, evidence has been admitted to show that he was not of such character, &c. *Morse* v. *James*, 1 Willes, 122; *Perkin* v. *Proctor*, 2 Wils. 382; *Wise* v. *Withers*, 3 Cranch, 331; *Mills* v. *Martin*, 19 John R. 7. So where jurisdiction depended upon residence, evidence has been admitted to show that the residence was not such as to confer it. *Cutts* v. *Haskins*, 9 Mass. R. 543; *Holyoke* v. *Haskins*, 5 Pick. 20; *Weston* v. *Weston*, 14 John. R. 428; *Wyman* v. *Mitchell*, 1 Cow. 316. So, *it would seem*, that wherever the judgment, order, or decree was obtained *ex parte*, and the persons affected by it are not bound to take notice of the proceeding, all jurisdictional facts may be inquired into to impeach such judgment. *Welsh* v. *Nash*, 8 East. 391; *Perkin* v. *Proctor*, 2 Wils. 382; per Dallas, C. J. and Burrough, J. in *Brittain* v. *Kinnard*, 5 E. C. L. R. 139, '40. And it has even been held that such judgment, &c. are not conclusive as to the merits. *Marchland* v. *Gracie*, 2 Mill. Lou. R. 147, '8, and other cases in Kentucky and Maryland, cited in 4 Ph. Ev. by C. & H.

865, '6. In pleading the judgment of an inferior court, it is necessary to allege all the facts which give the court jurisdiction. *Bowman* v. *Russ*, 6 Cow. 236; *Wyman* v. *Mitchell*, 1 Id. 316; *Morgan* v. *Dyer*, 10 John. R. 161; *Mills* v. *Martin*, 19 Id. 7; *Morse* v. *James*, 1 Willes, 122. Of course these jurisdictional facts may be denied and inquired into as matters *in pais*, and as the only difference between the judgments of inferior and of superior courts is, as to the burden of proof of want of jurisdiction, (see supra,) it follows that the judgment of a superior court, may be impeached by showing affirmatively, against the legal presumption, a want of jurisdiction.

There are cases which seem, at first view, to conflict with the above. They belong to two distinct classes, and are admitted to form exceptions to the rule we are attempting to establish. Thus,

First: Where jurisdiction over persons is necessary, and has been acquired, and the power of the court to proceed to adjudicate between the parties depends upon the existence of other facts, into which the court is bound to inquire, and which may be contested like the merits. In such cases, we may admit that the judgment of the court is conclusive, as to the existence of such jurisdictional facts. To this class belongs *Brittain* v. *Kinnaird*, 5 E. C. L. R. 139, for there the party appeared in the court where the judgment was rendered, and contested the very jurisdictional fact which he sought again to inquire into to impeach the judgment. And *Ackerly* v. *Parkinson*, 3 Maule & Selw. 425, for there also the party appeared. And *Leonard* v. *Leonard*, 14 Pick. 280, for, by reference to 14 Mass. R. 222, and 5 Pick. 490, it will be found that before a person could be adjudged *non compos mentis*, he must be notified of the proceedings, and may appear and contest the fact of whether he is so. *Dublin* v. *Chadbourne*, 16 Mass. R. 433; *Judson* v. *Lake*, 3

Day's R. 322, and other cases deciding that the probate of a will is conclusive, belong to this class, if, as is supposed, the heirs are parties to the probate, and may appeal therefrom, and are entitled to notice; otherwise they are cases *in rem* to be next noticed.

Second: In proceedings strictly *in rem*, no jurisdiction over persons is necessary. The whole world are parties, and all persons interested are bound to take notice of them. We may admit, (although this is more than the authorities will establish,) that, in general, in such cases, jurisdictional facts, into which the court was bound to inquire, and which might have been contested by the party interested, may be regarded as *res adjudicatæ* by the judgment. To this class belong *Grignon's Lessee* v. *Astor*, 2 Howard, 338; *McPherson* v. *Cunliff*, 11 Serg. & Rawle, 432, 426 —'30, and numerous other kindred cases.

These exceptions to the general rule we are attempting to establish, rest upon this ground, viz: that the parties to be affected by the judgment are either *in court*, as in cases *in personam;* or they are *bound to take notice of the proceedings*, without being brought before the court, as in cases *in rem;* and if the facts are such that the court had no jurisdiction, they are bound to show them. By not objecting they admit the jurisdiction; if they object, the facts are inquired into; and in either case the jurisdictional questions become *res adjudicatæ*.

But in the present case, there was *no party before the court*. Thomas Palmer had *no notice* of the proceedings to appoint a guardian for him. They were *ex parte;* behind his back. He *was not bound* to take notice of them, and the law did not recognize him as a party capable of appearing in court. He had no opportunity to contest the jurisdiction. The present case, therefore, does not come within either of the above exceptions. And the following cases, many of which have already been cited to estab-

lish different propositions in the foregoing argument, seem to show clearly, that the evidence offered was admissible, and would have shown that the decree appointing the guardian was void, as to Thomas Palmer. *Clark* v. *Holmes*, 1 Dougl. Mich. R. 391; *Welsh* v. *Nash*, 8 East. 402; *Holyoke* v. *Haskins*, 5 Pick. 20; *Hathaway* v. *Clark*, Ibid. 490, 219; *Heath* v. *Wells*, Ibid. 239; 18 Id. 116; *Griffith* v. *Fraser*, 3 Pet. Cond. R. 1; *Cutts* v. *Haskins*, 9 Mass. R. 543; *Smith* v. *Rice*, 11 Mass. R, 511; *Sherman* v. *Ballou*, 8 Cow. 304; *Perry's Lessee* v. *Brainerd*, 11 Ohio R. 442.

The evidence offered did not go to contradict the probate record. Even if it did, it was not for that reason inadmissible. *Clark* v. *Holmes*, 1 Dougl. Mich. R. 390; *Aldrich* v. *McKinney*, 4 Conn. R. 380; *Latham* v. *Edgerton*, 9 Cow. 227; *Starbuck* v. *Murray*, 5 Wend. 148; 4 C. & H. Ph. Ev. 801, and other authorities cited supra.

3. The decree appointing a guardian does not show jurisdiction. Neither citation of the minors, nor any finding by the court that they were under fourteen, appears. Nor was citation shown *aliunde*. The probate court was a court of *inferior* jurisdiction. 4 C. & H. Ph. Ev. 862, '3; *Dakin* v. *Hudson*, 6 Cow. 221; *Sherman* v. *Ballou*, 8 Id. 308; *Smith* v. *Rice*, 11 Mass. R. 510; *Bloom* v. *Burdick*, 1 Hill, 139. The rule in relation to such courts is, that jurisdiction must appear on the face of their proceedings. *Wight* v. *Warner*, 1 Dougl. Mich. R. 384; *Clark* v. *Holmes*, Ibid. 391; 4 C. & H. Ph. Ev. 1013; 11 Wend. 647; 42 E. C. L. R. 1034, 1006, 685, 305, 667; 35 Id. 415; 5 Pet. Cond. R. 28; and must be proved by persons claiming under them. See cases cited *supra*, showing what facts it is necessary to allege, in pleading the judgments of inferior courts.

4. The guardian's sale was void because the notice given thereof, was not in accordance with the statute, nor was the bond filed, or oath taken, as required by the

statute, before publication of the notice. Ante, p. 438, § 5, p. 440, § 18; *Williams* v. *Reed*, 5 Pick. 480; *Parker* v. *Nichols*, 7 Id. 111; *Ventress* v. *Smith*, 10 Pet. R. 161, 175; *Knox* v. *Jenks*, 7 Mass. R. 488; *Denning* v. *Smith*, 3 John. Ch. R. 332, 344, '5; *Bloom* v. *Burdick*, 1 Hill, 130, 141; *Berger* v. *Duff*, 4 John. Ch. R. 367; 6 Cow. 387; *Stead's Ex'rs* v. *Course*, 2 Pet. Cond. R. 151; *Williams* v. *Peyton*, 4 Id. 395; *Parker* v. *Rule's Lessee*, 3 Id. 308; *Wellman* v. *Lawrence*, 15 Mass. R. 326; *Wiley* v. *White*, 3 Stew. & Port. 355.

*A. D. Fraser*, and *Van Dyke & Emmons*, for the defendant.

1. Archange Simmons was not incompetent to be a guardian, on account of her coverture. A married woman may execute a power; Sugd. on Pow. 184; 13 Law Lib. 99, 100; Lew. on Trusts, 44, 46; whether given before or after her marriage; and the concurrence of her husband is not necessary. 1 Ves. Sen. 303, 517; Fonb. Eq. 91, note. So she may be an administratrix or executrix, or may execute an authority; or may, *in autre droit*, sell lands even to her husband. 2 Com. Dig. 223; 1 Id. 480, 497; 1 Sch. & Lef. 266; Story on Agency, 8; Toller's Ex'rs. 94; 4 Bac. Abr. 548; 3 John. Ch. R. 543; 1 Am. Ch. Dig. 255. Her husband need not join with her in the execution of a power. 13 Ves. 517; Eq. Cas. 138. The incapacity created by the common law applies merely to the civil rights of a married woman, and is for her protection. 3 Peters, 242; 1 Brownl. & Gold. 31. So a *feme covert* may be a guardian. 3 Pick. 280; 1 Dallas, 186; 2 Swanst. 567; *In re Gornell*, 1 Beavan, 348; *Jannett* v. *The State*, 5 Gill. & John. 27; 4 Com. Dig. 510; 1 Bro. 288. There is nothing in our statute which expressly forbids the appointment of a married woman guardian; this is not pretended; but it is said

that the statute requires certain bonds to be executed by a guardian, and that she is not competent to execute a bond, and therefore is incompetent to be a guardian. May we not reply that, as the statute does not forbid, it admits a married woman to be a guardian; and, by fair implication, permits her to do every material thing, even to the executing the bond, if that be necessary? But,

2. Whether it was competent for Mrs. Simmons, as a married woman, to have executed the bonds or not, is immaterial, and cannot affect the validity of the proceedings. For, the statute does not require that the guardian should *execute* the bonds; it is satisfied if bonds are *given*, as they were in this case; the sole object of the statute is to provide *security*. *Brockett* v. *Brockett*, 2 Howard, 240. And even if the statute did require the *execution*, by the guardian, and a *feme covert* should be deemed incompetent to execute a bond, the proceedings in this case would be *irregular* merely, not *void*. *Russell* v. *Coffin*, 8 Pick. 143; *Bloom* v. *Burdick*, 1 Hill, 130; *Ray* v. *Doughty*, 4 Blackf. R. 115; *Westcott* v. *Cady*, 5 John. Ch. R. 334.

3. The execution of the bond required by R. S. 1827, p. 88, § 2, (ante, p. 438, § 2,) was not a condition precedent to the sale of the premises, and even if it had been, it was perfectly competent to execute it after notice of sale and before sale made. *Bloom* v. *Burdick*, 1 Hill, 130.

4. It was neither necessary nor proper, that the husband of Mrs. Simmons should join with her in the execution of the deed given in consummation of the sale. Sugd. on Pow. 184; 13 Law Lib. 100; Lew. on Trusts, 44, 46.

5. It was not necessary that the decree appointing Mrs. Simmons guardian, should show, on its face, that the minors were under fourteen, or that either of them were cited to choose a guardian; nor was the evidence offered by the plaintiffs to show that Thomas Palmer was over fourteen, admissible.

The probate court had general jurisdiction over the appointment of guardians for minors. The petition of Mrs. Simmons to be appointed guardian for minors represented to be under fourteen, called that jurisdiction into exercise. The subsequent action of the court was the exercise of that jurisdiction. In its exercise the court inquired into, and adjudicated upon the very fact that the minors were under fourteen. Tha decree was the result of that adjudication; and it is binding and conclusive until reversed on appeal; it cannot be questioned collaterally. To receive the proffered testimony now, would, in effect, be to review the sufficiency of the testimony before the judge of probate. These principles are fully established by the following authorities, many of which show, also, that it is not necessary that the decree of a probate court should show on its face the facts necessary to give jurisdiction. *Grignon's Lessee* v. *Astor*, 2 Howard, 319, 339, 340, '1, '2, '3; 10 Peters, 477, '8; *United States* v. *Arredondo*, 6 Id. 728, 730; *Thompson* v. *Tolmie*, 2 Id. 165; *Ex parte Tobias Watkins*, 3 Id. 202; *Ph. and Tr. R. R. Co.* v. *Stimpson*, 14 Id. 458; *Tarver* v. *Tarver*, 9 Id. 174; *Jenkins* v. *Robinson*, 4 Wend. 436; *Jackson* v. *Crawford*, 12 Id. 533; *Jackson* v. *Irwin*, 10 Id. 431; *Brittain* v. *Kinnaird* 5 Eng. C. L. R. 139; *Mould* v. *Williams*, 48 Id. 469; *Ackerley* v. *Parkinson*, 3 Maule & S. 420; 8 N. Hamp. R. 124; 1 Greenl. Ev. 587; *Leonard* v. *Leonard*, 14 Pick. 280; 1 Ph. Ev. 343, 340; *Cassels* v. *Vernon*, 5 Mason, 332; *French* v. *French*, 1 Dick. 268; *Bogardus* v. *Clark*, 4 Paige, 623; *Moore* v. *Tanner's adm's*, 5 Monroe, 425; *Rhoades' Lessee* v. *Selin*, 4 Wash. C. C. R. 720, '1; *Leverett* v. *Harris*, 7 Mass. R. 292, '7; *Perkins* v. *Fairfield*, 11 Id. 227; *Dublin* v. *Chadbourne*, 16 Id. 433; *McPherson* v. *Cunliff*, 11 Serg. & R. 422—'9; 2 Whart. Dig. 131; *Thompson* v. *McGow*, 2 Watts, 164, 261; *App* v. *Driesbach*, 2 Rawle, 287; *Bush* v. *Shelden*, 1 Day's R. 170; 2 Strange,

480; 1 Id. 703; 1 Ld. Raym. 262; 3 T. R. 125, 129; *Jackson* v. *Hixon*, 17 John. R. 125; 5 Conn. R. 168; *Brown* v. *Lanman*, 1 Conn. R. 467; *Judson* v. *Lake*, 3 Day's R. 318; *Goodrich* v. *Thompson*, 2 Id. 305; 4 Id. 215; *Allen* v. *Lyons*, 2 Wash. C. C. R. 475; *Dubois* v. *Dubois*, 6 Cow. 353; *Mooers* v. *White*, 6 John. Ch. R. 381; 1 Ph. Ev. 242; 1 Stark. Ev. 253; 7 Cow. 353; 1 Pick. 535; 3 Binney, 498; 1 Mass. R. 229; 7 Id. 292; 5 Pick. 140; 2 Edw. Ch. R. 242; 1 Wheel. Eq. Dig. 527; 4 C. & H. Ph. Ev. 824, 853, '57, '8, '9; Ohio Dig. 344, 295–'8, 303; 11 Ohio R. 257; 9 Id. 119; 4 Dallas, 451; 13 Mass. R. 166; 7 Wheat. 59; 2 Binney, 46; 6 & 7 Ohio R. 340; 3 Mass. 399; 15 Id. 26; 3 Wash. C. C. R. 122; 1 Bailey, 212; *Loring* v. *Steinman*, 1 Metc. 204; 1 Ph. Ev. by C. &. H. 340, 343; 4 Id. p. 824, n. 586, p. 853, n. 609, p. 857, n. 613, p. 858, n. 616, p. 859, n. 869.

The proceedings of probate, orphan's and surrogate's courts are viewed with great indulgence and liberality, whenever they are brought in question, and great allowance is made for informalities in them. *Goforth* v. *Longworth*, 3 Ohio R. 129; *Messinger* v. *Kintner*, 4 Binney, 103, '5; *Lyle* v. *Forman*, 1 Dallas, 483, '4, '12, '13, '17; *Ludlow* v. *Wade*, 4 Ohio R. 401; per *Yates*, J. in 6 Binney, 497–'9; *McPherson* v. *Cunliff*, 11 Serg. & Rawle, 432; 11 Mass. R. 229; 2 Howard, 343; *Carver* v. *Jackson*, 4 Peters, 99.

Even if the decrec in this case was not valid, this would not affect the title of a *bona fide* purchaser. 6 John. Ch. R. 381; 20 John. R. 420; 5 N. Hamp. R. 246; 1 Ohio R. 684, '5; 1 Story's R. 552; 2 Nott & McC. 577; 2 Binney, 46, 227; 1 Serg. & Rawle, 163, 433, '4; 2 Ohio R. 560; *Swayes* v. *Burke*, 12 Peters, 24; *Armstrong* v. *Jackson*, 1 Blackf. 212; 7 Ohio R. 165; 1 Sumner, 500; 2 Mason, 351, '2, '3; 2 Peters, 167; 2 Root's 359; 2 Pick. R. 243; 2 Howard, 341; 1 Ves. Sen. 195; 9 Ves. Jr.

97. 8 John. R. 366; 5 Id. 273; 4 Wheat. 507; 11 Mass. R. 227; 6 Ohio R. 490; 4 Watts' R. 85; and other cases cited above.

This is not the case of an heir claiming property of his ancestors, in opposition to a title derived from a sale by an administrator, to pay the debts of the decedent, on the ground that the proceedings are void. Here the guardian represents the minor; made the sale on his account, and for his benefit; and now he comes to repudiate the sale, after the lapse of years; after receiving the avails of it. Under these circumstances, the plaintiffs are not entitled to be heard with any great favor.

Even if it is necessary that jurisdiction should appear on the face of a probate decree, it sufficiently appears in this case. It appears that the minors were under fourteen. The petition of Mrs. Simmons, the mother, represents it, and the court find it.

The decree in this case is not to be regarded as the decree of an *inferior* court. R. S. 1833, p. 323, (ante, 438, '9;) 1 Greenl. Ev. 586.

6. As to the notice of sale given by the guardian. It was *published* in accordance with the statute of 1818, (ante, p. 439, § 6,) instead of being posted up, as required by the statute of 1827, (ante, p. 437, § 1.) The former act was intended to extend to guardians, and has always been construed to extend to them since its passage. The usage of the probate courts throughout the state, has always been to order notice to be given by publication. This usage must be looked to and received as a correct exposition of the statute. *Communis error facit jus.* *McKeen* v. *Delaney*, 2 Pet. Cond. R. 179; *Durousseau* v. *United States*, Ibid. 380; *United States* v. *Fisher*, 3 Id. 421; *Elmendorf* v. *Taylor*, 6 Id. 62; 2 Overton, 118; *Lyle* v. *Forman*, 1 Dallas, 484; *Delany* v. *McKeen*, 1 Wash. C. C. R. 525; *Jackson* v. *Collins*, 3 Cow. 89, 91, 92; *McDermont* v.

*Lorillard*, 1 Edw. Ch. R. 273; 4 Gill. & John. 6; Cro. Chas. 416; Plowden, 18, 88; *People* v. *Utica Ins. Co.*, 15 John. R. 380; *Croker* v. *Crane*, 21 Wend. 211; *Snuyder* v. *Warren*, 2 Cow. 318; 9 Bac. Abr. 246, 250, Ed. 1846; 2 Inst. 11; 1 Dallas, 136; *Curry* v. *Paige*, 2 Leigh's R. 617; *Troup* v. *Haight*, 1 Hopk. Ch. R. 245, '68; *Farren* v. *Powers*, 1 Serg. & R. 105; 5 Cranch, 29, 32, '3; 8 Ohio R. 49.

WHIPPLE, J., delivered the opinion of the Court.

The case presented for our judgment has been considered with the deliberation which its importance demands. In proceeding to announce the opinion of the court upon the several questions involved in it, we shall depart somewhat from the order in which they have been presented to us.

1. It appears on the face of the decree of the probate court appointing Archange Simmons guardian of the plaintiffs, that she was, at the time, a *feme covert*; and it is contended on the part of the plaintiffs, that she was incompetent to be a guardian, on account of the coverture; and that therefore the decree, and her subsequent acts as guardian, are void. It is said that the statute under which these proceedings were had, required that a guardian appointed by the court of probate, should execute a bond, with sufficient sureties, for the faithful discharge of the trust; and, as a bond executed by a *feme covert* is void, the conclusion is sought to be drawn that the legislature intended to exclude her from the office of guardian; in other words, it is contended that a person incapable of executing the bond, is also incapable of becoming a guardian to minors.

But does the statute make it necessary for the guardian to *execute* the bond? The first section of the "Act empowering the Judge of Probate to appoint guardians to

minors and others," approved April 12, 1827, (R. L. 1827, p. 57,) directs that "*sufficient security*" shall be taken of guardians "for the faithful discharge of their trusts," and provides that when a guardian chosen by a minor above the age of fourteen years "is unable to give sufficient security," the judge of probate shall be authorized to appoint a guardian for such minor. The fifth section of the same act provides, that "guardians shall *give* bond," &c. "with sufficient securities for the faithful discharge of the trust," &c. "when and so often as they shall be thereunto required." (Ante, 433, § 5.) It is very clear that the words of the act do not make it imperative upon the guardian to *execute* the bond; and it is equally clear that the end to be attained does not render such a construction necessary. When the guardian *gives* a bond, *with sufficient security*, the object of the law is fully answered. If the fifth section stood alone, the construction contended for by the plaintiffs might prevail, as the words, "shall *give* a bond," might reasonably be construed to be equivalent to the words shall *execute* a bond. I am unable to perceive the necessity for the *execution* of the bond by the guardian, as no additional security is thereby afforded to the minor in the event of a breach of its conditions. The guardian would, under any circumstances, be personally responsible, in a court of law or equity, for the faithful discharge of the trust reposed in him. Cases may arise which would not only authorize, but require us to give to the language of the fifth section the construction contended for; but in the present case, we think the bond filed, with *sufficient security*, is not only a literal compliance with the words of the act, but answers the end and object for which the bond is required.

We are not entirely without precedent for this construction. The English statute of 3 Jac. I, c. 8, provided, that "no execution should be stayed, upon, or by any writ of

error or supersedeas thereupon," &c. unless the person sueing out the writ, "with two sufficient sureties," &c. should "*be bound* unto the party for whom the judgment was given, by recognizance to be acknowledged in the same court," &c. Similar language was used in the subsequent statutes of 13 Car. II. c. 2, and 1 Geo. IV. c. 87, on the same subject. By the construction given to the statute of 3 Jac. I. it was not necessary that the plaintiff in error should join in the recognizance; the words, *with sureties*, having been construed to mean *by sureties*. And a like construction was given to the statute of 1 Geo. IV. 1 Bac. Abr. 552, '3; 2 Sell. Pr. 370; 1 Barnes, 75. In *Barnes* v. *Bulver*, Carth. 121, it was objected that the plaintiff in error had not given his own recognizance to the defendant; to this it was answered that he had found two sufficient sureties, by which the intent, though not the letter of the statute, was satisfied. See also, 2 Tidd's Pr. 1251, and cases there cited. One reason given by Tidd for this construction is, that an infant plaintiff could not enter into the recognizance, nor a plaintiff who had become *feme covert* after the action brought; and, as the legislature could not have intended to exclude infants and *femes covert* from the benefit of the act, the courts so construed it as that it would apply to all plaintiffs in error. The same course of reasoning will apply, with additional force, to the provision of our statute which requires a guardian to give a bond with sureties. It may well be argued that the legislature never could have intended to withdraw from the care and custody of her who is guardian by nature, her infant child, and place it under the control of a mere stranger. To warrant such a construction, the statute should contain clear words of exclusion.

Let us grant, however, that the statute does require that the guardian should *execute* the bond; does it follow that the grant of letters of guardianship to a *feme covert*

who is not legally competent to execute a bond, and her acts as guardian, are absolutely void? The giving of the guardianship bond is not a condition precedent to the execution of the trust of guardian. Our statute, like that of Massachusetts, requires that the guardian *appointed* by the probate court should *give* bond with sureties. The statute of New York requires the bond to be given *before* the appointment is made. In *Bloom* v. *Burdick*, 1 Hill, 130, a title was sought to be sustained through an administrator. By the statute of New York, the surrogate was required, upon granting administration, to take sufficient bond of the person to whom the administration was granted, with two or more competent sureties. Upon the production of the bond it appeared that it was executed by only one surety. It was contended that this circumstance rendered the proceeding void. The court, however, held, that this was an error to be corrected on appeal, and not a defect of jurisdiction, which rendered the whole proceeding void. In *Russel* v. *Coffin*, 8 Pick. 143, the precise question now under consideration arose, and Chief Justice *Parker*, in delivering the opinion of the court, says: "The letter of guardianship is far from being an execution of the power of the judge of probate, under the statute; but its defects are not substantial. It is directed to the select men of Nantucket, without naming them; but in the close of the instrument, the names of the persons holding that office are mentioned. The bond is taken from them in their private capacities, and binds their heirs, executors and administrators. This, however, does not make the guardianship void; for the giving of bond with surety, is not a condition precedent to the executing the authority of guardian, it being in the power of the judge of probate to remove guardians if they fail to give security from time to time, as he shall direct."

If this case contains a sound exposition of the statute from which ours was borrowed, it may well be questioned whether letters of guardianship granted to a married woman are absolutely *void*, although the statute might contemplate the execution of the bond by her. The granting of letters of guardianship is a *judicial act;* and if the court, by whom such letters are granted, has jurisdiction of the subject matter, and of the parties, will not the decree bind? Let it be admitted, that our statute requires a bond from the person to whom letters of guardianship are granted, and that it does not contemplate that letters can be granted to a person who has not the legal capacity to execute the bond; would the acts of such a guardian be void? I am inclined to think they would not, while the decree remained unreversed. If the decree were *absolutely void*, all acts done under it would also be void; so would the bond, as respects the sureties. Yet, I think, it will hardly be contended that acts done by virtue of the decree, would, as respects third persons, be held void. Receipts of money by such a guardian, and acquittances granted by her, would be held valid; and, if she abuses the trust confided to her, I have no doubt the sureties would be liable on the bond. The granting of letters of guardianship, under such circumstances, might be an error in law, sufficient to authorize their revocation, but until revoked, the acts of the guardian would be held binding.

The case of *Janett* v. *The State*, 5 Gill & John. 27, establishes both of these propositions. In that case, a person died, leaving a widow and an infant son entitled to personal property. The widow refusing to act as guardian, the orphan's court appointed some third person who accepted the trust. The person thus appointed, died; and the mother, (who, in the mean time intermarried the plaintiff,) as natural guardian of the infant, and with the

consent of her second husband, undertook the guardianship of the infant, and gave a bond in that character, with security, in which her husband united. An action of debt was brought upon the bond against Janett, the second husband, as one of the sureties in the bond; and it was held that the orphan's court had jurisdiction to accept the bond, and that the action could be maintained against the surety without sueing the guardian. I shall recur to this case hereafter for another purpose; my only object in referring to it now is, to show, that the sureties in a guardianship bond were held liable, although the guardianship of the infant was entrusted to a *feme covert*. By the statute of Maryland, a bond was required of the natural guardians, in certain cases; and it was urged with great force and ability by counsel who have attained to the highest honors of the profession, that from this circumstance, it was clearly inferable that the statute never contemplated that letters of guardianship could be granted to one who was legally incompetent to execute the bond; and if so, that the bond was void as to the sureties. The court of appeals of Maryland, however, affirmed the judgment of the county court declaring the sureties liable.

In the case of *Ray and wife* v. *Doughty and another Admrs.* 4 Blackf. R. 115, it seems that letters of administration were granted to a widow, being *nineteen years of age*, on the estate of her deceased husband, and that suit was brought against her co-administrators, for a devastavit committed by the infant administratrix. It was held, that "while the letters of such infant administratrix remained unsuspended and unrevoked, the payments made to her by the debtors of the intestate, and the delivery of goods of the estate to her by her co-administrators, are to be considered in the same light, as if her authority were undisputed." It was further held, that the granting of let-

ters of administration is a judicial act, and where the court granting them has jurisdiction, individuals and courts of justice are bound to respect the authority of the letters, and to presume *omnia rite acta*. The statute of Indiana, like our own statute, requires a bond to be given by a person to whom administration of an estate is granted, and yet, the acts of an *infant* administratrix were adjudged valid.

The case of *Westcott* v. *Cady*, 5 John. Ch. R. 335, asserts the same principle. In that case, it was stated in the answer, "that the plaintiffs were aliens, and residents in England, and could not administer," &c.; and in the arguments of counsel it was urged, that the plaintiffs could not be regarded as administrators, because, being aliens, always residing in a foreign country, they never could have qualified as such. Upon the question thus raised and discussed, the Chancellor, *(Kent,)* remarked: "Another objection, of a technical kind, is, that the plaintiffs are aliens, and residents in England, and that they have not qualified themselves, according to law, to sue here as administrators. The answer to this is, that letters of administration, under the seal of the court of probates of this state, are produced, and I am bound to presume *omnia rite acta*, and to give full credit to the judicial acts of a competent jurisdiction. I am not bound to look beyond the letters of administration, *sub pede sigilli*." p. 343.

It has also been held, that payment to an executor who had obtained probate of a forged will, was a discharge to the debtor, notwithstanding the probate was afterwards declared null in the ecclesiastical court. Will. on Ex'rs. 404; *Allen* v. *Dundas*, 3 T. R. 125, 129; *R. Peebles' Appeal*, 15 Serg. & R. 39; 4 Bac. Abr. 62. It would be productive of infinite inconvenience and injustice if a contrary rule were established. There would be no safety in dealing with an executor, administrator or guardian,

unless the adjudications of the probate court in granting the probate of wills, letters of administration, and of guardianship, are entitled to the highest credit, and are to be regarded as conclusive until revoked. Errors of law or fact, *when the court has jurisdiction*, will not render void the decree of a probate court.

If the views I have expressed respecting the force and effect of decrees of the probate court be correct, it is apprehended, that, although *it is incompetent to grant letters of guardianship to a feme covert*, yet, *if granted*, the acts of a guardian, within the scope of his powers, will be binding and obligatory, and afford full and ample protection to third persons dealing with him. Our statute does not, in terms, prohibit the appointment of a *feme covert* as guardian. If such an act is prohibited, it must be in consequence of that provision which requires a guardian to give a bond; or, the incapacity must result from the legal relationship existing between husband and wife. I have endeavored to show, that the execution of the bond, by the guardian, is not required, and that the spirit of the statute is fully complied with, if a bond is given with sufficient sureties; and that if I am in error in this respect, and a bond is required to be executed by the guardian, yet, the decree of the probate court granting letters of guardianship to a *feme covert*, is not, for that reason, void; that the court of probate having jurisdiction of the subject matter, the grant of letters of guardianship to a *feme covert*, (whose bond at common law would be void,) is a mere error in law, which might be corrected upon appeal, but which does not render the decree nugatory. These positions, it is believed, are abundantly sustained both upon principle and authority; and are sanctioned by sound policy, reason and justice.

There being no express statutory disqualification, is the

appointment of a *feme covert* as guardian, inhibited by the common law?

Between the civil and the common law, there exists a wide diversity in respect to the legal consequences of marriage. The great point of distinction is this: that by the former, husband and wife are regarded as distinct persons who may have separate estates, contracts, debts and injuries; whereas the latter treats them as one. So distinct were the husband and wife by the Roman law, that they might contract with each other; and, upon the same principle, sue each other. Bro. Civ. Law, 82, '3. Some of the evil consequences which might be supposed to flow from permitting the wife to enter into contracts without the consent of the husband, were obviated by rendering such contracts inoperative upon the husband, and permitting her to sue and be sued without her husband. The authority to sue and be sued, however, is recognized in the tribunals in England, which have, to some extent, retained the imperial constitutions, viz: the courts of equity, and ecclesiastical courts.

The disabilities which, at the common law, attach to a *feme covert*, apply solely to her civil rights; and a reason among others for creating the incapacities provided in that code, is to be found "in the variety of wills with which human nature is ordinarily constituted, which makes it necessary for the preservation of peace, that where two or more persons are destined to pass their lives together, one should be endowed with such pre-eminence as may prevent or terminate all contestation." Experience and observation prove that this pre-eminence should be lodged in him upon whom rests the chief burden of educating, defending and providing for the wants of his family, and who is endowed by nature with those qualities, moral, intellectual and physical, which enables him to sustain that burden.

As a consequence of the authority vested in the husband, a *feme covert* has, in general, no power to contract. The law declares all contracts made by *femes covert* absolutely void. To this general rule, however, there are a few exceptions; such, for instance, as her power to contract for necessaries, which will bind the husband. At the common law, she is incapable of executing a deed; therefore, the bond of a *feme covert* is void. To this general rule, also, there are exceptions which will be noticed hereafter.

The powers and duties of guardians are not expressly defined by the statute of 1827, but it may be fairly inferred that a guardian has not only the custody of the person of the ward, but has also the control of his personal property, and, for certain purposes, of his real estate. His interest in the real estate is sufficient to enable him to maintain trespass, *Byrne* v. *Van Hoesen*, 5 John. R. 67; or to lease it for a term of years, 4 Bac. Abr. 585; and, as the guardian stands to his ward, *in loco parentis*, he may maintain an action on the case for seduction. In general, a guardian possesses all the powers of a guardian under the statute of 12 Car. 2, who, it is said, has the same interest in all respects as a guardian in *socage*, except as to the time and *modus habendi*; 4 Com. Dig. 510. A guardian, it is said, has an authority coupled with an interest; but this interest cannot be regarded as a *beneficial*, but a mere *legal* interest. In *Granby* v. *Amherst*, 7 Mass. R. 5, the court said that by the law of Massachusetts from which ours was borrowed, guardians, being agents of their wards, have an authority not coupled with an interest.

It was contended in argument, that a *feme covert* might execute the powers and duties of a guardian, administrator, or executor, without the consent of her husband. And this position was sought to be sustained by showing

the practice which prevails in the court of chancery in England, in respect to the appointment of guardians, and in the ecclesiastical courts in respect to the appointment of executors and administrators.

These tribunals are, for the most part, governed by the rules of the civil law in respect to the incidents of coverture, regarding the wife as in many respects a *feme sole*, and in view of the wide distinction which we have already shown to exist between the civil and the common law on this subject, it is evident that their decisions must be followed with much caution.

Wentworth, in his treatise on executors, (p. 375—'7,) says: "As for the second point, viz: wives or women coverts being made executors, and so having the office of executorship put upon them against their husband's will, there has also been diversity of opinions. In the time of King Edward the First, *Brab.* Justice, saith she may be executor without her husband, and the administration shall be delivered to her only. And I think he meant that this might be without the assent of the husband, or whether he would or not; for so it is said in the time of King Henry the Seventh to be the *law spiritual;* and indeed in courts spiritual *no difference is made between woman married and unmarried*, for aught I can find. There a wife sueth, and is sued, alone without her husband; he intermeddleth not nor is meddled with touching the things pertaining to his wife. But at the common law it is otherwise; and there, as *Brian*, Chief Justice, saith, a wife, without the assent of her husband, cannot be executor, he meaning thereby that the husband may oppose and hinder it; for such a one may be named executor in and by a will, without the knowledge of the husband." "She may clearly, as well as any other person, (especially if her husband concur with her therein,) refuse the office, trust, and charge, so as if there be no other executor

named, the ordinary must commit the administration." "But suppose she doth come into court, and offers herself ready to take the executorship upon her; and, on the other side, her husband expresseth his disassent thereunto, praying that she may not have the execution of the will to her committed; what will then be done? This, I confess, pertains to another learning, and not to that of our profession. But forasmuch as I find, that in the courts spiritual, a wife stands in the same plight and state as a woman sole, the husband not intermedling withal or the affairs of the wife; therefore do I conceive, that in that court the husband's refusal will not be of force to hinder the committing of the executorship to the wife," &c. In reference, however, to the legal consequences of marriage at the common law, the same author says: "This stands clear in the rules of the law of England, that the wife is under the husband's power," &c. "But if once the will be proved, and the execution thereof committed to the wife, though against her husband's mind and consent, I think it will stand firm; and the husband and wife being after sued, cannot say she was never executrix. And I doubt whether the wife administering without the husband's privity and assent, although the will be not proved, do not conclude her husband as well as herself from saying after, in suit against them, that she neither was executor, nor did ever administer as executor. Yet, perhaps, this administration by the wife, against her husband's mind, will, (as against him,) be as a void act; else cannot I see how *Brian's* opinion before cited, viz: that the wife shall not be executor without or against her husband's mind can be law."

By the civil code it is quite clear that a *feme covert* might, even against the will of the husband, take upon herself the office of executor or administrator, while at the common law, it is equally clear that she cannot, without his

consent. The reason of for this diversity being, that by the former law, *femes covert*, in respect to civil rights, are regarded us *sole*, while at the common law, a different rule prevails. Yet, I am not prepared to say that, if administration be committed to the wife, without the assent of the husband, her acts will not bind, so long as the letters remain unrevoked.

Toller, in his treatise on executors, recognizes the rule, that a *feme covert* may, with the consent and concurrence of her husband, take the office of an executrix. (p. 31.) The same author, (p. 91,) uses this language: "If a *feme covert* be entitled, she cannot administer without the husband's permission, inasmuch as he is required to enter into the administration bond, which she is incapable of doing. But if it can be shown by affidavit that the husband is abroad, or otherwise incompetent, a stranger may join in such security in his stead. In either case, the administration is committed to her alone, and not to her jointly with her husband." In the case of an infant entitled to administration, the practice is to assign it to a guardian of the infant, during his minority. The reason for committing administration to a guardian of an infant, arises, however, from a want of capacity on the part of the infant, and as a protection to the inexperienced, against the machinations of the fraudulent; while the disabilities of *femes covert* are the consequence of the sole authority which the law has recognized in the husband.

The rule as stated by Toller, will be found to be sustained in 4 Bac. Abr. 12. It is there said that a *feme covert* may be appointed executrix, and that in the spiritual courts she is considered as a *feme sole*, capable of sueing and being being sued without her husband; and, therefore, according to their law, she may take upon her the probate of a will without the assent of her husband. It is denied, however, that by the common law she can

take upon herself that office without such assent; and if the spiritual courts proceed to compel her, against the consent of the husband, to take upon herself the executorship, a prohibition will be granted. If, however, a wife administers, though against the consent of the husband, and an action is brought against them, they are estopped to say that the wife is not executrix. Ibid. 13. From this, it would seem, that administration committed to a wife, against the will of her husband, is not void, but will bind until revoked.

The capacity of a *feme covert* to become executrix or administratrix, is also affirmed by Baron *Comyn*. 1 Com. Dig. 480, 497. See also Chitt. on Contr. 149; Will. on Ex'rs. 325, '6; 1 Sch. & Lef. 266. It is also well settled that a *feme covert* may execute a power simply collateral; and, although once questioned, it seems she may also execute a power appendent, or in gross. Sugd. on Pow. 155; *Godlphin* v. *Godolphin*, 1 Ves. 21; Lewin on Trusts, 89.

If, then, a *feme covert* may, with the consent of her husband, execute the office of executor and administrator, and may, in a variety of other cases, act *in autre droit*, it is difficult to imagine why she may not, with the like consent, execute the office of guardian under our statute. I say, with the consent of the husband; for, looking to the duties and powers which appertain to that office under our statute, and to the legal consequences which the common law attaches to marriage, I am satisfied that the consent of the husband is necessary; although I am inclined to the opinion, that letters of guardianship granted to a wife, by a competent jurisdiction, without such consent, would not be absolutely void, but simply voidable.

Express authority is not wanting, however, to show that a *feme covert* may be a guardian. "It is improper that the wife of a man addicted to the habits of intemperance, should be guardian (in socage,) she being subject to his

control." 4 Bac. Abr. 548. "If a *feme* guardian marry, the guardianship is not transferred to the husband." 4 Com. Dig. 510; *Jannett* v. *The State*, 4 Gill. & John. 27. I regret, very much, that the opinion of the court of appeal does not appear in the report of the case last cited. The character of the counsel who took part in the argument, and the research and ability exhibited in the briefs which appear in the case, show that it was one of no ordinary interest; and it seems somewhat remarkable that the opinion of the court is not given. From what does appear, however, it is manifest that the capacity of a married woman, to take upon herself the office of a guardian was fully discussed; and the court must, from the judgment which they rendered, have considered it competent for a *feme covert* to execute the duties of guardian, with the consent of her husband, notwithstanding a bond, in certain cases, was required. In fact, the suit was instituted on the guardianship bond, and against the husband as one of the sureties. In that case, as in this, it was contended that a married woman could not act as natural guardian, for by the act of Maryland of 1798, such guardian was required to give a bond; and that the bond of the principal, being at common law void, it was also void as to the sureties. The judgment of the county court, however, in which it was held, 1st. That the mother was the natural guardian; 2d. That the orphan's court had jurisdiction to accept the bond; and 3d. That the action could be maintained against the surety without sueing the guardian, was affirmed.

*In re Gornall*, 1 Beavan, 348, a petition was presented in behalf of an infant, praying a reference to a master to approve of a proper person to be guardian. From the case it appears, that, by an order of the court, the mother of the infant petitioner, was appointed his guardian, and that after such appointment she married. In support of

the motion it was said, that it was of course, where a lady who had been appointed guardian, married, to appoint a new guardian. The master of the rolls admitted that it was the usual practice in such cases to direct a reference, on the marriage of a female guardian. He denied, however, that the mother, by reason of her marriage, was to be deprived of her child; but, on the contrary, ordered that the mother be at liberty to propose herself, and hoped that her application would be successful. It is to be observed, that in the exercise of the large and wholesome jurisdiction of the court of chancery of England, that of requiring security from guardians is included.

In 4 Com. Dig. 506, it is said that, "if a wife, being a guardian, (in socage,) die, her husband shall not have it, though he survive."

I think it may be assumed, as fully established, that it is competent, at the common law, for a *feme covert* to execute the office of guardian; and that she may, with the consent of her husband, execute the like office under the provisions of the statute of 1827.

The next question to be determined is, whether such consent was given. Nothing appears in the case before us, showing any express consent by the husband. The only fact from which consent may be inferred, is, the execution, by the husband, of the bond required to be given by the guardian before sale of the real estate of the ward. In the absence of any direct evidence to the contrary, I think this would be sufficient to warrant the presumption that his consent was given. It is said that administration taken by a wife, during coverture, must be presumed to have been with the assent of the husband. 4 Bac. Abr. 13. In the case of *Adair* v. *Shaw*, 1 Sch. & Lef. 243, Lord *Redesdale*, in the course of an elaborate and learned opinion, says: "The administration having been taken in this instance during coverture, must unquestionably have

been with the privity and assent of the husband: he must be taken to have authorized the proceedings." The same presumption will obtain in respect to a guardian; as the same reason which warrants the presumption in the one case will warrant it in the other. So that, unless the dissent of the husband expressly appear, his assent will be implied.

2. A further objection made to the validity of the decree of the probate court appointing Archange Simmons guardian, was, that it did not appear, on its face, that the minors were under fourteen years of age, or that they were cited to choose a guardian.

Another point made and which we will consider in connection with the above is, that the circuit court erred in refusing to permit the plaintiffs to prove on the trial, that, at the time of the appointment of said guardian, Thomas Palmer, one of the alleged minors named in the decree, was over fourteen years of age.

In the investigation of these points, I have encountered considerable difficulty, arising principally from the circumstance, that learned judges have differed widely upon the question, how far the proceedings had before courts of probate could be impeached collaterally, and when, and under what circumstances, their decrees are to be deemed and taken as conclusive and binding, until revoked by a revisory court, upon a direct proceeding taken for that purpose.

The importance of the question is not confined to the case or the parties before us, but upon its determination will depend the title to a large part of the real estate in the older counties in this state. This consideration has induced me to give to this part of the case reserved for our advice, a careful and extended examination; the result of which has been, that if reliance were to be had upon adjudged cases, no satisfactory rule could be extract-

ed, by which the question immediately before us could be determined. A survey of the authorities in several of the states has convinced me, that the law on this subject has undergone more fluctuations than on any other which has fallen within the range of my observation. These fluctuations are the more to be deprecated, for the reason that a painful uncertainty must hang over the proceedings of courts of probate, rendering insecure and uncertain, titles to a large amount of property, derived through their orders and decrees. Courts have sometimes struggled hard to sustain titles thus derived, in favor of *bona fide* purchasers, against the claims of those who, at the time of the purchase, were minors, but who, through the fraud or neglect of administrators or guardians, have been stripped of their inheritance; while, on the other hand, barriers erected by the law for the protection of minors, have been as often demolished, to sustain titles in favor of innocent purchasers. The judgments of courts seem, in some instances, to have been swayed more by the supposed equities of the case, than by the application of those general rules and principles by which they should have been determined.

At the time the decree appointing Archange Simmons guardian was made, two statutes were in force from which the jurisdiction over the appointment of guardians was derived; both approved on the same day, viz: April 12, 1827. One, entitled "An act establishing Courts of Probate," defined in general terms the jurisdiction of these courts, and granted, *inter alia*, the power of "appointing guardians for minors, idiots and distracted persons," without any restriction as to the age of the minors. R. S. 1827, p. 85, § 1. (See ante, p. 435.) The other statute was entitled "An Act empowering the judge of probate to appoint guardians to minors," and authorized the probate court to *appoint* guardians for minors under the age

of *fourteen years;* and to *allow* of guardians chosen by minors of over that age. It further provided, that in case the minor was over fourteen, he should be cited by the judge of probate to choose a guardian; and if, upon being cited, he should refuse to appear, or, when appearing, should refuse to choose a guardian; or, if the person chosen by the minor should be unable to give security, then and in such case, the judge of probate was authorized to appoint a guardian for him. This act certainly contemplated that minors under the age of fourteen years, did not possess the discretion necessary to make choice of a guardian, and therefore conferred the appointment upon the judge of probate; while minors over that age are supposed to possess such discretion. The choice made by a minor over fourteen, was not absolutely binding, however, upon the judge of probate, unless the necessary security was given. The cases in which the judge of probate *might appoint*, without the intervention of the minor, are indicated in the act. But in no case could the authority to *appoint* be exercised, without notice to the minor, except where the minor was over fourteen years of age, or resided without the territory. R. S. 1827, p. 57. (See ante, p. 435, '6.)

It was contended on the argument that the former of these acts authorized the *appointment* of guardians for minors; that the power of choosing granted to the minor by the latter act amounts, in fact, to the privilege of nomination; and that the judge might either "allow," or reject the nomination;—that the power of appointment, in all cases, is conferred upon the judge of probate, which he may exercise without citation; and that such a proceeeding, where the minor was over fourteen, might be *irregular*, but is not *void*, as the choice to be made by the minor, is a mere incident in the proceedings, and does not enter into the jurisdiction or authority of the court to ap-

point in all cases under the provisions of the first named act. We think that, although the "act establishing courts of probate" confers the authority, in general terms, upon the court of probate, to appoint guardians, yet, it is to be construed with reference to the second act, which was passed the same day; and that it was the obvious intention of the legislature, by that act, to restrict and regulate the exercise of this general authority. Suppose the two acts to have been merged in one and the same act; could it be contended that it conferred upon the probate court the unrestricted power to appoint guardians to minors, irrespective of age, and without notice? I think it could not be so contended, without doing violence to the words and spirit of the act. How, for instance, could such a construction be reconciled with that part of the act which limits, in express terms, the authority to *appoint;* as, where the person chosen by the minor refuses to give the required security, or where the minor resides out of the state. But especially would such a construction contravene that provision, which requires notice to be given to the minor, when over fourteen years of age, before any decree can be made affecting his rights.

I am not prepared to say, that if a citation had been issued and served upon the minors, and, upon their appearing, a question as to whether Thomas Palmer was under or over the age of fourteen years had arisen, and the judge of probate, after hearing evidence to that point, had arrived at a wrong conclusion, his decree appointing a guardian would have been void, if, in fact, he was over fourteen years of age. By issuing and serving a citation upon the minor, the probate court would have acquired jurisdiction over the subject matter and the person, and any error of fact committed by him in the exercise of that jurisdiction, might have justified a reversal of the decree upon appeal; but such error in judgment would not ren-

der void the decree; nor could it be successfully assailed in a collateral action. The acts of a guardian, so appointed, would bind until the decree was annulled by appeal to a superior jurisdiction. The whole fallacy of the argument of the learned counsel consists in supposing, that the mere presentation of the petition, representing all the minors to be under the age of fourteen years, gave jurisdiction to enter the decree appointing a guardian to the minors, whether they were over or under the age of fourteen years; and that, having jurisdiction, the decree will bind, whether a citation was issued and served or not.

It is a fundamental principle of the common law, founded in justice and sound policy, that no judgment or decree affecting the person or property of an individual shall be valid, unless notice, actual or constructive, is given to the individual whose rights are to be affected. The exceptions to this general rule, prove the existence of the rule itself. And this principle is applicable to all courts, whether of superior or inferior jurisdiction. With respect to superior courts, however, jurisdiction will be presumed until the contrary be shown; whereas, the jurisdiction of an inferior court must be shown by those claiming rights under their orders or decrees. Opinion of *Spencer*, J. in *Mills* v. *Martin*, 19 John. R. 33; *Borden* v. *Fitch*, 15 Id. 141.

Applying this principle to the case before us, it is clear that nothing appears in the proceedings to show the authority of the probate court to make the order appointing a guardian for a minor over the age of fourteen years. The record furnishes no evidence whatever, that a citation issued, or that any notice of the pendency of the application was given to any of the minors. By the decree, the custody both of the persons and property of the minors was transferred to the guardian. It was a decree by which their rights and interests were vitally affected. The pro-

sentation of the application by Mrs. Simmons, the mother of the plaintiffs, to the judge of probate, gave him full power and authority to inquire into and determine the question, as to whether the prayer of that petition should be granted or denied. This, to be sure, is the exercise of jurisdiction; for it is an authority to hear and determine. The law, however, pointed out the mode by which this authority should be exercised, before a final order or decree should be entered, by which the rights of the minors were to be concluded. The first step which should have been taken, was, to ascertain whether the authority to *appoint* a guardian existed. This could only be determined by receiving evidence of the facts upon which the right to appoint depended. If the proceeding had been conducted with regularity, a citation should have issued to the minors; this being served, the parties to be affected by the proceeding would be considered as having been brought into court, whether they actually appeared or not. This would have been a safe proceeding, although, perhaps, unnecessary, as respects those of the minors whose wishes were not to be consulted in the appointment of a guardian. The return of the citation *served*, ought to have been followed by evidence touching the ages of the minors, respectively; upon this evidence the judge of probate was to determine whether the power to appoint actually existed. If the evidence showed, to his satisfaction, that the minors were all under the age of fourteen years, then his authority to appoint would be unquestionable; but if it manifestly appeared that one of the minors was over the age of fourteen, then his jurisdiction in the premises was at an end; unless, indeed, the minor failed to appear and make choice of a guardian, in which case the probate court would have possessed full power to appoint, without the intervention of such minor. If a citation issues and is served, and the minor appears, and ad-

mits that he is under fourteen years of age; or, if the evidence warrants that conclusion, although the fact may be otherwise, yet, the decree will stand good until reversed; and for this reason, that the person to be appointed by the decree is brought into a court competent to hear and determine the facts upon which his authority to enter a final decree depends. If his determination is erroneous, the error must be corrected by a direct proceeding to annul the decree. The error in judgment, of the court by whom the decree is pronounced, cannot impair rights of innocent third persons, acquired through such proceedings. They have a right to rely upon the decree of a court having jurisdiction of the subject matter, and which has acquired jurisdiction of the person affected by the decree.

The case of *Bloom* v. *Burdick*, 1 Hill's R. 130, illustrates and enforces the principle for which I contend. An administrator presented a petition for the sale of the real estate of an intestate, which was granted, and the estate sold. An action of ejectment was subsequently brought by the heirs at law of the deceased, for the real estate sold. The statute of New York requires that guardians should be appointed to take care of the rights of infant heirs who may be interested in the estate. The record of the surrogate did not show the appointment of a guardian to represent the interests of the plaintiffs, who were minors at the time the order for the sale was made. In delivering the opinion of the court, *Bronson*, Justice, remarks: "The surrogate undoubtedly acquired jurisdiction of the subject matter, on the presentation of the petition and account. It was also necessary that he should acquire jurisdiction over the *persons* to be affected by the sale. It is a cardinal principle in the administration of justice, that no man can be condemned, or divested of his right, until he has had the opportunity of being heard. He must, either by serving process, publishing notice, appoint-

ing a guardian, or in some other way, be brought into court; and if judgment is rendered against him before that is done, the proceeding will be as utterly void as though the court had undertaken to act where the subject matter was not within his cognizance." And again: "The surrogate's court is one of inferior jurisdiction; it is a mere creature of the statute. Indeed, it has been held that, in all the cases relating to surrogate's sales, the persons claiming under them, must show affirmatively that the officer had acquired jurisdiction."

In the case of *Jackson* v. *Robinson*, 4 Wend. 436, the lessor of the plaintiff claimed to recover under a deed from an administrator. One of the objections taken to the sufficiency of the evidence to entitle the plaintiff to recover was, that it was not shown, otherwise than by the recitals in the order, that there were any debts of the intestate, that there was a deficiency of assets to pay the same, or that the personal property had been applied to the payment of the debts, and consequently that enough had not been shown to give the surrogate jurisdiction. *Marcy*, Justice, in delivering the opinion of the court, makes use of this language: "After hearing the proofs and allegations of the executors or administrators and others interested in the estate, the surrogate is to examine into and determine the question whether there is sufficient to pay the debts or not; and if he finds that there is not enough for that purpose, he orders a sale. In deciding upon the sufficiency of the assets, he acts judicially, and an error in this matter does not affect his jurisdiction." "He has not only authority, but it his duty to settle that question. If he errs, his determination may be reviewed and reversed on appeal; his proceedings are not void, but voidable only." I cite this case to support the position I have laid down, that, if the judge of probate had jurisdiction of the subject matter, and of the person of the minor,

Thomas Palmer, any error committed by him in determining the question whether he was over or under the age of fourteen years, would not render his proceedings void, but voidable only. The distinction is clear, and recognized in many cases, between proof before a court which is to *give* it jurisdiction, and before a court that already *has* jurisdiction. *Adkins* v. *Brewer*, 3 Cow. 206; per *Spencer*, J. in *Van Steenburgh* v. *Kortz*, 10 John. R. 170; *Smith* v. *Bouchier*, 2 Str. 993; *Jackson* v. *Crawford*, 12 Wend. 533. In the case of *Bigelow* v. *Stearns*, 19 John. R. 42, Chief Justice *Spencer*, in delivering the opinion of the court, said: "I consider the process issued by the defendant as unexceptionable; it had no seal, and there is nothing in the act requiring it. The constable returned upon it that he had served it by reading. It appeared in evidence that the plaintiff was never before the justice; that the process was served by reading it to the plaintiff in the presence and hearing of his father, who now prosecutes as guardian *ad litem* to his son. The father requested the constable to delay the return of the process, until the next day at ten o'clock, as he wished to take counsel, and that he would attend before the justice the next day for his son. This conversation took place when the officer served the warrant, and in the plaintiff's hearing and presence, and he did not object to the arrangement. The father appeared with counsel before the justice, and objected to the process and the manner of its being served, and insisted that the plaintiff ought to have been brought personally into court; these objections were overruled, and the father withdrew with his counsel." "It is evident that the summoning of the accused, was not specifically required; yet this has been considered a principle so necessary to the impartial administration of justice, that it cannot be dispensed with." And again: "It is no answer to say, that being summoned, he might

appear. It was the duty of the justice to cause him to be brought before him." This case is a strong one to show that although a court may have jurisdiction of the subject matter, and issues process which is unexceptionable, yet, that its judgments will be held void, unless the person is not only served with the process, but is actually brought before the court, before judgment is rendered.

Applying these principles to the case before us, it will appear that, notwithstanding the probate court had jurisdiction to entertain the petition presented by Mrs. Simmons for the appointment of guardian to her minor children, yet, that it was not competent to pronounce a decree in relation to such of the minors as were over the age of fourteen years, until a citation was issued and served upon them.

It was intimated in argument, that the application itself shows, that all of the minors were under that age, and that this was sufficient to authorize the decree, whatever the fact might be. This argument cannot, I think, be sustained. It would be to make a mere suggestion contained in the petition, unsupported by the oath of the petitioner, or any other proof, conclusive evidence of a fact, upon the determination of which the right to enter a decree appointing a guardian depended. The legal effect of the application, was to give to the court of probate jurisdiction to inquire into the very fact which the application assumed; but the petition did not, of itself, prove the fact. The decree does not purport to find the fact that the minors were under the age of fourteen years, nor that any citation ever issued, nor that any proof was offered, or evidence heard in relation to that fact.

To sustain further the views I have expressed, upon the point immediately under consideration, I will recur to a few more of the many authorities which were cited upon

the argument, and others which have come under my observation.

In the case of *Chase* v. *Hathaway*, 14 Mass. R. 223, it was held, that the decree of a court of probate appointing a guardian to a person who had been adjudged and certified by the select men of the town in which he resided, to be incapable of taking care of himself, was absolutely *void*, no notice having been given to him before the final adjudication in that court. The statute did not, in terms, require that notice should be given; but the court held, that an opportunity should have been given to the person interested, to be heard in support of his capacity. It was urged in that case, that, as the proceeding was wholly a matter of judicial discretion in the judge of probate, it was to be presumed that every proper measure was adopted by him, before passing the decree; and that notice to a *non compos*, would be of no avail. The court, however, rested the judgment upon the ground, that notice to the party was essential to jurisdiction; and, it not appearing upon the face of the proceedings, or otherwise, that notice was given, they declared the decree null and void; and, to the last proposition upon which the decree was sought to be sustained, the court gave the following conclusive answer: "It has been intimated, that notice to an insane person would be of no avail, because he would be incapable of deriving advantage from it. But the question upon which the whole process turns, is, whether *he is* insane." In that case, the application or petition to the judge of probate gave jurisdiction of the subject matter, precisely as the application did in the case before us. But the court held the decree void, because notice was not given to the party to be affected by the decree, and he was thus deprived of an opportunity of contesting the very fact upon which the right to pass the decree depended. So in the case before us: the failure

to give notice to Thomas Palmer, deprived him of an opportunity to prove the falsity of the suggestion contained in the application, that he was under the age of fourteen years; and which suggestion, if overthrown by competent proof, would have rendered any appointment of guardian, so far as he was concerned, nugatory.

In the case of *Newhall* v. *Sadler*, 16 Mass. R. 122, the facts were, that one Jonathan Newhall died intestate, leaving several children, his heirs at law, to inherit his estate. A proceeding was had before the probate court with a view to divide the estate among the heirs. For this purpose, commissioners were appointed by the judge of probate, who appraised the estate, and assigned the whole to the eldest son, being of opinion that the same could not be divided among all the heirs without prejudice to or spoiling the whole; and they ordered him to pay to the other heirs their several proportions of the appraised value of the estate—the sum to be paid to the demandant being $217.53, within three years, with interest annually. The doings of the commissioners were approved by the judge of probate; and, by his decree, the whole of the estate was assigned to the eldest son, "upon condition that he should pay to the other children of said deceased, or to their lawful representatives, the several sums of money, at the time and with the interest, as ordered in said return of said commissioners." No security was ordered to be given to the heirs, and none in fact was given. Hetty Newhall, the demandant, disregarding the decree of the probate court, brought a writ of entry to recover seizin and possession of her share of the real estate inherited from her father. The supreme court directed a recovery, on the ground that the judge of probate had no authority to pass a decree until the money was actually paid to the demandant, or good security given for its payment as required by the statute. The jurisdic-

tion of the probate court over the subject matter was unquestionable; his authority to issue a warrant to commissioners, was equally clear; but his authority to enter a decree assigning to the eldest son the whole of the estate was denied, because payment was not made, nor security given as required by law.

We have been referred to the case of *Loring, Adm'r* v. *Steineman*, 1 Metc. 204, as supporting the views of the counsel on the part of the defendant, in respect to the conclusiveness of the decree of the judge of probate. I have carefully examined that case, and do not find that it militates against or overrules other cases to be found in the Massachusetts Reports, some of which have been referred to in this opinion. On the contrary, both the reasoning decision of the court in that case, tend to confirm the views I have endeavored to sustain. The language of the Chief Justice in one part of the opinion, is as follows: "We can entertain no doubt that the judgment of a probate court, duly made, after such notice as the statutes require, or if they require no notice, then after such notice as the court, in its discretion, acting upon the circumstances of the case, may think proper to order, must be deemed in its nature so far conclusive, as to protect an administrator, acting in good faith, in conforming to it." But it is sufficient to say of that case, that the court likened the proceeding had before the court of probate, to proceedings in courts of admiralty, where persons are only incidentally concerned.

In the case of *Heath* v. *Wells*, 5 Pick. R. 140, it was held, that a license granted to an administrator to sell real estate of a deceased person, to pay a debt barred by the statute of limitations respecting executors and administrators, was void. After reviewing some of the previous decisions in Massachusetts respecting the conclusive nature of decrees made by the probate court, Mr. Justice

*Wild* says: "But in the case under consideration, it appears that the court granting license to the administrator had no jurisdiction of the subject matter; for if the administrator had no right to sell, the estate not being assets in his hands, the court had no cognizance of the case, and the license was merely void. It was not a case for deliberation or decision." And yet, if the views of counsel were fully understood, and reliance is to be had upon some of the cases which seem to favor these views, the decision of the supreme court of Massachusetts was erroneous. These views, upon the case cited, would be, that over the whole subject of granting license to administrators to sell real estate, the probate court of Massachusetts had jurisdiction; the presentation of a petition for the sale of real estate, representing that the personal property was insufficient to pay the demands against the estate, called this jurisdiction into exercise; and a decree directing a sale, involved the question as to the existence of demands against the estate and the sufficiency of personal assets to pay them, and hence such a decree of sale would be valid, although in point of fact no debts existed. But it is apprehended that this view cannot be sustained. The proceedings are not, strictly speaking, *in rem*. There are adversary parties. By such a decree and sale, heirs may become divested of their inheritance; devisees may be divested of rights under a will; and yet, it would be contended that there is no remedy for the mischief, except by appeal, when, perhaps, neither heirs nor devisees had notice of the proceeding. I think the views of the supreme court of Massachusetts, when they assert, that where there are no debts, the real estate never becomes assets in the hands of the administrator, and he cannot therefore sell, must prevail, and that a decree without the existence of a fact upon which to base it, must be void.

The case of *Perkins* v. *Fairfield*, 11 Mass. R. 227, is

distinguishable from the case of *Heath* v. *Wells*. In the former case, says Mr. Justice *Wilde*, "the estate had been represented insolvent, and the certificate of the judge of probate was founded on the list of claims allowed by the commissioners. One of these had been afterwards reduced by a trial at law, so that the proceeds of the real estate exceeded the amount of claims thus reduced, and the attempt was, to set aside the sale as void, on account of this excess. But the sale was held valid." The distinction consisted in this; that in the case of *Heath* v. *Wells*, there were no debts, and therefore there was nothing upon which a decree of sale could be founded; in the case of *Perkins* v. *Fairfield*, there were debts, and therefore the necessary facts existed to authorize a decree of sale. In the first case there was no jurisdiction; in the latter case there was jurisdiction, but it was improvidently exercised.

In *Holyoke* v. *Haskins*, 5 Pick, R. 20, administration granted by the judge of probate of Suffolk, on the estate of a person, whose domicil at the time of her death was in Middlesex, was held void, for want of jurisdiction. It might have been said in that case, as in this, that the residence of the deceased was involved in the question as to whether an administrator should be appointed, and consequently the decree was not absolutely void, but merely voidable.

We have been referred by counsel to the case of the *United States* v. *Arredondo*, 6 Pet. R. 709, for a definition of the word jurisdiction. Mr. Justice *Baldwin*, in that case says: "The power to hear and determine a cause is jurisdiction; it is "*coram judice*," whenever a case is presented which brings this power into action; if the petitioner states such a case in his petition, that, on demurrer, the court could render judgment in his favor, it is an undoubted case of jurisdiction." With this definition I

am not disposed to find fault; and yet, I am unable to see that it renders conclusive the decree of the judge of probate appointing Mrs. Simmons guardian of Thomas Palmer. Let us apply the definition and illustration given by Judge *Baldwin* to the facts as they appear before us. The jurisdiction of the court of probate to grant letters of guardianship is expressly given by statute. The petition of Mrs. Simmons presented facts which called this jurisdiction into exercise. It gave to the probate court power to hear and determine. Suppose a citation had been issued and served upon Thomas Palmer, and upon his appearing in court, he had interposed an answer to the petition, affirming that he was over fourteen years of age; and to this answer a demurrer had been interposed by the petitioner; what, it may be asked, would have been the judgment of the probate court? Clearly, that the petition, as to him, must be dismissed; for the reason, that there was an admission of record, which ousted the court of jurisdiction; an admission which, in point of fact, showed that it never had jurisdiction to pass a decree. But suppose the facts to have existed as they are presented by the record. We have an application from Mrs. Simmons to be appointed guardian to her minor children, who, it was *suggested*, (not averred,) were under the age of fourteen years. Then follows the decree of the probate court, granting the prayer contained in the petition. No citation issues; no evidence appears to have been taken. No fact is found by the court. Yet, is it insisted, that a decree thus made, is conclusive upon Thomas Palmer, because the petition presented a case for the exercise of the jurisdiction conferred upon the probate court, although the fact was that that court never had jurisdiction to pass the decree. If Thomas Palmer is bound by such a decree, although no notice was ever served upon him, and no opportunity ever afforded him to deny the

facts it contained, then would he be bound, although he may have attained the age of twenty-one years; for the same course of reasoning which would sustain the validity of the decree in case he was fifteen years of age, would sustain it although he was in fact twenty-one years of age. It is admitted, however, that if a citation had issued and been served on Thomas Palmer, and upon thus obtaining jurisdiction of the person whose interests were involved, he had demurred to the petition, thus admitting the facts therein stated, the judgment upon the demurrer, in favor of the petitioner, would have been conclusive. The same effect, I have already stated, would be given to the decree, had he appeared, and, by plea and answer, denied the facts contained in the petition.

But it is said that the only remedy in such a case is by appeal. It is very true, that when an appeal is given by statute from the judgment of any court, the party aggrieved must avail himself of the remedy which the statute provides. *Putnam* v. *Churchill*, 4 Mass. R. 517. In the case before us, for aught that appears, Thomas Palmer never had notice of the pendency of the proceedings in the probate court, and that court never obtained jurisdiction over the person; the proceedings were *ex parte;* and thus, without any fault on his part, the opportunity for appealing was lost. Under such circumstances, it would seem extraordinary to urge that he was forever concluded, because he did not avail himself of his remedy by appeal.

The right to impeach a decree thus rendered, in a collateral action, is fully recognized in the case of *Smith* v. *Rice*, 11 Mass. R. 507. In that case, the court say: "If it appear that the judge of probate has exceeded his authority; or that he has undertaken to determine upon the rights of parties, over whom he has no jurisdiction; whether the want of jurisdiction arise from their not being duly notified, not regularly before him, or from any other cause;

or that he has proceeded in a cause expressly prohibited by law; in all such cases, the party aggrieved, if, without any *laches* on his part he has had no opportunity to appeal, may consider the act or decree void."

The comments made upon the case of the *United States* v. *Arredondo*, will apply to the case of *The State of Rhode Island* v. *The State of Massachusetts*, 12 Pet. R. 657. It is said in the latter case, (p. 718,) that "jurisdiction is the power to hear and determine the subject matter in controversy between parties to a suit; to adjudicate, or exercise any judicial power over them." And again: "If the law confers the power to render a judgment or decree, then the court has jurisdiction; what shall be adjudged or decreed between the parties, and with which is the right of the case, is judicial action, by hearing and determining it." Admitting, in their fullest extent, the correctness of these propositions, it is quite obvious that the power to hear and determine the subject matter in controversy between parties to a suit, necessarily implies that the parties have been regularly brought into court; and if they have not, then the law does not confer the power to render a judgment or decree. In *Grignon's Lessees* v. *Astor*, 2 How. 319, Mr. Justice *Baldwin*, in referring to his definition of jurisdiction as given in the two cases last referred to, says: "This is the line which denotes jurisdiction and its exercise, in cases *in personam*; where there are adverse parties, the court must have power over the subject matter and the parties." The supreme court of the United States, in that case, decide, that, in a proceeding to sell the real estate of an indebted intestate, there are no adversary parties; that the proceedings are *in rem*, the administrator representing the land; and that all the facts necessary to give jurisdiction to the county court who decreed a sale, having been sufficiently shown, that decree was to be held conclusive upon all persons interested. If

the proceedings were strictly *in rem*, (which is neither denied or affirmed,) then the judgment of the supreme court can be easily sustained; if not, then it would be difficult to reconcile it with numerous reported cases relating to the same subject.

I have given to the two leading cases decided by the supreme court of the United States, and so much relied upon by counsel, a very careful and critical examination; and without questioning the correctness of the conclusion to which the court arrived in those cases, I am bound to declare, that the judge by whom the opinions were delivered, asserted principles which are at war with the opinions of judges and jurists, who have done much to illustrate the jurisprudence of this country; and which, if correct to the extent warranted by the language in which they are announced, conflict with the views of that court, at an earlier period of its existence. In the case of *Rose* v. *Himely*, 4 Cranch, 241, Chief Justice *Marshall*, uses this strong and clear language: "The court pronouncing the sentence, of necessity, decided in favor of its jurisdiction; and if the decision was erroneous, that error, it is said, ought to be corrected by the superior tribunals of its own country." "This proposition certainly cannot be admitted in its full extent. A sentence, professing on its face, to be the sentence of a judicial tribunal, if rendered by a self-constituted body, or by a body not empowered by its government to take cognizance of the subject it had decided, could have no legal effect whatever." "The power under which it acts, must be looked into; and its authority to decide questions which it professes to decide, must be considered." "But, although the general power by which a court takes jurisdiction of causes must be inspected, in order to determine whether it may rightfully do what it professes to do, it is still a question of serious difficulty, whether the situation of the particlar thing on which the sentence has

passed may be inquired into, for the purpose of deciding whether that thing was in a state which subjected it to the jurisdiction of the court passing the sentence. For example, in every case of a foreign sentence condemning a vessel as a prize of war, the authority of the tribunal to act as a prize court, must be examinable. Is the question whether the vessel condemned is in a situation to subject her to the jurisdiction of that court, also examinable? This question, in the opinion of the court, must be answered in the affirmative." "Upon principle, it would seem that the operation of every judgment must depend upon the power of the court to render that judgment."

In the case of *Elliot* v. *Piersol*, 1 Pet. R. 328, the court hold this language: "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it act without authority, its judgments and orders are regarded as nullities." And again: "This distinction runs through all the cases on the subject; and it proves that the jurisdiction of any court exercising authority over a subject, may be inquired into in every court where the proceedings of the former are relied on and brought before the latter, by the party claiming the benefit of such proceedings." It would certainly be difficult to reconcile these views, which are so fully sustained by a long train of decisions both in England and in this country, with the opinions of the distinguished judge in the case of *Grignon's Lessees* v. *Astor*, and also in *United States Bank* v. *Voorhies*, 10 Pet. R. 449.

In the case of *Perry* v. *Brainard*, 11 Ohio, 442, it was held, that the county court were not authorized to appoint a guardian to a female over twelve years of age, unless she refused to appear and make choice of one, after notice to her for that purpose.

In the case of *Demming* v. *Corwin*, 11 Wend. 647, the supreme court of New York, in a collateral action, held that a judgment in partition was void, where the record did not show that notice was given to unknown owners.

In *Clark* v. *Holmes*, 1 Dougl. Mich. R. 390, this court, after a careful review of the authorities, held, that courts of special and limited jurisdiction, when proceeding to exercise the powers conferred, must have jurisdiction of the person, by means of the proper process or appearance of the party, as well as of the subject matter of the suit; and that where they have no such jurisdiction of the cause or person, their proceedings are absolutely void. And in the conclusion of the opinion in that case, Mr. Justice *Goodwin* said: "As far as authorities have come under my view, it would seem that the jurisdiction of special inferior tribunals, at least, may be inquired into in respect to their authority over the person, as well as the subject matter; and the want of jurisdiction may be shown by evidence, even when it tends to contradict the minutes or dockets which those tribunals may keep as records of their proceedings." It is unnecessary to go so far in the case before us, or to affirm, that the rule as laid down, is applicable to the records of the probate court, inasmuch as it no where appears that a citation issued, or that jurisdiction was obtained over the person of Thomas Palmer.

A brief reference to one or two other cases will conclude my review of the many authorities cited by counsel in argument. *Brittain* v. *Kinnaird*, 5 E. C. L. R. 137, was strongly relied upon to uphold the decree of the probate court. A careful examination of that case, however, will show the grounds upon which the court held the conviction in the inferior court conclusive. A new trial was moved, for the reason that the magistrate had, by the act under which the proceedings were instituted, no power to

take any thing but a *boat;* that he had no right to assume to himself a jurisdiction, by calling that a *boat*, which was in truth a *vessel.* In opposition to the motion it was insisted that, whether the subject matter of the conviction were a boat or not, was the very question to be decided before the magistrate, and upon which his decision was final. The reason for the judgment of the court in refusing a new trial will appear in a few extracts from the opinions of the judges. *Dallas*, C. J. remarked: "Now allowing, for the sake of argument, that *boat* is a word of technical meaning, and somewhat different from a vessel; still, it was matter of fact to be made out before the magistrate, *and on which he was to draw his own conclusion.*"—*Parke*, J.: "In the present case, the whole argument has turned on that, which, under the circumstances, it was impossible to give in evidence, namely, that the vessel in question was not a boat; but supposing that this point might have been entered into at the trial, has any thing been stated to show that the vessel was not a boat? Upon such point as this, dictionaries are certainly very good authority, and Dr. Johnson calls a boat, a ship of small size," &c.—*Richardson*, J.: "Whether the vessel in question were a boat or no, was a fact on which the magistrate was to decide," &c.—The Chief Justice, referring to the case of *Welsh* v. *Nash*, 8 East. 394, spoke of it as an *ex parte* order of justices; "a proceeding in no way resembling a conviction, where the matter is investigated on oath, in the presence of both parties." These brief extracts, show very clearly the distinction between that case and the one before us. The magistrates were authorized to seize, under certain circumstances, boats in the river Thames. A vessel was seized, which, it was insisted, was not a *boat*, within the meaning of the act of 2 Geo. III. A trial was had in presence of both parties, and evidence heard; after which it became necessary for the magistrates to ex-

ercise a judicial discretion—to decide judicially, whether, under the evidence, the vessel seized was a boat within the meaning of the act. In the case before us, the proceedings were *ex parte;* the order was *ex parte;* and the court pronouncing the order had no jurisdiction over the person upon whom it was to operate, either by citation issued and served, or by voluntary appearance.

In *Ackerly* v. *Parkinson*, 3 Maule & Selw. 425, the party appeared, although the citation was defective in some formal particulars. This fact distinguishes that case from the present.

But I am admonished by the length to which this opinion has been drawn out, to bring to a close the discussion of this important feature of the case before us. I have bestowed upon it much labor and consideration, and the conclusion to which I have arrived, is, that it was competent for the court below to receive evidence that Thomas Palmer was, at the time the order was granted appointing a guardian, over the age of fourteen years, unless it shall further appear that he had legal notice of the proceedings; in which case the evidence would be incompetent.

From what I have had occasion to say on this branch of the case, and especially from a view of the authorities cited, my views of the other branch of the proposition I have been considering, will have been anticipated. It is very true that the record of the probate court is, in some respects, informal; nevertheless, I think the decree is sufficient to bind such of the plaintiffs as were under the age of fourteen years; and that a formal finding of the fact that they were under fourteen, was not necessary to be inserted in the decree, to render it valid. We must intend that the probate court had sufficient evidence of the facts upon which the decree was founded. That evidence it was not necessary to spread out upon the record. All

that was necessary was to enter the decree, which we must presume was justified by the evidence before the court. *Dubois* v. *Dubois*, 6 Cow. 496; 5 Mason, 335.

It was suggested in argument, that if no citation in fact issued to Thomas Palmer, and if, in point of fact, he had no notice of the pendency of the proceedings, yet, from the relation in which he stood to the guardian who was appointed, and from the circumstance that he lived with her for several years, and received his proportion of the money arising from the sale, he would be considered as acquiescing in the appointment. No such facts appear in the case before us, and we therefore express no opinion as to the effect of such evidence when it shall be produced.

3. Another objection was, that the deed of the guardian was void because the husband did not join in its execution. To this we answer, that it was not necessary that the husband should join. This follows from what we have already said upon the first point presented in the case made. Besides, it is quite clear that the husband had no interest in the premises conveyed; his execution of the deed, therefore, was unnecessary. On the part of the wife it was the mere execution of an authority in which neither she nor her husband had any beneficial interest.

4. The last objection to the regularity of the proceedings by the guardian in conducting the sale is, that the notice of sale given was insufficient, and was given before the bond was executed.

The statute requires, that, before making sale of any real estate by a guardian, a bond shall be given with sureties, and thirty days' notice of the intended sale. (See ante, pp. 437, '8.) An oath is also required. (See ante, p. 440, § 18.) The requirement in respect to the bond and notice, is contained in a proviso, and may be considered is a limitation or restriction upon the authority

to sell. But does the neglect on the part of the guardian to comply with these several provisions of the statute, render the sale absolutely *void*, and can it affect the rights of an innocent *bona fide* purchaser, claiming through the decree authorizing the sale. I think the rights of such a purchaser, especially after the lapse of so many years, are not to be disturbed in consequence of the failure of the guardian to perform acts *in pais*, subsequent to the decree of sale. The acts of the guardian are, in legal contemplation, the acts of the ward, whom he represents; and it cannot now be permitted to the ward to come in and allege the non-feasance of his guardian, to disturb a title derived from him, through such his legally constituted representative. All that a purchaser at a judicial sale is bound to look to with a view to his protection, is, to see that the court by whom the sale was authorized, was empowered to make the decree. If the court had the power, the failure of the guardian, as in this case, to fulfil certain directions which the law imposed on her, should not, and cannot prejudice the rights acquired by such purchaser. If the ward is prejudiced by any neglect on the part of the guardian in the execution of the trust reposed in her, his remedy is upon her bond. It never could have been contemplated by the legislature, that the validity of a sale should be made to depend upon the observance of those provisions of the law, which are in their nature *directory* to the guardian. If such a rule were to obtain, but few purchasers would be found at judicial sales; for but few would incur the hazard of purchasing and paying their money, when the purchase so made, may, at the distance of ten or fifteen years, be held void, in consequence of a non-compliance by a guardian with the requisitions of the statute. Such a rule would also operate injuriously on the ward, as, upon every sale made, the purchaser would take into the ac-

count the hazard he incurs. The best interests of infants require, that no unnecessary obstacles should be thrown in the way of obtaining the best possible price for their estates, when sold. If a wrong is done them by their guardians, they have a full and ample remedy. In the case of *Perkins* v. *Fairfield*, 11 Mass. R. 226, it was held that a failure, by an administrator, to give the bond required by the act of Massachusetts of 1783, before the sale of real estate of his intestate, would not invalidate a title derived through such administrator. The views I have expressed are also fully sustained in an able and conclusive opinion, delivered by Mr. Justice *Hitchcock*, in the case of *Stall's Lessee* v. *Macalester*, 9 Ohio R. 19. And it has been held that a sale made by an administrator, under like circumstances, would protect an innocent purchaser. *Ludlow's heirs* v. *Johnson*, 3 Ohio R. 553. Counsel referred us to the case of *Williams* v. *Reed*, 5 Pick. R. 480, to show that a failure on the part of the guardian to take the oath and give the bond required by law, would render a sale void. The case does not sustain the proposition. The language of Chief Justice *Parker* was as follows: "There being then no bond, and no oath, the sale is void, or at least *voidable*, so that the parties to it were at liberty to vacate it, and consider it as annulled." Our statute was borrowed from that of Massachusetts; and, in adopting it here, we are disposed also to adopt the practical construction it has received in the courts of that state; especially, when that construction seems consistent with sound policy, and is justified by construing the section in question, with reference to other sections of the same statute.

*Ordered certified*, that, as to Thomas Palmer, one of the plaintiffs, the motion for a new trial should be *granted*; but that, as to the other plaintiffs, it should be *denied*; and that the defendant, as to them, was entitled to judgment.

## DANIEL GREENVAULT *v.* THE PRESIDENT, DIRECTORS AND COMPANY OF THE FARMERS AND MECHANICS' BANK OF MICHIGAN, AND GARRETT BREESE.

Under the Revised Statutes of 1838, the clerks of the circuit courts had no power to administer oaths in vacation.

An affidavit sworn to before a person not authorized to administer oaths, is a *nullity*.

The making and filing with the clerk, of the affidavit required by R. S. 1838, p. 506, ch. 1, § 1, is essential to confer jurisdiction upon the circuit court, over a proceeding by attachment under that statute.

If a court act without authority, its judgments will be regarded as nullities; and the jurisdiction of a court exercising authority over a subject matter, may be inquired into, in every court where the proceedings of the former are relied upon by a party claiming the benefit of such proceedings.

Accordingly, where it appeared from the record of a judgment in attachment under ch. 1 of R. S. 1838, p. 506, that the preliminary affidavit required by § 1 of that chapter was sworn to before a person not authorized to administer oaths, *it was held*, that the proceedings were void for want of jurisdiction; and that a person claiming under and who was a party to them, could not maintain ejectment against a mortgagee of the defendant in attachment, in possession under a mortgage executed while they were pending.

An act of April 20, 1839, (S. L. 1839, p. 228, § 36,) amendatory of R. S. 1838, p. 506, ch. 1, declares, that "no writ" of attachment "shall be quashed on account of any defect in the affidavit on which the same issued, provided, the plaintiff, his agent or attorney shall, whenever objection may be made, file such affidavit as may be required by law." *Held*,

1. That this act did not authorize the filing of a new affidavit, after judgment and sale of the attached premises, where the original affidavit, filed before the act took effect, was a nullity, in consequence of having been sworn to before an officer not authorized to administer oaths: and,
2. That if it did, such amendment would not render the title acquired under the proceedings in attachment valid, as against the claim under a mortgage executed by the defendant in attachment, while they were pending.

THIS was an action of ejectment, tried in the Lenawee Circuit Court, at the October Term, 1845, before the Hon. A. FELCH, Presiding Judge.

Both parties derived title through one Edward Bissell.

Greenvault, the plaintiff, claimed through certain proceedings in attachment, in said Lenawee circuit court, instituted against Bissell, as an absent debtor, by one Caleb N. Ormsby. These proceedings were had under Ch. I, of R. S. 1838, p. 506, the two first sections of which were as follows:

"Sec. 1. Any creditor shall be entitled to proceed by attachment against the property of his debtor, *upon the conditions, and in the cases* following, to wit: The creditor, or some person in his behalf, shall make and file with the clerk of the circuit court of any county, an affidavit, stating that the defendant against whom the attachment is requested, is justly indebted to such creditor, in a certain sum therein mentioned, according to the belief of the deponent, and being more than one hundred dollars, and that the same is due upon a contract," &c.; and further, "that according to the belief of the deponent, either, *First*, The defendant has absconded to the injury of his creditors; or, *Second*, That the defendant does not reside in this state, and has not resided therein for three months immediately preceding the time of making the application for such attachment."

"Sec. 2. Upon the filing of such affidavit with him, the said clerk shall issue a writ of attachment," &c. "If any such writ shall issue before such affidavit filed as aforesaid, *such writ shall be quashed.*"

The attachment against Bissell was sued out September 28, 1838, and was founded upon an affidavit of indebtment, &c. which was sworn to before the clerk of the circuit court, on the 24th of the same month, and during vacation of that court.

The Revised Statutes of 1838, contained no provision, in express terms, empowering the clerks of the several circuit courts to administer oaths or take affidavits.

On the 9th of October following, the sheriff seized the premises in controversy by virtue of this attachment; caused the same to be appraised; filed a certified copy of the writ, and a description of the premises, and statement of the time when they were attached, with the register of deeds, pursuant to R. S. 1838, p. 507, § 5; and made return of the writ to the circuit court.

Greenvault, being a creditor of Bissell, filed his declaration under the attachment, as did also, sundry other creditors.

In October, 1839, Ormsby, the original plaintiff in the attachment, and the other creditors who had filed their declarations, obtained judgments against Bissell. An order for the sale of the attached premises to satisfy these judgments was thereupon granted by the court, by virtue of which the sheriff sold the premises in controversy to Greenvault, May 2, 1840. On the expiration of the equity of redemption, a deed of the premises was executed by the sheriff to Greenvault.

By an act of April 20, 1839, the first section of the chapter above referred to relative to proceedings by attachment, was amended by adding thereto the following:

"But no writ shall be quashed on account of any defect in the affidavit on which the same issued: *Provided*, That the plaintiff, his agent or attorney, shall, whenever objection may be made, file such affidavit as is required by law." S. L. 1839, p. 228, § 36.

At the April Term, 1842, Bissell moved the circuit court to set aside the attachment and subsequent proceedings, on the ground, among others, that the affidavit of indebtment, &c. upon which the attachment was founded, was a nullity. The court refused the motion, and granted leave to the plaintiff in attachment to file a new affidavit; and the same was filed accordingly.

The President, &c. of the Farmers and Mechanics'

Bank of Michigan, claimed title to the premises through a mortgage executed by Bissell on the 23d December, 1838. When this suit was commenced, they were in possession under this mortgage, by Breese, who was their tenant.

It did not appear that, at the time of the execution of the mortgage, the bank had notice of the proceedings in attachment against Bissell.

On the trial of the cause, the jury rendered a special verdict, finding the above facts. The plaintiff having moved for judgment thereon, the Presiding Judge reserved the questions arising upon this motion for the opinion of this court.

*Baker & Millard* and *E. Lawrence*, for the plaintiff, contended:—1. That the clerk had authority to take the affidavit on which the attachment was founded, not only from the common law, which conferred upon clerks and prothonotaries the power of administering oaths; but from R. L. 1833, p. 573, § 3, which was not repealed by R. S. 1838, p. 689, § 3, and p. 697, § 2, not being repugnant to any provision of the latter statutes, and not having been revised or re-enacted by them.—2. That if the clerk had no such authority, the defect was amendable under S. L. 1839, p. 328, § 36, and had been amended; that the defect did not render the affidavit a *nullity*, and was no more fatal than a neglect to state what the statute requires should be stated, would have been.—3. That the defect in the affidavit did not go to the jurisdiction, but was mere irregularity; that such was the legislative construction given by the amendatory act of 1839; and that the judgment was valid until reversed, and could not be impeached collaterally. *Voorhees* v. *Bank of United States*, 10 Peters, 449; *Grignon's Lessees* v. *Astor*, 2 Howard, 319;

*Thompson* v. *Tolmie*, 2 Id. 157; *Bank of United States* v. *Bank of Washington*, 6 Id. 8; 6 Wheat. 109.

*T. Romeyn*, for the defendants.

The proceeding by attachment against the property of a non-resident, and without the service of personal process or outlawry, was unknown to the common law. The *custom of London* is most analogous to it; but that is a special custom, of which the courts will not take judicial notice. It must be pleaded specially. 1 Chitt. Pl. 216, 217; 10 Wentworth, 462.—Actions by attachment under our statute are special and extraordinary, and in the nature of summary proceedings. The cases hereafter cited as to the rules applicable to summary proceedings show their character.

It is not material to inquire whether the circuit courts of this state are inferior or otherwise. The difference between inferior and superior courts, (in regard to the questions involved in this suit,) is, that in the former there is no presumption of jurisdiction; in the latter, there is. Where a court of general jurisdiction exercises an extraordinary power, by special proceedings, it is, *quod hoc*, an inferior court. 4 Ph. Ev. by C. & H. 945, '6, 825, '6; 6 Peters, 119; 5 Pet. Cond. R. 32.

The general doctrine of the law is, that in summary or special proceedings, where a court exercises an extraordinary jurisdiction, under a special statute, which prescribes its course, that course ought to be *strictly pursued*; otherwise the proceedings are not merely *voidable*, but absolutely *void*. They do not derive their efficacy from the general authority of the court. The court can act only under the special limited powers granted by the statute, and according to its forms of procedure. See as to the doctrine in England *Rex* v. *All Saints*, 1 Man. & Ryl. 668; 1 Cowp. 26, '8, '9; 3 Wils. 297; 1 Com. Dig. 720,

'1; in Ohio, 1 Ohio Cond. R. 272, 377; 3 Id. 133, 155; Wright's R. 567; 12 Ohio R. 272, 385, 667; in Indiana, 1 Blackf. 35, 215, 291; 3 Id. 230; 5 Id. 275; in Connecticut, 1 Conn. R. 46, 249; 6 Id. 528; 3 Day's R. 168; 5 Id. 527; in Virginia, 2 H. & M. 308; in Massachusetts, *Smith* v. *Rice*, 11 Mass. R. 510; *Heath* v. *Wells*, 5 Pick. 140; *Whitman* v. *Tyler*, 8 Mass. R. 284; *Bissell* v. *Briggs*, 9 Id. 462; in Vermont, 2 Vt. R. 269; 3 Id. 120; in New York, *Borden* v. *Fitch*, 15 John. R. 141; *Mills* v. *Martin*, 19 Id. 33, 40; 8 Cow. 370; *Latham* v. *Edgerton*, 9 Id. 229; 11 Wend. 647; 15 Id. 369; *Bloom* v. *Burdick*, 1 Hill's R. 141; in Tennessee, 2 Yerg. 484; in Louisiana, *Collins* v. *Batterson*, 3 Mill. Lou. R. 242, '5, and in United States Courts, *Wise* v. *Withers*, 1 Pet. Cond. R. 552; *Griffith* v. *Fraser*, 8 Id. 7, 8, 9; *The Mary*, Ibid. 312; *Parker* v. *Rule's Lessee*, Ibid. 273; *Stead's Ex'rs* v. *Course*, 2 Id. 154; *Williams* v. *Peyton*, 4 Wheat. 77; *McClung* v. *Ross*, 5 Id. 116; *Thatcher* v. *Powell*, 6 Id. 119; *Rockendorf* v. *Taylor*, 4 Peters, 359; *Ex parte Wood*, 5 Pet. Cond. R. 603; *Elliott* v. *Piersol*, 1 Peters, 340; *Bank of Hamilton* v. *Dudley's Lessee*, 2 Id. 498, 523; *Walker* v. *Turner*, 5 Pet. Cond. R. 672; *Shriver's Lessee* v. *Lynn*, 2 Howard, 59, 60.

Were the proceedings in this case such as to give the court jurisdiction? To constitute jurisdiction, not only the subject matter must be within the general powers of the court, but the person or property to be affected, must be brought within the powers of the court, by the service of legal process, *lawfully issued* and properly served. In this case, no affidavit of indebtment, &c. was filed previous to the issuing of the attachment. The jurat of the county clerk was a *nullity*. He had no power to administer oaths. Such has been the construction given to the matter by all of the judges of this court. Such was the legislative construction given by the act of 1839, which

empowered the clerk to administer an oath. The filing of the affidavit is, by the statute, a *condition* of the *allowance* of the writ. The authorities are abundant and luminous to show that "where the right of issuing process depends upon certain proof being given, in order to lay the foundation of it, or certain other preliminaries and indispensable requisites being complied with, the want of such renders the whole void." 4 Ph. Ev. by C. & H. 1000, '1, '2; 1 Blackf. Ind. R. 35; 3 Id. 230, and other cases supra. The court had, then, no jurisdiction in regard to the *process*.

But it is said that the proceedings have been *amended*, by filing a new affidavit under S. L. 1839, p. 228, § 36. Without the statute, it is clear that the court would have had no power to direct such an amendment. 4 Cowen, 80, 82. The statute declares that the attachment "shall not be quashed on account of *any defect* in the affidavit on which the same issued." It allows a *defective affidavit* to be amended; but does not save the writ where there has been *no affidavit*. The paper filed in this case was *no affidavit*; therefore, not amendable. Grah. Pr. 121, 122; 18 John. R. 213. But if the statute was intended to allow an affidavit to be filed where none had been filed before, we deny the right of the legislature to pass it. Before the affidavit the court had no jurisdiction. The proceedings up to this point were invalid. Legislation could not, by retrospective enactments, give them validity even as between the original parties.

But if the amendment was rightly allowed as between the parties to the suit in the attachment, (and it will be remembered that the plaintiff here was a party to that suit, and cannot therefore claim as a *bona fide* purchaser,) it cannot affect the present defendants who acquired their interest in the property before the amendment was allowed. *Putnam* v. *Hall*, 3 Pick. 445; *Williams* v. *Brackett*,

8 Mass. R. 240; *Freeman* v. *Paul*, 3 Greenl. R. 260; 6 N. Hamp. R. 749; 5 Vt. R. 97; 8 T. R. 153; 4 Maule & S. 329; *Emerson* v. *Upton*, 9 Pick. 167; 15 Conn. R. 34; 4 Ph. Ev. by C. & H. 1096.

The proceedings in attachment, then, were defective in a matter essential to the jurisdiction of the court; this defect appears on their face; and being so defective, they are void, and no title can be asserted under them. 4 Ph. Ev. by C. & H. 801, '26, 903; 13 Peters, 511; 3 Howard, 762; 4 Cow. 457; 8 Id. 370; 4 Ph. Ev. by C. & H. 637, 904—6, 913, 1006—12.

2. There is another principle which allows us even to contradict the record, in this case, and show, as against the plaintiff in this suit, error in the judgment in attachment, (though not apparent on the record,) which would defeat the proceedings on appeal or writ of error, even if it does not go to the jurisdiction of the court; and this whether they be viewed as ordinary common law proceedings or not. The plaintiff in this suit was a party to the proceedings in attachment, and is not entitled to the protection of a *bona fide* purchaser. 4 Ph. Ev. by C. & H. 990, '2, '3, 1006—'10, '12; 1 Ves. 195; 5 Peters, 370; 8 Id. 128, 146; 2 Hill's R. 566, 633, '4; 1 Cowen, 641, '5, 735. The defendants in this suit were not parties, nor privies to the record in attachment, and could not have brought error. Bac. Abr. Error B.; 6 Com. Dig. 445—7, Tit. Pl. 3, B. 9; Grah. Pr. 936; 8 Cow. 333, '8. The land in controversy having been aliened before verdict or judgment, the estoppel of the judgment does not run with the land. There is nothing in our statutes modifying these common law rules. The rule that one cannot contradict a record, applies only to such as are parties or privies to the record, and may bring error. This is implied in the above cases. See also 4 Cowen, 457; Cro. Eliz. 199; 1 Ld. Raym. 669; 2 Salk. 600; 2

Mod. R. 303. In these cases the party was allowed to contradict the record by plea and proof *aliunde*. Much more shall he be allowed to take advantage of error apparent.

WHIPPLE, J. delived the opinion of the Court.

The paper purporting to be an affidavit, filed with the clerk as the foundotion of the attachment against Bissell under which the plaintiff claims, was sworn to before the clerk of the circuit court of Lenawee county, in vacation. The first question that arises in the case, is, whether the clerk was authorized to administer the oath, or take the affidavit. Whatever may have been the powers, in this respect, of the clerk, at common law, during the term, and while the court was in actual session, it is clear that the authority to administer oaths or take affidavits in *vacation*, must result from some positive provision of the statute *in force*. No provision conferring such authority is to be found in the Revised Statutes of 1838; and it follows, as a necessary consequence, that the act of the clerk in administering the oath, was extra judicial and void.

The act of the clerk, then, being void, no affidavit was, in fact, filed previous to the issuing of the writ of attachment.

The next question to be determined, is, whether the issuing of the writ, without an affidavit, was also void; or, in other words, did the authority to issue the process, depend upon the making and filing of the affidavit with the clerk? This question must be answered in the affirmative. The statute, (see ante, p. 499, § 1,) declares, in express terms, that the creditor shall be entitled to proceed by attachment, against his debtor, upon the *condition*, that an affidavit, such as is required, be fiiled wth the clerk; and the second section, in terms equally clear, authorizes the clerk to issue the writ, upon the filing of the affidavit.

The intention of the legislature is manifest from the language of the act itself, and that intention we are bound to carry into effect.

The next inquiry is, what was the legal effect of issuing the writ without making and filing the affidavit required by law, upon the judgment and subsequent proceedings of the circuit court. This inquiry is answered by the opinion of this court in the cases of *Palmer* v. *Oakley*, (ante, p. 433,) *Wight* v. *Warner*, 1 Dougl. Mich. R. 384, and *Clark* v. *Holmes*, Ibid. 390. In the case first named, we recognized the rule as laid down in the case of *Elliott* v. *Piersol*, 1 Peters, 340, that the decision of a court which has acquired jurisdiction of a cause, will be held binding until reversed; but that if a court act without authority, its judgments will be regarded as nullities; and that the jurisdiction of a court exercising authority over a subject matter, may be inquired into in every court where the proceedings of the former are relied on, by a party claiming the benefit of such proceedings. The rule thus laid down, is firmly established by the numerous decisions referred to in that case, and is recognized in all courts, where the common law prevails, as too firmly settled to be shaken. Another rule, sustained by an unbroken current of decisions in this country and England is, that where a court is vested with extraordinary powers, under a special statute prescribing its course, that course ought to be exactly observed; and the facts which give jurisdiction, ought to appear, in order to show that its proceedings are *coram judice*. These principles are applicable to all courts, whether of inferior or superior jurisdiction; the only difference being, that in respect to inferior courts, jurisdiction must appear on the face of the proceedings; while, in regard to superior courts, jurisdiction will be presumed, until the contrary is shown. It will be unnecessary, at this time, to recur to the reason-

ing or authorities by which these propositions are sustained, as the cases to which I have referred, contain not only a full exposition of our views upon those propositions, but a full citation of many of the leading authorities by which they are established.

Nothing remains for us but to apply the principles laid down by us in those cases, to the questions now before us. What, then, was the character of the court, and the nature of the jurisdiction it exercised in suits in attachment? The circuit court was a court of general common law jurisdiction, in both civil and criminal cases. Its *general* powers are clearly defined by statute. It was, in other words, a court of superior jurisdiction. Do proceedings in attachment, fall within the circle of the general powers conferred upon the circuit court by statute? They clearly do not. The jurisdiction in this respect is special and extraordinary. ' The mode of proceeding is peculiar, and in derogation of the common law. It is special, because limited to cases either of absconding or non-resident debtors. It is extraordinary, because the process, contrary to the general rule recognized in our statutes, acts upon the property and not the person of the debtor. It is, in its nature, a proceeding *in rem*, to collect a debt due from a debtor to his creditor. It is in derogation of the common law, because it is a direct proceeding to subject the real estate, by actual sale, to the payment of debts.

I have already said that there was no preliminary proof whatever to authorize the issuing of the attachment. The *facts* which give jurisdiction, do not appear in the proceedings. In the absence of such proof, what, it may be asked, is the judgment which the law pronounces upon such proceedings? There being no authority to issue the process, it is of course void. Being void, the *service* was void; the property attached never was brought with-

in the jurisdiction of the court, and the court had no authority to order its sale. In short, the circuit court never had jurisdiction of the subject matter, because the facts necessary to call that jurisdiction into exercise never existed. Can a party, then, to such proceedings—one who stood in the character of a plaintiff, so far as the prosecution of his own claim was concerned—protect himself, under a sale made by virtue of an order entered in the records of a court which never acquired jurisdiction of the subject matter—a court within whose jurisdiction the property never was brought? As well might it be contended that a judgment, where the proceedings are *in personam*, could be sustained, when it affirmatively appears in the record, that the person to be affected by the judgment never was brought within the jurisdiction of the court by whom it was rendered. The distinction is well defined between cases where jurisdiction is acquired, and is improvidently exercised, and cases where jurisdiction never was acquired. In the first class of cases the judgment will bind until reversed. In the other, the judgment is a mere nullity; it is as though it had never been entered. In the first class, the record cannot, in general, be impeached; in the last, it may be impeached, especially, if it shows on its face that jurisdiction was usurped. Acts done by a court, without authority, are equally as void, and for the same reason, as acts done without authority by either the executive or legislative departments of the government. If either of these departments usurp an authority not conferred by the constitution or laws of the state, and a party seeks to shelter himself under such usurped authority, in a judicial proceeding, the court before whom such a proceeding is pending, would not hesitate to declare all acts done under such authority void. If not, then we should have to submit quietly to the well merited rebuke, that rights the most sacred are no

longer guarded and protected by just laws enacted by our consent; but are left to the tender mercies of a man or set of men, who, although acting under color of authority, are mere usurpers. Apply this reasoning to the case before us. The powers possessed over the person and property of the citizen, by the judicial tribunals, are as accurately defined as are the powers conferred upon the other departments of the government. In the particular case before us, the circuit court of Lenawee county was authorized, by a judicial proceeding, to divest one person of his property and transfer it to another, under a certain state of facts. The facts, however, which authorized the act to be done, did not exist; nevertheless, the court proceed to do the act, by which, under color of legal proceedings, one man is divested of his estate, and it is transferred to another. What difference it may be asked, is there between such an act, and an act of the legislature which should declare that the property of A. should become the property of B. No difference in principle exists between the two cases. In the one case, it would be regarded as a bold and palpable usurpation; in the other, the usurpation would appear less bold, although more dangerous, because partially concealed beneath the solemn drapery with which judicial proceedings are invested. The theory of our government contemplates that its powers should be distributed, and administered by three departments; neither of which should exercise powers conferred upon another. This principle, so necessary to the existence of free government, should be carefully observed; yet, it is to be regretted, that, to suit the emergencies of particular cases, courts of justice have sometimes assumed legislative powers. Not contented with expounding the law, they have resolved themselves into legislative bodies, and made laws adapted to the supposed equities of particular cases. The opinions of men are thus

substituted for the will of the community expressed through the legislature. In the case before us, the legislature have thought proper to give to the circuit court jurisdiction in certain cases, and upon certain conditions. To call this jurisdiction into exercise, it must be shown that the conditions upon which it depended have been fulfilled; and where this jurisdiction is special and extraordinary, not falling within the line which circumscribes the general powers of the court, it would seem that the record itself should show affirmatively the existence of all the facts necessary to call into action the special powers thus granted. 3 Blackf. R. 230.

Much reliance was placed upon the case of *Voorhees* v. *Bank United States*, 10 Peters, 473. But the distinction between that case and the one before us is so obvious as to render it impossible to use it as an authority. 1. In that case, Voorhees was the alienee of Cutter, who was the defendant in the attachment, by a conveyance executed *long after* the judgment in attachment. Cutter, then, stood in no better plight than Voorhees would have done, had he brought suit against the bank. 2. It was competent for Voorhees to have brought error upon the judgment, which he failed to do. In the case before us, the defendants could not have availed themselves of this remedy to reverse the proceedings below. 3. Stanley, under whom the Bank of the United States purchased, was regarded in the light of an *innocent* purchaser; whereas, in the case before us, the plaintiff was a party to the proceedings in attachment, and was bound to see that the court had jurisdiction. The Supreme Court of the United States decided in that case, that from what appeared on the face of the proceedings, it might be fairly presumed that all the facts necessary to give jurisdiction to the court of common pleas of Ohio, were shown to that court before the rendition of the judgment confirming the acts of the

auditors. In the case before us, nothing is left to implication. The verdict sets out all the proceedings, from which it manifestly appears that there was no affidavit proving the facts necessary to confer authority upon the circuit court to issue the process. Whether the presumptions made in support of the judgment in the case of *Voorhees* v. *Bank of United States*, were, or were not justified by the facts of that case, it is quite unnecessary to determine. The fact that the report of the auditors making the sale was confirmed by the court of common pleas of Ohio, was, in the opinion of the Supreme Court of the United States, sufficient to authorize the presumption, that all the jurisdictional facts were shown; especially, as reference was had, in some part of the proceedings, to an affidavit, which, in the absence of all other proof, the court would intend was regular, and in accordance with law. It is to be remembered, however, that the controversy was between the alienee of the defendant in attachment, who purchased *subsequent* to judgment, and innocent third persons, who claimed through the purchaser at the sale, by virtue of the judgment in attachment, and whose purchase was afterwards confirmed by the court.

It is not to be denied, that some of the views expressed by Mr. Justice *Baldwin*, touching the *conclusiveness* of judgments rendered in attachment causes, differ essentially from those expressed by other judges and courts of great respectability. But upon this point, much of what is said by Judge *Baldwin*, was not called for by the facts in the case before the court. While, therefore, I am unable to perceive, *if the premises assumed by the Supreme Court were correct*, why the judgment of that court may not be sustained, I desire it to be understood, that we express no opinion upon questions which did not necessarily call for the opinion of the court.

The last question to be considered, is, as to the legal

effect of the filing a new affidavit, by the plaintiff, by virtue of the order made at the April Term, 1842, of the circuit court.

First: Was it competent to grant the order? The act of 1839 provides, that "no suit shall be quashed on account of any defect in the affidavit on which the same issued: *Provided*, That the plaintiff, his agent or attorney shall, whenever objection may be made, file such affidavit as is required by law." S. L. 1839, p. 228, § 36. This law, it is to be observed, was not in force at the time the paper purporting to be an affidavit, and upon which the attachment was issued, was filed. Do the words of the act authorize a new affidavit to be filed, where the original affidavit was void; or, in other words, where no affidavit was made or filed, as contemplated by the statute? The amendatory act speaks of *defects* in the *affidavit* upon which the writ issued; from which it results, by necessary implication, that *defects* could not be supplied, in cases where no affidavit whatever was filed. It evidently contemplated cases where affidavits were filed, but which, through ignorance, inadvertence, or mistake, did not embody all the facts necessary to authorize the issuing of the writ; but it could not have been the intention of the legislature to authorize an affidavit to be filed after judgment was rendered and the property attached sold, and thus legalize acts which were absolutely void. The language, in the latter part of the act, is conclusive upon this point. It authorizes a party to "file such affidavit as is required by law;" implying that the original *affidavit* was *not* such as was required by law. In the case before us, if the construction contended for by the plaintiff, be correct, an affidavit filed three years after the rendition of the judgment, would have the effect of rendering a proceeding legal, which was before that time a mere nullity; —of giving jurisdiction to a court, which, at the time the

writ issued and the judgment was rendered, had no jurisdiction. Such a power the legislature would hardly exercise; and there is nothing in the amendatory act, from which it can, with any show of reason, be contended that such was the intention of the legislature.

But, supposing for a moment, that the legislature might, in the plenitude of its authority, exercise such a power, and that the act of 1839 warrants the construction contended for by the plaintiff, how could it affect the rights of the present defendants? The filing, with the register, of the writ of attachment, did not operate as constructive notice to the defendants, who purchased soon after the date of the writ, or create a lien on the premises, for the reason that the writ itself was void. To affect a party with notice, the deed, or in this case, the writ, must be such an one as in the case of a deed, the law authorizes to be registered, or in the case of a writ, it must be a writ, the issuing of which is authorized by law. The special verdict does not find that the defendants had *actual* notice of the pendency of the proceedings in attachment. There being, then, neither actual or constructive notice, how could the rights of the defendants be affected by an order of the court made three years after they had acquired a valid title to the premises? No *ex parte* legislation, or order of the court founded upon such legislation, could, under the circumstances stated in the special verdict, have the effect claimed for it, viz: that of divesting an estate acquired by the defendants from Bissell, and transferring it to the plaintiff in this case. The original proceedings in attachment, then, being void, and no subsequent legislation, or orders of the court, having applied remedies sufficiently potent to cure those proceedings of the infirmities which beset them, it follows, that the judgment on the special verdict must be rendered for the defendants. *Certified accordingly.*

## Rue High, Appellant.

*Held*, that the court of probate had power, under R. S. 1838, p. 435, §§ 28, 30 p. 385, §§ 6, 7, to issue a commission to take the deposition of a witness to a will, residing out of the state.

It is not necessary that any particular form of words should be used to make a will.

A will of personal property, regularly made according to the forms and solemnities required by the law of the testator's domicil, is sufficient to pass such property in every other country in which the same is situate.

Domicil, how defined, and how, and from what facts and circumstances it may be inferred.

Sec. 4 of R. S 1838, p. 270 is merely declaratory of the right which every person has, at the common law, to dispose of his personal property by will.

Sec. 5 of R. S. 1838, p. 270, which requires that wills, whether of real or personal property, "shall be attested and subscribed, in the presence of the testator, by three or more competent witnesses," as amended by S. L. 1839, p. 220, § 14, applies only to wills executed within the state.

The common law prevails in this state, as to wills executed abroad, by persons domiciled here.

By the common law it is not essential to the validity of a will that it should be attested by witnesses.

*Held*, accordingly, that a will of personal property executed abroad, by a person who died there, but whose domicil was, at the time, in this state, was valid, though unattested by three witnesses.

In the absence of proof to the contrary, it will be presumed that the common law as in force in this state, prevails in a foreign country.

A legatee is a competent witness to a will, where the statute renders the legacy to a witness void. *Semble.*

Appeal of Rue High from the decree of the Probate Court of Macomb county, admitting to probate a certain instrument hereinafter set forth, as the last will and testament of Nathaniel High, deceased. The instrument was presented for probate by Joseph C. High, the principal

legatee therein named. The appellant was the father of the deceased.

The following facts appeared on the hearing in this court:

Nathaniel High, the testator, was born in the state of Vermont about the year 1812 and continued to reside there with his parents, who were domiciled in that state, until about eighteen years of age, when he left the parental roof and went South. He remained at the South until the year 1842. During his absence, his parents, two of his brothers, and two sisters emigrated from Vermont to this state,—the parents and one of the brothers, Joseph C., and Mrs. Merrill, one of the sisters, taking up their residence near Mt. Clemens in Macomb county, where they have resided ever since. The parents came here as early as 1832. At what time the brothers and sisters came, did not distinctly appear, but they were domiciled here in 1842, and had been for some time previous. One of the younger members of the family only, remained in Vermont. Early in 1842 the testator came to Macomb county for the purpose, as he said, of visiting his relatives from whom he had been so long absent. He was unmarried, and in feeble health. He said that during most of his absence South, he had been residing on the Island of Cuba. Capt. Canfield, one of the witnesses, testified to different conversations had with the testator during his stay in Macomb county, in which he expressed doubts as to whether he should live long; said that he intended to go a sea voyage for his health; that he had been advised to do so by his physicians; that if he lived to return he intended to make Macomb county his home; that his friends lived there. On one occasion he said that he had been negotiating for the purchase of a farm near Mt. Clemens, known as the Conger farm, but that he was then unable to procure a title from the person who had it in

charge; that he must soon leave on account of his health, and that if he was unable to complete the purchase before his departure, he should leave money with his brother Joseph C., to purchase it for him. He said he wished to buy some land, that he might have a place to call his home; that he had been roaming about the world, and could not tell, when asked, where he lived; he hardly knew where he belonged; he wanted a place to call his own. At another time he expressed to the witness a wish to loan some money, if he could do so on good security. Witness thereupon expressed a desire to borrow money of him, and offered to give him security on real estate. Some time afterwards the testator came to witness' house, and there loaned some money to witness, who executed to him a mortgage on real estate, to secure the same. During the transaction of this business the testator again spoke of leaving soon, and being asked by whom his business would be settled in case he never lived to return, he replied by his brother Joseph C. When the mortgage came to be drawn, he was asked in what place he should be described as residing: he replied in Macomb county, Michigan; that he knew of no other place where he lived; and the mortgage was drawn in pursuance of such direction.

H. D. Terry testified that in June 1842 the testator proposed to him to purchase the Conger farm, of which he had the agency; that he told the testator that he did not wish to sell the farm to a speculator, and that the testator replied that he wished to purchase it to settle upon. The witness further testified that no bargain was then concluded, but that some months afterwards, Joseph C. High purchased the farm and paid for it.

In July 1842, the testator left this state, and went to New York, from which port he sailed on the 20th of that month, on board of the ship Plato, William S. Hoyt, Master, bound on a voyage to Rio Janeiro, and Montevideo

in South America. During the voyage out, his health declined rapidly. He did not leave the ship, except for occasional visits of a few hours on shore, at the ports last named.

On the 26th of October, while the Plato was lying at anchor in the harbor of Montevideo, he expressed to Captain Hoyt his consciousness that his end was approaching, and said he wished to make his will. He requested the Captain to write it, as he should dictate,—he being too feeble to write himself. This was about one o'clock, P. M., and in the cabin of the Plato. Captain Hoyt proceeded to comply with the request, and wrote the following, as it was dictated to him by said Nathaniel.

Dear Brother Joseph C. High:

Dear Brother, it has become my painful duty to call upon Capt. W. S. Hoyt to inform my distant relations of my dying request; and it is owing to the kind and brotherly treatment I have received from Capt. Hoyt, that I am not now in my grave; and I request him to notify you of my last wishes. I wish you, my brother Joseph, to make use of the money I left with you as your own. I give and grant it to you. And my watch I leave to Mary Ann, your wife. Dear Brother, I began the voyage in the hopes of obtaining my health, and after all the kind and friendly attention I could receive on the passage, I arrived safe at Rio de Janeiro. There I went on shore, but finding the climate wet, and the prospect all against me, I concluded to remain with Capt. Hoyt, and go farther south. And now, at this place, although all has been done for me possible, I am fast falling away; and I still remain with Capt. Hoyt, for I should soon die on shore, and have all the attention I can ask or wish. I had a Doct. at Rio, and he told me he could do nothing for me; and I have had a Doctor here, and he ordered me to remain on board the ship, saying that I would get no atten-

tion on shore, and the expenses are very high. Dear brother, Capt. Hoyt has done all for me that any man could do, and I am happy to know that you will feel satisfied that I found a friend in my last and trying moments. Captain Hoyt has given me friendly and christian counsel, and I hope I have profited by it, and am prepared to meet my Saviour in the world above, where all is peace and rest. I know that I have been a great sinner, and I look to Christ for pardon and acceptance. I have long been thoughtless, but now I feel there is no hope but in Christ. O, take warning from me, and turn to God, who will abundantly pardon. O give my dying words to all that are dear, and tell them to turn to Christ. And, my dear Brother, put not off the evil day until it be too late. O comfort my dear and aged Father, and see that he does not want for any thing during life. Tell him I thought of him until the last. And now, dear Brother, I have given all things into the charge of Capt. Hoyt—my papers and all my effects—to do and act as he thinks best. My note of $3410, due to me in Cuba, I have lent to Capt. Hoyt for two years from the date of the note, if he will collect it, for his great kindness to me during the time I have been with him, and in all my illness, and wish you to take his note for the same. And now, dear Brother, I bid you farewell."

Witness to signing, (Signed) *Nathaniel High.*
*Wm. S. Hoyt.*

The drawing up of this instrument occupied about two hours, and when it was finished, Capt. Hoyt read it over to said Nathaniel, who signed it, declaring at the time that it was his last will. Capt. Hoyt at the same time subscribed his name thereto as a witness. Although said Nathaneil was on the verge of the grave, and very feeble, his mind was sound and healthy. He expired at one o'clock of the next morning.

It further appeared that the testator left in the possession of his sister in this state, a large trunk containing his clothing, which remained in her possession until after his death.

*H. T. Backus* for the appellant.

*H. D. Terry & James F. Joy* contra.

WING J. delivered the opinion of the court.

The proof of the instrument claimed to be the will of Nathaniel High, and indeed the only testimony as to any of the facts in this case which transpired on board the ship Plato, is contained in the deposition of Capt. Hoyt, taken in New York, under a commission issued by the judge of Probate. In the course of the hearing in this court, objection was made to the reading of this deposition, on the ground that the court of probate had no power to issue a commission to take the testimony of a witness residing out of the state. On a hasty glance at the statute we overruled the objection, and permitted the deposition to be read, reserving the question of its admissibility, however, for further examination. The consideration we have since given to this point has confirmed us in the views expressed on the hearing.

R. S. 1838 p. 435 § 28, provides that the deposition of any witness without the state may be taken under a commission, issued to one or more competent persons, in any state or country, by *the court* in which the cause is pending," &c. Sec. 30 provides that "*the courts* may make rules as to the issuing of commissions," &c. Sec. 6 of the statute relative to probate courts, (R. S. 1838 p. 385) provides that "the several judges of probate shall, from time to time, make rules for regulating the practice, and conducting the business in their respective courts, in all cases not expressly provided for by law;" under which

section the court of probate of Macomb county, had adopted rules concerning the whole subject of taking depositions of witnesses residing without the state. Sec. 7 of the same statute authorizes the judge of probate for each county to "make and issue all warrants and processes, that may be necessary or proper to carry into effect the powers granted to him," &c. The section last quoted was borrowed from the statutes of Massachusetts. In adopting it, we must be considered as adopting also the construction which the courts of that state had previously given to it; and in *Amory* v. *Fellows*, 5 Mass. R. 222, the supreme court of that state held, that this provision authorized the judge of probate to issue a commission to take the deposition of a witness to a will residing out of the state. Even if the language of the 7th section was not sufficiently broad to confer upon the probate court the power to issue a commission, we are inclined to think it might be derived from the other provisions of the statute above quoted.*

It is contended on the part of the appellant, that the instrument admitted to probate by the court below, is not a will. We do not think this objection is well taken.

It is not necessary that any particular form of words should be used to make a will. Lord *Hardwicke* says in 3 Atk. R. 163, that "there is nothing which requires so little solemnity as the making of a will of personal estate, according to the ecclesiastical laws of England; for there is scarce any paper that they will not admit as such." Judge *Story* says, also, that to constitute such an instrument, all that is necessary is, that "it should clearly appear to be the intention of the party to have it operate after his death, and not before." 8 Law Reporter 118. See also 1 Paige 368; Will. on Ex. 58; 1 John. Ch. R. 153.

* See R. S. 1846, p. 374, § 11, conferring the power in express terms.

The instrument in question here was drawn up, at the request of a person lying at the point of death, as his will. It purports on its face to be his will—his last will. It contains a bequest of all his property, and a parting farewell to his distant relatives. He executed it as his will, in the presence of a witness, who attested its execution. He died in a few hours afterwards. What element of a will was wanting here? See authorities before cited.

Another ground taken by the appellant is, that the instrument in question is not executed with the requisite formalities to entitle it to probate in the courts of this state.

It may be laid down as a general rule, though subject to some exceptions, that the law of the owner's domicil determines the validity of every transfer, alienation, or disposition of personal property, made by the owner, whether it be *inter vivos*, or *post mortem*. Story's Confl. Laws. § 383. *Holcomb* v. *Phelps* 16 Conn. R. 132. And it is now well settled, both in England and in this country, that a will of personal property, regularly made according to the forms and solemnities required by the law of the testator's domicil, is sufficient to pass such property, in every other country in which it is situate. Ibid. §§ 465, 468. *Desesbats* v. *Berquiers*, 1 Binney 336; *Holmes* v. *Remsen*, 4 John Ch. R. 460, 469; *Harvey* v. *Richards*, 1 Mason 381, and cases cited, p. 408, note; *Dixon's Ex'rs.* v. *Ramsay's Ex'rs.*, 3 Cranch 319; *De Sobry* v. *De Laistre*, 2 Harr. and John. R. 193, 224; 4 Hagg. Ec. R. 346, 354; Encyclopedia Americana, Tit. *Domicil*; *Grattan* v. *Appleton*, 8 Law Reporter 116.

It becomes necessary, then, to ascertain what was the domicil of Nathaniel High, who executed the instrument in question, at the time of its execution, and of his death. The inquiry, it should be borne in mind, is as to his *national* domicil,—the domicil, by the law of which, the succession to his personal estate is to be governed.

It may be laid down as a settled maxim that every man must have such a national domicil somewhere. It is equally well settled that no person can have more than one such domicil, at one and the same time. *Somerville* v. *Somerville*, 5 Ves. 786. It follows from these maxims, that a man retains his domicil of origin until he changes it, by acquiring another; and so each successive domicil continues, until changed by acquiring another. And it is equally obvious that the acquisition of a new domicil does, at the same instant, terminate the preceding one. *Thorndike* v. *City of Boston*, 1 Metc. 245.

Domicil has been defined to be the place where a person has his true, fixed, permanent home, and principal establishment, and to which, whenever he is absent, he has the intention of returning *(animus revertendi.)* Enc. Amer. art. *Domicil*; Story's Confl. Laws, § 41. It has been otherwise defined to be the habitation fixed in any place without any present intention of removing therefrom. Story's Confl. Laws, § 43; *Putnam* v. *Johnson*, 10 Mass. R. 488. It is always that place which has more of the qualities of a principal or permanent residence, and more pretensions to be considered as such, than any other place. Two things, it is said, must concur to constitute domicil. First, residence, which however is not indispensable to retain domicil after it has been once acquired; and, secondly, intention of making it the home of the party. Story's Confl. Laws, § 44. The question of domicil is, then, a question of fact and intent, and if these elements are found, the reference of the domicil to one place or another depends upon the comparative weight of the circumstances. In the language of the chief Justice, in *Abington* v. *North Bridgewater*, 23 Pick. 178, "it depends, not upon proving particular facts, but whether all the facts and circumstances taken together, tending to show that a man has his home or domicil in one place, overbalance all the

like proofs tending to establish it in another." See also, *The Venus*, 3 Pet. Cond. R. 115; Story's Confl. Laws, p. 44, 45; Enc. Amer. *Domicil*; 3 Hagg. Eccles. R. 172; *Lyman* v. *Fisk*, 17 Pick. R. 234; *Thorndike* v. *City of Boston*, 1 Metc. 242, 245.

It appears from the evidence in this case, that the testator was born in Vermont, about the year 1812, where he continued to reside with his parents, who were domiciled there, until he went South some time prior to 1832, and before he had attained the age of twenty one. Vermont, then, was the domicil of his birth or nativity; Story's Confl. Law, § 46; and it continued to be his domicil until he acquired another, which he could not do until he arrived at full age, and became a person *sui juris*. 1 Binney 352. Encyc. Amer. 614. He acquired no other domicil until he went South. He remained at the South until 1842, when he came to this state. Where he was during all this time does not appear, but for several years previous to his return to this country, he appears to have been on the Island of Cuba; and from all of the facts in the case it is fair to presume that he was in business there. He had accumulated some property, and had debts due him there. During his absence, he does not appear to have had any fixed residence elsewhere. After his return to this country he said that he had been roaming about the world, and could not tell when asked where he lived: that he had then just come to this country to visit his friends. He had remained unmarried. Whether, when he left the parental roof, it was with the intention of again returning to the United States, does not appear. Did he, during his absence, lose his domicil in Vermont, and acquire a new one in Cuba? "If," says Judge *Story*, "a person has actually removed to another place, with the intention of remaining there for an indefinite time, and as a place of fixed present domicil, it becomes his place of

domicil, notwithstanding he may entertain a floating intention to return at some future period." Confl. Laws, § 46. Again, "If a man is unmarried, that is generally deemed the place of his domicil, where he transacts his business, exercises his profession, and assumes and exercises municipal duties and privileges." Ibid. § 47. In view of these principles, I think it may be fairly concluded, from the facts in this case, that during his absence at the South the testator abandoned his domicil in Vermont, and acquired a new one in Cuba.

Did the testator afterwards abandon this domicil and acquire a new one in this state? It seems probable that before leaving Cuba, he had sold his property and closed his business there. He seems to have left there without any fixed intention as to his future domicil, or, perhaps, with the intention of returning, and to have come to this state on a visit to his parents and other relatives who resided here. He stated to Capt. Canfield that this was the object of his coming here. He remained here several months, residing with his relatives. While here he seems to have formed and frequently expressed a determination to make this his home. 1 Metc. R. 244; 7 Id. 201; 17 Pick. 234. He was enfeebled by disease, and was without family ties elsewhere. The love of kindred which would naturally operate most strongly upon a person in his situation, drew him here. His acts while here, as well as his declarations, evinced an intention to make this his home. He negotiated for the purchase of a farm, not, as he said, on speculation, but to settle upon; that he might have a place to call his own—his home. He loaned money on bond and mortgage, and by his own direction was described in the mortgage as residing here. It is needless to recapitulate here all the evidence on this point, as it will be found in the preceding statement of the case. But we think that all the facts taken together,

show clearly, that he abandoned his domicil in Cuba, and acquired a new one in this state. He certainly had abandoned his domicil in Cuba. As we have seen, he must at the same time have acquired a new one some where else. What other place than Macomb county could have been his new domicil? Did not Macomb county most clearly have more of the qualities of his fixed and permanent residence than any other place? See *The Venus*, 3 Pet. Cond. R. 115; Encl. Amer. *Domicil;* 3 Hagg. Eccles. R. 172; *Catlin* v. *Gladding*, 4 Mason's R. 308; *Ex parte Wrigby*, 8 Wend. 134; 3 Vesey, 202; 2 Pet. Cond. R. 600.

It remains to inquire whether this state continued to be the testator's domicil until his death. As to this I think there can be no doubt. The testator left this state in July 1842, and proceeding directly to New York, he took passage on board of the ship Plato, bound for Rio Janeiro and Montivedeo, South America. He remained on board of the ship, with the exception of occasional visits of a few hours on shore, while she was in port, until his death, in the harbor of Montevideo. The testimony shows that this voyage was undertaken by the advice of his physicians, for the sole purpose of regaining his health; that he considered his recovery doubtful; but that, if he lived, he intended to return to Macomb. Judge *Story* says that, "in many cases, actual residence is not indispensable to retain a domicil, after it has been once acquired; but it is retained, *animo solo*, by the mere intention not to change it. If, therefore, a person leave his home for temporary purposes, but with an intention to return to it, this change of place is not in law a change of domicil. Thus, if a person go on a voyage to sea, or to a foreign country, for *health*, or pleasure, or business of a temporary nature, with an intention to return, such transitory residence does not constitute a new domicil, or amount to an abandon-

ment of the old one." Story's Confl. L. § 44. Our conclusion, then, is that at the time of the testators death his domicil was in this state.

We have before seen that the law of the testator's domicil governs as to the formalities required in the execution of a will. It remains, then, to inquire whether the instrument in question here was executed with the formalities required by the law of this state?

It is urged that its execution should have been attested by three subscribing witnesses.

By the common law, every man has the right to dispose by will, of his personal property; and this right existed from the earliest period. Will. on Ex'rs. 103; 2 Bl. Com. 492.

This right is confirmed by § 4, of Ch. 1, p. 270, of R. S. 1838,* which provides, "that any person, of full age and sound mind, may, by his last will and testament, in writing, bequeath and dispose of all his personal estate remaing at his decease, and all his right thereto and interest therein." The 5th section of the same chapter, as amended by the act of 1839, (S. L. 1839 p. 220, § 14.) contains the only statutory provision relative to the attestation of wills. It is as follows: "No will, except," &c., "shall be effectual to pass any estate, whether real or personal, nor to change, or in any way to effect the same, unless it be in writing, and signed by the testator, or by some person in his presence and by his express direction, and attested and subscribed in the presence of the testator, by three or more competent witnesses, *if made within this state.*"†

The section last quoted, is, in express terms, limited in its application to wills executed within this state. It cannot, without violence to its language, be applied to the in-

* Re-enacted by R. S. 1846, p. 276, § 4.

† Substantially re-enacted by R. S. 1846, p. 276, § 5.

strument in question, which was executed at Montevideo, in South America.

The statute, then, confirms the previously existing common law right of every person to dispose of his property by will. It prescribes the formalities with which wills must be executed, when made within the state; but as to wills executed abroad, by parties domiciled here, and which we have already seen are governed by the laws of this state it is silent. What, then, is the law of this state as to such wills? We answer the common law, which is in force here except so far as it is repugnant to, or inconsistent with, our constitution or statutes.† Now by the common law, it is not essential to the validity of a will that it should be attested by witnesses. Will. on Ex'rs. 50. The instrument in question was executed with all the formalities which that law requires. The conclusion seems inevitable, then, that it was a valid will, properly executed, and that it is entitled to probate.

We are aware that it follows as a consequence of the view we have taken of the law of this state, that the most extensive estates, whether real or personal, may be devised by will executed without the state, by a party domiciled here, without any attestation whatever, and that this seems inconsistent with the policy of the statute which requires all wills executed within the state to be attested by three witnesses. But the statute is clear and explicit in its language: it requires attestation only, provided the will is executed within the state; and it would be an unwarrantable act of judicial legislation to construe it so as to apply to wills executed abroad.

On the argument, the counsel for the appellee asked whether, even if the evidence had not clearly established the fact of the testator's domicil in this state, it being shown

† *Stout* v. *Keyes*, ante. p. 84.

that he did not reside either in Vermont or Cuba; that, in the language of Justice *Washington*, he had turned his back upon both of these places; and that he was at Montevideo only for a special purpose, for a few days, and by compulsion; this court could presume that he had a domicil somewhere abroad, and that by the law of that domicil such a will was not valid? We think not. 8 Conn. R. 254; 7 Pick. 94; 4 Mass. R. 593. Under such circumstances, it being shown that the will was made out of the state, that it was found in the possession of a brother here, that it does not contravene our statute, but is duly executed under our laws, does not that *prima facie* entitle it to probate? In the absence of any proof we think it will be presumed that the common law prevails where the will was made. *Jones* v. *Palmer*, 1 Dougl. Mich. R. 379; 4 Ph. Ev. by C. &. H. 1126; 1 Cowen, 108; 10 Wend. 75; 1 Harr. & John. 710.

It was contended on the trial, that captain Hoyt was not a competent witness to the will, because he was a legatee. The testator, before his death, delivered the note due to him in Cuba, to captain Hoyt, giving him the use of it, for two years, in case he would collect it, as a compensation for his care and kindness. The fact that he had done so, is stated in the will; but we do not think that this made captain Hoyt a legatee, or that he derived any interest under the will. Besides, by our statute, a legacy to a witness is void. R. S. 1838, p. 271, § 7.* Where such is the case, a witness is competent. 2 Bl. Com. 377; 4 Cow. & H. Ph. Ev. 1342.

We are of opinion that the will in question should be admitted to probate.

* See R. S. 1846, p. 277, § 7.

## Reuben Town *v.* The President, Directors and Company of the Bank of River Raisin, Charles Noble, Harry V. Man, Lewis A. Hall, and Henry N. Walker, Attorney General.

An act of incorporation being a compact between the state and the corporators, the corporation cannot dissolve itself, by its own act merely; but a dissolution can only be effected by the assent of both of the parties to the compact, or by the judgment of a court of competent jurisdiction. *Semble.*

Where the directors of an insolvent bank, with the assent of a majority, though without the knowledge of some of its stockholders, assigned all the corporate property to trustees for the payment of the debts of the bank, preferring particular creditors, *it was held*, that the assignment was valid at common law, and was not in contravention of the policy of the statutes of this state.

*It seems* that such an assignment does not, *per se*, operate as a dissolution of the corporation, or surrender of its franchises.

And that the power to make such an assignment, though not conferred by charter, is incident to the general powers conferred upon banking corporations.

The acts providing for proceedings in chancery against corporations, (S. L. 1837, p. 306,) and for the voluntary dissolution of corporations, (S. L. 1839, p. 94,) are not in the nature of statutes of bankruptcy applicable to corporations.

Appeal from Chancery.

The act of the legislative council of the late territory of Michigan, to incorporate "The President, Directors and Company of the Bank of River Raisin," took effect on the 29th of June, 1832, and conferred upon the persons who should become stockholders of the bank, corporate capacity, with the usual powers incident to banking incorporations.

Soon afterwards, the bank was organized under the provisions of this charter, and commenced doing ordinary banking business, which it continued to do, with the exception of suspensions and and interruptions which occurred between 1838 and 1842, until about the 15th of

May, 1846, when it became wholly unable to meet its engagements, and was compelled to suspend specie payments, and to cease from doing business as a bank, and remained in that condition until the time of the filing of the bill in this case.

On the said 15th of May, the President and Directors of the Bank, without the knowledge or assent of some of its stockholders, but with the approbation of a majority in interest of them, executed, in the name of the corporation, a deed of assignment, by which all the corporate property and effects were conveyed to Charles Noble, Lewis Hall, and Harry V. Man, *in trust*, for the purposes following, to wit: to be collected and sold, as the case and the interest of the creditors of the bank might require, and converted into money, as speedily as might be, for the payment and satisfaction, first, of the debts due from the bank to sundry preferred creditors, in the order of their classification in the assignment; and then for the payment, rateably, of all the other debts and liabilities of the bank. And, finally, the assignment provided that if any surplus should remain in the hands of the assignees, after paying all the debts and liabilities of the bank, and the expenses of the trust, the same should be distributed among the stockholders of the bank according to their respective amounts of stock. The assignees accepted, and proceeded to execute the trust.

In October, 1846, Reuben Town, a creditor of the bank, holding its bills to the amount of $235, which had been presented to the bank for payment and payment refused, filed the bill in this case, against the bank, and the said Noble, Hall, and Man, its assignees, and also against the Attorney General, alleging the above facts, among others, and praying for an injunction restraining the bank from further exercising corporate rights, privileges, or franchises, &c., and said assignees from all further proceedings

under said assignment; and also praying that the assignment might be declared illegal and void, and the said assignees made to account for their doings in the premises; and that the bank might be dissolved, and a receiver appointed to take charge of its effects, &c.

The defendants answered, admitting the facts above stated, but denying the other allegations in the bill.

Subsequently, on hearing before the Chancellor, upon bill and answer, of a motion by the complainant for an injunction, and for the appointment of a receiver, it having been intimated by counsel for the respective parties that the cause would be taken by appeal to this court, the Chancellor, without deliberation, and with the view of expediting the appeal, granted an order for an injunction according to the prayer of the bill, and referring it to a master to appoint a receiver to take charge of the property and effects of the bank, with the rights, powers and duties of receivers under the statute in such case made and provided.

From this order the defendants appealed to this court.

The proceedings in this case were had under the acts providing for proceedings in chancery against corporations, (S. L. 1837, p. 306,) and for the voluntary dissolution of corporations. (S. L. 1839, pp. 94, 101, §§ 38, 39.)

*R. Manning* and *T. Romeyn*, for complainant.

I. The validity of the assignment by the bank, is involved in this case.

II. The assignment is illegal, and should be declared void *at common law.*

1. It contemplates a dissolution of the corporation, and, if sustained, will be, in legal effect, a surrender of its franchises. *Bank Commissioners* v. *Bank of Brest*, 1 Harr. Ch. R. 111; *Slee* v. *Bloom*, 19 John. R. 456; *People* v. *Bank of Hudson*, 6 Cow. 299; *Boston Glass Manufactory* v.

*Langdon*, 2 Pick. R. 53; *Beaston* v. *Farmers Bank of Delaware*, 12 Peters, 138, per *Story*, J. *dissentiente.*

2. A corporation, even if its stockholders desire it, has no right to surrender its franchises and terminate its existence, without the assent of the power that created it. 1 Bl. Com. 485; Ang. &. Ames on Corp. 656, § 4; Will. on Corp. 230, 332, § 681, and cases there cited; *Enfield Toll Bridge Co.* v. *Connecticut River Co.*, 7 Conn. R. 45; 2 Kent's Com. 311, 260; *Revere* v. *Boston Copper Co.*, 15 Pick. R. 359, 360; *Boston Glass Manufactory* v. *Langdon*, 24 Id. 53; *Crease* v. *Babcock*, 23 Id. 342, '3; *Ward* v. *Sea Ins. Co.*, 7 Paige, 297.

3. Even if the body of the corporation may so dissolve it, the directors have not the right so to do. *Niagara Ins. Co.*, 1 Paige, 260; Will. on Corp. 332; 12 Peters, 138; *Smith* v. *Smith*, 3 S. Car. Eq. R. 574—'6; 2 Kent's Com. 312, '13; 7 Paige, 297, '8; *Bank Commissioners* v. *Bank of Brest*, Harr. Ch. R. 111.

Under this we contend—*First:* That this illegality is not cured by the want of dissent, or even by the subsequent assent of the stockholders;—and, *Secondly:* That the complainant, as a creditor, may insist on the illegality.

4. If the assignment be not viewed as a surrender of all corporate rights, still it was unauthorized by the charter or other law, and is therefore void. No power to make it is expressly given, and none can be implied, 2 Kent's Com. 298, '9; *Dartmouth College* v. *Woodward*, 4 Wheat. 636; *Charles River Bridge* v. *Warren Bridge*, 11 Peters, 544; *State* v. *Granville Alexandrian Society*, 11 Ohio R. 12; *Kemper's Lessee* v. *Cincinnatti, &c. Turnpike Co.*, Ibid. 392; 2 Barn. & Adol. 792; *Knowles' Lessee* v. *Beatty*, 4 Peters, 152. The exercise of such a power is a violation of the contract with the state contained in the charter. *Ward* v. *Sea Insurance Co.*, 7 Paige, 297; Ang. & Ames

on Corp. 510, Old Ed.; *People* v. *Bank of Hudson*, 6 Cowen, 217.

The power of a corporation to make an assignment of all its effects cannot be considered as established by adjudication. The power to make such an assignment was not involved in *State of Maryland* v. *Bank of Maryland*, 6 Gill. & John. 205, nor in *Union Bank of Tennessee* v. *Ellicott*, Ibid. 363, and what was said on the subject was *dictum*. *Catlin* v. *The Eagle Bank of New Haven*, 6 Conn. R. 233, *Savings Bank of New Haven* v. *Bates*, 8 Id. 512, and *Dana* v. *Bank of the United States*, 5 Watts & Sarg. 233, were cases of particular, and not of general assignments. *Ex parte Conway*, 4 Ark. R. 302, was decided on the authority of the Maryland and Connecticut cases. The reasoning of the court is evidently fallacious; and the objection taken by us, that such an assignment is void because it is a violation of the charter of the corporation, was not taken by counsel, or passed on by the court. The point decided in *Brace* v. *Bishop*, 3 Wend. 13, was, that the title of the plaintiffs to the note in suit was good by virtue of an appointment by the court of chancery as receivers, &c. What the court said on p. 17, as to the validity of the assignment, is *dictum*; is but an opinion that it was not within the policy of the New York act, and did not refer to the general doctrine of the common law; is opposed to the ruling of the circuit judge and of the court of chancery; is not law on its face, being opposed to the New York statute; and refers to an assignment different from the one in question here, as it contemplated a continuance of the bank, and created no preferences.

III. The assignment is illegal, and should be declared void *under the statutes of this state.*

1. It is void as opposed to the provisions of the act of 1839, (S. L. 1839, p. 94,) entitled "an act to provide for the voluntary dissolution of corporations, and to prescribe

the duties of receivers in chancery in certain cases, and for other purposes." Under this act no corporation can close its affairs, or surrender its charter, without the assent of the state in legal form.

2. It should be declared void, because, having been made in contemplation of insolvency and of a dissolution of the corporation, *to trustees of the directors' selection*, and *preferring some creditors to others*, it is a fraud upon creditors, and contrary to the policy of the statutes of 1836, (S. L. 1836, p. 157,) of 1837, (S. L. 1837, p. 307,) to R. S. 1838, p. 229, and to the statute of 1839, (S. L. 1839, p. 94.) *First:* These contemplate an equal distribution among creditors, of the assets of an insolvent corporation, and under the supervision and control of chancery, through the agency of its own officers. *Second:* They are *bankrupt* laws, and are to be construed together as one system, and favorably for creditors. 2 Kent's Com. 315; 2 Hoven. on Frauds, 331; 1 Burr. 474. *Third:* Transactions contravening the *policy* of these acts are void, even if they are not within the letter. 2 Hov. on Frauds, 368, '9, 360, '1; Cowp. R. 123—5, 632, '3; 3 Ves. 85; 6 T. R. 84; 1 Burr. 476, 482; 14 Ves. 188, note, new ed.; 4 Burr. 2239, '40; 16 Eng. C. L. R. 88; 1 John R. 373, '4; 5 Id. 424; 1 Stark. R. 70, (or 89.)

IV. Chancery has jurisdiction to set aside an unlawful assignment, not only on general principles, but under the statute 1839. S. L. 1839, p. 103, § 47.

*A. D. Fraser*, (with whom was *J. F. Joy*,) for the defendants.

1. The assignment is valid: it is not in violation of law; nor is it impeached on the ground of fraud.

All corporations have the absolute *jus disponendi* of their property, neither limited as to objects, nor circumscribed as to quantity, unless restrained by charter, or by some

unequivocal provisions of law;—having the same power in this respect as an individual. 1 Kyd. on Corp. 108; 1 Siderfin, 161, notes; 4 Com. Dig. Tit. Franchise (F.) 11, 12; 10 Co. 306; 10 Rep. 1. A corporation may, although insolvent, assign its property in trust for the payment of its debts,—defeating, by preferences, when the law does not inhibit it, the priority of the state. Ang. & Ames on Corp. 126; Kent's Com. 315, note; *State* v. *Bank of Maryland*, 6 Gill. & John. 205; *Union Bank of Tennessee* v. *Ellicott*, Ibid. 363, '71; *Warner* v. *Mower*, 11 Verm. R. 385; *Pope* v. *Stewart*, 2 Stew. R. 401; 2 Bland's Ch. R. 142; *Ex parte Conway*, 4 Ark. R. 302, '46; *Catlin* v. *Eagle Bank of New Haven*, 6 Conn. R. 233; *Savings Bank of New Haven* v. *Bates*, 8 Id. 512; *Dana* v. *Bank of United States*, 5 Watts & Sarg. 240; 3 Id. 205; *Revere* v. *Boston Copper Co.*, 15 Pick. 351; *Lenox* v. *Roberts*, 2 Wheat. 373; 7 Gill. & John. 459, 465; *Brace* v. *Bishop*, 3 Wend. 13; 5 Id. 570; 1 Brock. C. C. R. 461.

2. It may be said that this construction would place too large authority in the hands of the corporate officers, who might place the property beyond the reach of the members; but this court can aid in the case of fraud, and the security against improvidence and bad management must be looked for in the interests, wisdom, and justice of the official agents. 4 & 5 Ohio R. 205; 1 Ves. & Bea. 226.

3. Now there is no fraud here alleged or proved. On the contrary, the object—the payment of the debts of the bank—is a most laudable one. On general principles, therefore, this assignment is perfectly valid, and notwithstanding the bankrupt and insolvent laws. *Pickstoek* v. *Lyster*, 3 Maule & Selw. 371; *Mease* v. *Howel*, 4 East. 1; 5 T. R. 420; *Inglis* v. *Grant*, Ibid. 526; *Nunn* v. *Wilsmore*, 8 Id. 520; *Rex* v. *Watson*, 3 Price Ex. R. 6; *Bailey* v. *Burton*, 8 Wend. 348; *Hunter* v. *U. S.*, 5 Peters, 173; 3 Com. Dig. 285, Title *Covin*, B. 2; *Fidgedon* v. *Beecher*, 2

Rose R. 153; *Goss* v. *Neale*, 16 Eng. C. L. R. 387; *Phenix* v. *Ingraham's Assignee*, 5 John. R. 425; *Brooke* v. *Marbury*, 6 Pet. Cond. R. 233; *U. S.* v. *King*, Wallace C. C. R. 21; *Wheelwright* v. *Jackson*, 1 Eng. C. L. R. 30; S. C. Ibid. 217; 3 Taunt. 241; *Small* v. *Ondley*, 2 P. Wms. 427.

4. The objection that it was incompetent for the directors to execute the assignment without the concurrence of the stockholders, is untenable, as coming from the present complainant. If their consent was necessary, their acquiescence is sufficient, for *they* do not complain; and it was done with the assent of a large majority of the stockholders. No person can make complaint on this head but the stockholders. 2 Kyd on Corp. 466; 1 Id. 308; *State* v. *Bank of Vincennes*, 1 Blackf. R. 277; Ang. & Ames on Corp. 167, 213, 214, 155—160; *Robins* v. *Embree*, 1 Smedes & Marsh. Ch. R. 207, 269; *Spear* v. *Ladd*, 11 Mass. R. 94; 2 Metc. R. 167.

5. Assuming that the assignment operated as a surrender of the charter it would not therefore be void. It is surely competent for the bank to close its affairs at any time, and in its own way, even if a surrender followed: this is an incident which belongs to every corporation. But the assignment has no such effect: the corporation is not even dissolved by the judgment of seizure, but exists until the franchises are seized by execution on the judgment. *Hackstone* v. *Bishop*, 1 Wend. 1; 2 Kyd on Corp. 446, 466; *State* v. *Bank of Vincennes*, 1 Blackf. R. 271, 282.

6. The assignment is not in violation of the acts of 1837 and 1839, (S. L. 1837, p. 306—'8, S. L. 1839, p. 94—105,) whether the bank was solvent or not. These statutes no where prohibit such an assignment. They are not in their nature bankrupt laws, (2 Bl. Com. 209, 307;) but were designed merely to prevent the *fraudulent disposition of their property*, by banking corporations.

WHIPPLE, J. delivered the opinion of the Court.

On the part of the complainant, it is contended, that the assignment is void, on general principles, and irrespective of the statutes of this state.

The first reason offered in support of this proposition is, that the assignment is in effect a surrender of the franchises of the corporation, without the concurrence of the state. No rule is better settled than that a corporation may be dissolved, by the surrender of its franchise of being a corporation into the hands of the government: if accepted by the government, the dissolution becomes effectual. The modes in which a surrender is to be made, and as to what facts constitute a surrender, have been a fruitful subject of discussion in the courts of this country. In England, the surrender is by deed to the King, by whom corporations are usually created by charter. In this country, corporations are created by an act of the legislature, and it would seem to follow, in the absence of any statute prescribing the mode in which a surrender is to be made, that to become available, it must be accepted by the authority which created the corporation. I have no doubt that a surrender made by the great body of the society, and accepted by the legislature, would operate as a dissolution of the corporation; but such a surrender and acceptance would not, perhaps, in this country, absolve the corporation from any of its liabilities,—contracts being protected by the constitution of the United States.

Regarding an act of incorporation, when accepted, as a contract between the state and the corporation, it would, then, appear necessary, in order to dissolve a corporation, that the consent of both parties should be obtained. If, therefore, the members of a corporation are desirous of bringing its business to a close, a resolution to surrender by the great body of the corporators, being presented to the legislature, and assented to by that body in the form of a

legislative act, would be effectual to dissolve the corporation. So an act of the legislature repealing the charter, if assented to by the corporation, would operate as a dissolution. That a corporation, by its own act, can dissolve itself, is no where asserted, nor can it be sustained: this must be done by the concurrence of the parties to the compact, or by the solemn judgment of a court of competent jurisdiction. See Ang. & Ames on Corp. 656, '7, '8, and authorities cited in note; 15 Pick. 351, *(Revere* v. *Boston Copper Co.;)* 24 Pick. 49, *(Boston Glass Manufactory* v. *Langdon,)* and cases there cited; 2 Kent's Com. 310.

Applying these rules and principles to the case before us, it would be difficult to maintain, that the assignment either operated as a surrender of the charter, or a dissolution of the corporation. The deed of assignment does not indicate, on the part of the corporation, any design to surrender its franchises, or contemplate a dissolution. On the contrary, it appears from the deed that the assignment was executed on account of the inability of the the bank to pay, at that time, its debts, on demand, owing to the difficulty of converting the property and assets of the bank into cash; and the answer, though it admits that the bank had suspended the payment of its debts in specie, and failed to meet its engagements, and had ceased to do banking business, does not admit that the bank will prove insolvent, or be unable ultimately to pay its creditors.

Admitting for a moment the legal competency of the corporation to make an effectual surrender of its franchises without the consent of the state, it is apprehended that the facts disclosed in the deed of assignment and answer would not amount to such surrender. It is not essential to the existence of a corporation that it should possess property; its legal existence, therefore, is not ne-

cessarily determined by even actual insolvency. 24 Pick. R. 53. The *franchise* remained, although the bank may have assigned all its property to pay its debts. By thus dispossessing itself of its property, the bank might be under the necessity of discontinuing, temporarily, and perhaps permanently, its proper and legitimate business. The capital stock of the bank was $100,000, with the power to increase it to $500,000. Suppose on the day following the assignment, the bank had, by resolution, increased its capital stock $100,000, and that this amount had been actually paid in, and the usual business of the bank resumed; could it be contended that the assignment of all the property that it possessed the day before, would have so far operated as a dissolution as to render all the subsequent acts nugatory? I think not. The existence of the franchise would have continued unless the state had interposed; had arrested the proceedings by some legal measure, founded on a violation by the bank of some law by which it was bound. But suppose that the bank had ceased to perform its functions for a year, for the want of the necessary means of action; would this circumstance operate *per se* as a dissolution of the franchise? It is believed that it would not. The body may have lain dormant during that year, but, if in a condition to be revived, and if in point of fact it is revived, I know of no reason why it may not continue its business. By thus failing to fulfil the purposes of its creation, its franchises may be liable to forfeiture; but this forfeiture can only take effect after a judgment by a competent judicial tribunal, upon a direct proceeding instituted for that purpose, by the state, or under its authority and sanction. The corporate existence would, in the case supposed, as in every other case of neglect of duty, or abuse of power, continue until that existence is determined by a judicial decree. If the state does not choose to institute the

necessary proceedings, with a view to a dissolution, the acts of the bank, within the range of the powers conferred upon it, would be valid and binding; and the question as to whether it had forfeited its charter could not be inquired into in a collateral action.

To sustain the position that the assignment made by the bank was tantamount to a surrender of its charter, we have been cited to numerous cases, which I now propose to examine very briefly. In the case of *The Bank Commissioners* v. *Bank of Brest*, Harr. Ch. R. 106, Chancellor *Farnsworth* uses this language: "If this assignment is valid, it is no doubt a surrender of its charter; for if a corporation suffers acts to be done which destroy the end and object for which it was instituted, it is equivalent to a surrender of its rights." To support this doctrine the Chancellor refers to the following cases, which have also been cited by counsel, viz: *Slee* v. *Bloom*, 19 John. R. 456, and *The People* v. *Bank of Hudson*, 6 Cow. 219. In the first case, Chief Justice *Spencer*, in delivering the opinion of the court, says: "The ground on which I place my opinion that the corporation is dissolved, is, that they have done and suffered to be done acts *equivalent* to a surrender." Of the correctness of this opinion, there can be no doubt, if it be confined to the facts of the case then before the court; but if it was intended as the statement of a general principle, applicable to all corporations, and to a different state of facts, then it is apprehended, that it is not sustained by elementary writers or adjudged cases.

To ascertain how far the case of *Slee* v. *Bloom* supports the doctrine contended for, and the ruling of the Chancellor in the case of *The Bank Commissioners* v. *Bank of Brest*, it will be necessary to understand the facts upon which the decision of the court was based. In 1814, the respondents associated together and became a corporation

according to the provisions of the statute of New York relative to corporations for manufacturing purposes. In 1816, it was resolved that it was inexpedient to continue the factory in operation. After 1817, there was no meeting of the trustees, nor any business or act done by the corporation. In 1818, all the property of the corporation, real and personal, was sold under an execution. In 1819, Slee, who was a creditor of the corporation, filed his bill to charge the defendants, under the provisions of the seventh section of the act which made the corporators liable individually for the debts of the corporation to the extent of their respective shares of the stock, *after the dissolution of the corporation.* The question before the court was, whether the corporation, according to the true intent and meaning of the seventh section of the act, was *dissolved*, so as to render the respondents individually liable, although no judicial decree of dissolving the corporation had been pronounced. It is easy to perceive how the act above stated, would justify the opinion of the court of errors, that, according to the true intent and meaning of the act, there was such a *dissolution* of the corporation as would render the corporators liable in their individual capacity. The whole business of the corporation was, by a solemn resolution, discontinued, and all its effects sold under an execution. It certainly never was contemplated by the legislature that a creditor was bound to wait until the expiration of the time limited for the continuance of the corporation, (twenty years,) or until it was legally dissolved by a proceeding to be instituted by the state to annul the charter, before he could avail himself of the remedy provided by the act under which the corporation was organized. For the purpose of affording a remedy to creditors, the corporation was virtually *dissolved* [in 1818, by unequivocal acts indicating an abandonment of their franchises.

The facts, then, justified the principle laid down by Chief Justice *Spencer;* and it would be fair to infer that it was only to be applied to cases where debts due by a corporation, at the time of its dissolution, *were chargeable to the individual members*, or other special cases; although a reference, in the opinion of the Chief Justice, to 2 Kyd on Corporations, might induce the belief that the principle stated by him was intended to have a more extended application. The quotation from Kyd is as follows: "The rule adopted in all the cases which have occurred on this question, seems to have been this, that where the effect of the surrender is to destroy the end for which the corporation or corporate capacity was instituted, the corporation or corporate capacity is itself destroyed." Immediately preceding this passage, and in connection with it, Kyd uses this language: "That a corporation may, in point of fact, destroy itself, by its own act, seems as easy to be comprehended, as that a natural person may put an end to his life by his own hands. The acting part of the corporation put the common seal to a deed of surrender; carry up all their charters to St. James', and lay them at the King's feet; procure the surrender to be enrolled, and desert all the corporate functions; must not the consequence be that in a little time the corporate existence must be at an end?" And, in a passage immediately following the text above quoted, we find illustrations of it, which tend to show the application and extent of the principle it embodies. "Thus," says Lord *Coke*, on the authority of the book of assize, "if there be a Warden of a Chapel, and the Chapel and possessions be alienated, he ceases to be a corporation, because he cannot be Warden of nothing. But if the body of a prebend be a manor and no more, and the manor be recovered from the prebendary by title paramount, yet his corporate capacity remains, because he has *stallum in choro et vocem in capitulo*, and

he is prebendary, although he have no possessions." The mode of dissolving a corporation in England *by a surrender of its franchises*, is clearly pointed out; and it would seem to follow that unless the effect of the surrender is to destroy the end for which the corporation was instituted, the corporation is not destroyed; or in other words, *there may be a surrender*, without a dissolution of the corporate capacity.

If the rule as laid down by Kyd be correct, I think the learned Chief Justice could hardly have intended to convey the idea that the acts done and suffered by the corporation referred to in the case of *Slee* v. *Bloom*, operated to all intents and purposes as an actual surrender, or that the corporate existence was at an end. That it continued, so as to enable the corporation to sue by its corporate name, and to receive payment of debts, there can be no doubt. It is equally clear, that a suit might have been maintained against the corporation by a creditor seeking to charge it with a debt. This is the view of that decision taken by Chancellor *Kent*, (2 Com. 312.) He says: "It was held in the court of errors of New York, in *Slee* v. *Bloom*, that the trustees of a private corporation may do what would be equivalent to a surrender of their trust, by an intentional abandonment of their franchises, so as to warrant a court of justice to consider the corporation as in fact dissolved. But that case is not to be carried beyond the precise facts on which it rested. It ought only to be applied to a case where the debts due at the time of the dissolution are chargeable on the individual members, and then it becomes a safe precedent. It amounts only to this, that if a private corporation suffer all their property to be sacrificed, and the trustees actually relinquish their trust, and omit the annual election, and do no act manifesting an intention to resume their corporate functions, the courts of justice may, *for the sake of the remedy*,

*and in favor of creditors* who, in such case, have the remedy against the individual members, presume a virtual surrender of the corporate rights, and a dissolution of the corporation. This is the utmost extent to which the doctrine was carried, and, in such a case, it is a safe and reasonable doctrine." The same view of the case of *Slee* v. *Bloom*, is taken in Angel & Ames on Corporations, 659. It is there said, that "if a corporation, being indebted, suffer all its property to be sacrificed, and the trustees actually relinquish their trust and omit the annual election, and do no one act manifesting an intention to resume their corporate functions, the courts may, *for the sake of the remedy against the individual members, and in favor of creditors*, presume a *virtual* surrender," &c. And again: "The courts of New York did not decide that the corporations had lost all their rights, but that even if they had a right to reorganize themselves, the case had happened in which, with regard to their creditors, they were dissolved."

In the case of *Revere* v. *The Boston Copper Co.*, 15 Pick. 351, the facts were that a majority of the stockholders voted to dissolve the corporation, and wind up its affairs. To carry out this resolution, all the property was transferred to trustees, with authority to pay the debts and distribute the surplus among the stockholders; and they gave notice to the executive department of the government, that they claimed no further interest in their act of incorporation. The supreme court held, "that, by the acts disclosed, the corporation was not dissolved." In the case of *The Boston Glass Manufactory* v. *Langdon*, 24 Pick. 49, it was decided that a corporation could not surrender its charter without some solemn act of the corporation for that purpose; and that a surrender would not be of any avail until accepted by the government. In the case the corporation became actually insolvent; assigned all its

property for the payment of its debts; and omitted, for several years, to choose officers, or to hold meetings. In both of the cases last cited, the case of *Slee* v. *Bloom* was referred to by counsel, who insisted that the insolvency of a corporation, alienation of all its property, and cessation to do business, amounted to a dissolution. The supreme court of Massachusetts, however, rejected this doctrine, and held that such acts did not extinguish the legal existence of a corporation.

These authorities, if sound, are conclusive upon the first proposition made by the counsel for the complainant. They establish beyond controversy, that the acts done and suffered by the Bank of River Raisin were, in no legal sense, a surrender of their chartered rights, nor did they work a dissolution of the corporation.* The cases of *The Bank Commissioners* v. *Bank of Brest*, and *The People* v. *Bank of Hudson*, purport to be based upon that of *Slee* v. *Bloom*. The Chancellor of this state, in the first case, and the supreme court of New York in the second, seem to have given to the opinion of Chief Justice *Spencer* in *Slee* v. *Bloom*, a scope and meaning not warranted by the facts of the case. The broad language used in the opinion of Chief Justice *Spencer*, would, if construed literally, embrace the case before us; but I trust it has been shown that the doctrine therein advanced is unsound in principle, and unsupported by authority, when applied to the facts of the case before us.

The reasoning which has been employed in support of our views upon the first proposition argued by counsel, involved the discussion of the second proposition, viz: that a corporation has no right to surrender its franchises and terminate its existence, without the assent of the pow-

* In *The State* v. *The Real Estate Bank*, 5 Pike R. 596, 607, a geheral assignment by a bank though admitted to be valid, was held a good *cause* of forfeiture of its charter.

er that created it. We affirmed the correctness of the proposition that, in general, private corporations aggregate, such as are usual in this country, cannot surrender their franchises without the assent of the state. It becomes only necessary to repeat what has been already stated, that the facts do not make out a case to which the rule can be applied. The views we have already expressed, also determine the third proposition, which asserts that even if the body of the corporation have, at common law, a right to dissolve the corporation, the directors may not do it.

I shall now proceed to consider the fourth ground urged against the validity of the assignment. It was contended that if the assignment be not viewed as a surrender of all corporate rights, still, it was unauthorized by the charter, and is therefore void. I have given to this proposition, and to the very able arguments by which it was attempted to be sustained, the most careful consideration; and, in doing so, have felt strongly inclined to declare all such assignments void, unless upon clear legal principles, and strong authority, I should be driven to the necessity of affirming their validity. That the power exercised by directors in making such assignments, has been productive, in many instances, of great wrong and injustice, cannot be doubted. Preferences have been made, by which those who have knowingly contributed to bring upon the community the mischiefs which always follow in the train of bank explosions, have been secured against loss, while the innocent and unsuspecting creditor and bill holder have been the victims of the foulest frauds, and reaped the bitter fruits of misapplied confidence;—a confidence oftentimes induced by the conduct of those *preferred*, or, as they are sometimes called, *confidential* creditors. To provide a remedy which shall effectually cure the evil, is

the business of the legislature, and not of courts. *We* must expound the law as we find it.

It was contended that the power to execute this assignment was not *expressly* given by the act of incorporation, and that it could not be *implied*. We subscribe fully to the modern doctrine, so universally recognized, that corporations possess such powers only as are *specifically* granted, or as are necessary to carry into effect the *powers expressly granted*. At the common law, corporations possessed, as an incident, the capacity to purchase and alien lands and chattels; and this capacity was unlimited, except in so far as specific restraints were imposed by their charters, or by some statute by which they were bound. Chancellor *Kent*, (2 Kent's Com. 281,) says: "Independent of positive law, all corporations possess the absolute *jus disponendi*, neither limited as to objects, nor circumscribed as to quantity." Their capacities in this respect, are as full and ample over the property, as are those of a natural person, unless restricted by the charters by which they are created. In determining whether a corporation has assumed powers in derogation of its charter, we must carefully distinguish between such as are substantive, and expressly granted, and such as are merely incidental, and often necessary to its existence. The distinction between these two classes of powers is sufficiently obvious. The first class embraces the general object and purpose of its creation; and, if powers are assumed foreign to such object and purpose, its charter is liable to forfeiture at the instance of the authority by whom they were granted. The second class includes such powers as are sometimes vital to its existence, and furnish the means by which the powers expressly delegated are carried out. The case before us furnishes an apt illustration of the line of distinction I am endeavoring to draw between those powers which the charter of its cre-

ation confers upon a corporation, and such as are merely incidental. The act incorporating the River Raisin Bank, confers upon the corporation banking powers. To transact banking business, then, was the object for which it was created. If, in addition to these powers, the corporation had assumed the rights usually granted to insurance companies, or engaged in other business foreign to banking, its charter might be forfeited for an abuse of its powers. But, to accomplish the end for which it was created, it possesses, besides the powers incident to every corporation, that of employing agents and servants to transact its business; of collecting its debts; of discharging its liabilities; of converting the property and assets of the corporation into money, to fulfil its obligations to the public; and a variety of other powers peculiar to such corporations. If I have succeeded in making myself understood, it is very clear, that the authority of the bank to pay its debts is incidental, and, as the act of incorporation will show, necessary to its very existence; for a failure in this respect, would subject the franchises of the corporation to forfeiture. But while it is admitted that the bank was authorized and required, on pain of forfeiture, to employ all its assets, real and personal, to pay its debts, it is objected that the means adopted were not warranted by its charter. Because, first, corporate rights may be forfeited for non user; as, where a bank assigns so much of its property to trustees for the payment of its debts as to render it incapable of continuing its banking operations. It is admitted that a corporation may forfeit its charter as well for a *neglect*, as for an *abuse* of its franchises. But it does not necessarily follow, that a bank discontinues the exercise of all its corporate functions, by the assignment of its assets for the payment of its debts. If there exists a legal capacity to resume its business, by an increase of its capital, or otherwise, a

corporation is not dissolved, although it may not only have parted with all its property, but temporarily suspended business. Angel & Ames on Corp. 658; *Brinkerhoof* v. *Brown*, 7 John. Ch. R. 217; *State* v. *Bank of Maryland*, 6 Gill & John. 205. But if a temporary suspension of any of its powers would authorize the institution of proceedings with a view to a dissolution, it is for the state, through its judiciary, to say whether, under the circumstances, a dissolution should be decreed. A suspension of corporate functions may be waived by the power which created the corporation; but if not waived, and proceedings are instituted by the state, or under its authority, to dissolve the corporation, the court before whom the proceedings are had, would not, in the exercise of the large discretionary powers with which it is in such cases invested, decree a forfeiture, where there is a reasonable hope that it may resume its corporate duties. In other words, *non user* of its franchises, by a corporation, is not *necessarily* followed by a forfeiture of those franchises.

But it is said, secondly, that as the bank, by assigning so much of its property as to be incapable of continuing its business, may forfeit its charter, it follows that such assignment must be void. The reasoning of the counsel upon this point is, that if the right to make the assignment is unquestionable, it would be no ground of forfeiture; but as it is a ground of forfeiture, it follows that such an act is invalid. This reasoning, it appears to me, is more ingenious than sound. A forfeiture of a charter in such circumstances, does not result from the fact that the bank has appropriated its property in discharge of its liabilities, but because the bank, in performing a duty imposed by its charter, may find itself unable to act up to the end for which it was created.

The fallacy of the argument of counsel will appear, if we consider the consequences to which it would lead. It

cannot be denied that a bank is bound by high moral considerations, to dedicate the whole of its property to the payment of its debts. The duty of a corporation in this respect differs not from that of an individual. If, then, the bank, in the performance of this duty, devotes all its property for the object stated, it would incur a forfeiture of its charter, if the reasoning of counsel be sound; and yet it would be an anomalous proceeding for a court to pronounce a judgment of forfeiture against a bank, for doing an act which, if left undone, would subject it to the high penalties which follow a violation of its charter.

It is further insisted, thirdly, that the court will not imply the existence of a power which may be used to the detriment of creditors. The same argument may be used in regard to most of the implied powers which the bank possessed. Individuals are not bound to contract business relations with banks: if they do, they must incur all the hazard incident to such relation. If a person accept bills of a bank in payment of a debt, he accepts them with a full knowledge of all the powers with which the bank is invested. He knows that these powers may be abused. If, therefore, he substitutes the credit of a bank for that of an individual, he must bear all the consequences which flow from his own voluntary act.

While general assignments, made by a bank, of all its property for the benefit of creditors, are considered by counsel as invalid, especially where preferences are created in favor of particular creditors, the legality of special assignments is admitted. The reason given for the distinction is, that a special assignment is made to pay or secure a debt due by the corporation; while a general assignment divests the corporation of the power to exercise its corporate functions, and devolves on third persons the management of the corporate effects, and the duty of paying corporate debts. I have already endeavored to

prove that the assignment in the case before us, did not, in and of itself, operate as a dissolution of the corporation. If the reason last urged be a sound one, it applies as well to special as to general assignments; in both instances, the management of corporate effects, and the payment of corporate debts, is confided to third persons; for, in a legal point of view, I am unable to perceive the difference between an assignment to secure a debt, made directly to a creditor of a bank, and an assignment made to a third person, to effect the same object. If a bank may make *one* special assignment for the purpose of securing one of its creditors, why may it not make as many as may be necessary to secure each and every of its creditors, until all its property is exhausted? The last assignment which embraces the remaining assets held by the bank, is just as valid as the first. If so, I am at a loss to discover why, upon principle, the same object may not be attained by an assignment of all the assets for the benefit of creditors generally. The only difference consistsin this: that, in the one case, the whole property of the bank is assigned in several instruments, for the legitimate purpose of paying the corporate debts; while, in the other, but one instrument is made to effect the very same purpose. It is not difficult to see, also, that where a bank is driven by pressing necessity to multiply special assignments to secure the payment of its debts, and preserve its credit, preferences are in fact made. Those provided for by the first assignment are usually amply secured, while others are but partially secured. The assignment is not invalidated by being made by the bank to third persons. The mode and manner in which its liabilities are to be met, must, of necessity, be left to the discretion of those to whom the bank has confided the management of its affairs. Whether a payment is made directly by the bank, or through agents of its own selection,

can make no difference. By the instrument of assignment, the bank prescribes the powers and duties of the assignee, and does not commit the management of its assets to the unlimited control of third persons. The assignee is bound to execute the will of the bank as it is manifested in the instrument.

The last reason assigned under the first general head, why the assignment in question should be declared void, is, that, admitting that the stockholders had the right to dissolve the corporation, the directors had no such power. This reason is predicated upon the assumed fact, that the assignment had the effect of dissolving the corporation. We have already said, that the assignment did not work a dissolution of the corporation; and as the whole management and control of the property and affairs of the bank, is, by the charter, conferred upon the board of directors, the execution of the assignment by them was unobjectionable.

The assignment before us, made by the bank for the benefit of its creditors, may, I think, be sustained upon principle. Such assignments have received the sanction of some of the state courts, where their validity was directly drawn in question. In other cases they have been sustained, where their validity was not assailed. *State* v. *Bank of Maryland*, 6 Gill. & John. 205; *Union Bank of Tennessee* v. *Elliott*, Ibid. 363; *Warner* v. *Mower*, 11 Verm. R. 385; *Pope* v. *Stewart*, 2 Stewart, 401; 2 Bland's Ch. R. 142, *(Binney's case;)* 4 Ark. R. 302, *(Conway's case;)* 3 Wend. 13, *(Huxter & Brace* v. *Bishop;)* 5 Watts & Serg. 223, *(Dana* v. *Bank U. S.;)* Ang. & Ames on Corp. 126.*

The next general objection to the validity of the as-

* See, also, 1 Amer. Leading Cases, 78 and 79, and cases there cited.

signment is, that it is opposed to the policy of the statutes of this state.

The act of 1837, (S. L. 1837, p. 307,) which provides for proceedings in chancery against corporations, and that of 1839, (S. L. 1839, p. 94,) which provides for the voluntary dissolution of corporations, are the only statutes, the policy of which, it is said, would be defeated by sustaining the assignment made by the bank.

The act of 1837 contains some of the provisions embodied in article second of the Revised Statutes of New York, entitled, "Of proceedings against corporations in equity." (Vol. 2, p. 377.) It confers upon the Chancellor the authority *to dissolve any corporation having banking powers, when such corporation shall become insolvent, or violate any provision of its charter.* The third section of the act provides that, whenever any corporation having banking powers, shall become insolvent, or shall refuse to pay its debts, or shall violate any of the provisions of its charter, or act of incorporation, *or any other law binding on the same,* the Chancellor may, by injunction, restrain such corporation and its officers from exercising any, or all its corporate rights, and from receiving any debts or demands due or to become the same, and from paying out, or in any way transferring or delivering to any person any of the money or effects of such corporation, and likewise restrain any person or persons from transferring, in like manner, the whole or any part of his or their property or effects, who may directly or indirectly be liable for the payment of the debts or liabilities of such corporation. The fourth section provides, that such injunction may be issued on the application of the Attorney General, in behalf of the state, or of any creditor or stockholder of such corporation. The fifth section provides, that a receiver may be appointed to take charge of the property and effects, and collect the debts due the corpora-

tion. The seventh section confers power upon the Chancellor to compel such corporation, its officers, agents and stockholders to discover any property belonging to the corporation, &c.

Such are the general provisions of the act of 1837, and I see nothing in them which renders the assignment by the River Raisin Bank void. The act certainly does not, in express terms, prohibit such an assignment; nor does such an assignment defeat any object or purpose contemplated by the act. It simply affords a new remedy against corporations generally, for assuming or exercising any franchise, liberty, or privilege, or transacting any business not allowed by its charter; and to restrain individuals from exercising any corporate rights not granted by any law of this state. The other sections invest the court of chancery with new powers, and give a new remedy against corporations having banking powers, in case of their insolvency, or when such corporations shall violate any provisions of their charters, or other law binding on them.

The article of the New York statute, from which those provisions are borrowed, contains various others. It confers the most ample powers upon receivers, by which they are enabled to wind up the affairs of the corporation. Provision is also made for making all the creditors of the corporation parties to the proceeding. It gives to the Chancellor the most ample jurisdiction over all the officers of the corporation, and declares, in express terms, that all alienations made by such officers, contrary to the provisions of law, shall be set aside. Among these provisions of law, is that contained in section 4, title 4, (1 Rev. Stat. N. Y., p. 603,) entitled, "Special provisions relating to certain corporations," which provides, that, "whenever any incorporated company shall have refused payment of any of its notes, or other evidences

of debt, in specie, or lawful money of the United States, it shall not be lawful for such company, or any of its officers, to assign or transfer any of the property or choses in action of such company, to any officer or stockholder of such company, directly or indirectly, for the payment of any debt; *and it shall not be lawful to make any transfer or assignment in contemplation of the insolvency of such company*, to any person or persons whatever. And every such transfer and assignment to such officer, stockholder, *or other person*, or in trust for them or their benefit, *shall be utterly void.*"

This provision, taken in connection with the other provisions contained in the Revised Statutes of New York, make, so far as corporations are concerned, a bankrupt system. Our act of 1837, contains, within itself, scarcely an element of a bankrupt system. If intended for one, the legislature have been careful to exclude the idea that such was their intention, by failing to incorporate in the act those parts of the Revised Statutes of New York from which it was borrowed, and which carry, on their face, the evidence that a bankrupt system was contemplated. Speaking of the act of New York of 1825, in relation to corporations, Chancellor *Kent*, (2 Kent's Com. 315,) says: "It contained many directions calculated to check abuses in the management of all monied incorporations, and to facilitate the recovery of debts against them. All transfers by incorporated companies, in contemplation of bankruptcy, were declared void; and if any incorporated bank should become insolvent, or violate its charter, the Chancellor was authorized, by process of injunction, to restrain the exercise of its powers, and to appoint a receiver; and to cause the effects of the company to be distributed among the creditors. *This was a statute of bankruptcy in relation to incorporated banks.*" If these provisions had been incorporated in the act of

1837, and the means devised, as in the statute of New York, for carrying them into effect, we should have had no hesitation in determining that a bankrupt system was intended.

The act of 1839 has not, so far as I am able to discover, the slightest relation to the question before us. It simply provides a mode by which corporations may make a surrender of their rights and procure a distribution. It declares void all assignments of property, *after* the presentation of the petition, but does not invalidate assignments made before proceedings were commenced under its provisions. The act is not mandatory in its terms; nor was it intended to prevent a corporation from appropriating its property in payment of its debts, provided that, in so doing, it did not violate any law by which it was bound, and that such appropriation was not tainted with fraud. Such, it seems to me, was the object which the legislature had in view in the various acts relating to banking corporations. In the case of the *Bank Commissioners* v. *The Bank of Brest*, the Chancellor decided that the assignment made by the bank was void, because it evaded the provisions of the statute applicable to that class of corporations to which the Bank of Brest belonged; and because the directors, in making the assignment without the assent of their stockholders, exceeded their powers. The facts in that case differed essentially from those which appear in the case before us. The intention of the directors to wind up the affairs of the bank, was expressly admitted; and one of the reasons given for this proceeding, was, that they were *unable to perfect the securities required by law.* Besides, the Bank of Brest was subject to the provisions of the safety fund act; and the argument of the Attorney General against the validity of the assignment was founded upon the fact, that it contravened the policy of that act, and the act of 1838.

No reference whatever was had by him to the act of 1837. It is averred in the bill that the Bank of River Raisin was subject to the provisions of an act entitled "An act suspending, for a limited time, certain provisions of law, and for other purposes," approved June 22, 1837. By the eighth section of this act its provisions were declared inapplicable to any bank not subject to the act of 1836, (commonly called the safety fund act,) unless such bank should signify its assent to that act, so far as regards the visitation of the Bank Commissioner for the purposes specified in said act, and to ascertain the transactions of the bank in the sale of specie and bullion. All other provisions of the safety fund act were, therefore, inapplicable to the Bank of River Raisin; and we are, therefore, not called upon to affirm or deny the correctness of the opinion of the Chancellor in the case referred to. It may be that upon the facts admitted to exist, the assignment was void, as it defeated the policy of those statutes by which the banks organized under the general banking law were bound.

*Decree reversed.*

[REMAINDER OF JANUARY TERM IN NEXT VOLUME.]

# INDEX.

## AGREEMENT.

See CONTRACT.

## ALTERATION OF INSTRUMENTS.

See BOND, 1.

## AMENDMENT.

See ATTACHMENT, 1, 5, 6, 10.

## APPEAL FROM CHANCERY.

1. Under R. S. 1838, p. 379, §§ 121, 122, no appeal lies to this court from an order of the Chancellor denying a motion for the dissolution of a preliminary injunction, heard on answer to a part, and demurrer to the residue of the bill, before the time for filing replication had expired; even though the motion was founded, in part, upon want of equity in the bill, and, in denying it, the Chancellor gave his opinion upon the merits of the controversy between the parties; such order being interlocutory merely, and not a *decree or final order* within the meaning of the statute. *Wing* v. *Warner*, 288.

2. Where, on petition of one of several defendants and proffer of an answer, the Chancellor made an order setting aside a final decree, taken *pro confesso*, in a foreclosure suit, and permitting the party to defend, unless the complainant should elect to assign to him the decree for a sum named in the order, and the complainant thereupon appealed to this court, from the decision of the Chancellor granting the order, *it was held*, that the appeal would not lie, for that the order was not a *decree or final order*, within the meaning of R. S. 1838, p. 379, §§ 121, 122. *Prentis* v. *Rice*, 296.

3. An order of the Chancellor in a foreclosure suit, confirming the master's report of the appraisal, set off and conveyance of the mortgaged premises under the appraisal law of 1842, is a *final order*, from which, under R. S. 1838, p. 379, § 121, an appeal lies to this court. *Benedict* v. *Thompson*, 299.

4. *Held*, that it was not competent for this court, on an appeal from such order, to review the decree, made two years before the order, directing such appraisal, set off and conveyance. *Ib.*

5. *Semble*, that an appeal might have been taken from the decree, within the time limited by the statute; it being a *final decree* within R. S. 1838, p. 379, § 121. *Ib.*

6. It seems, that where a final decree is the subject of appeal, this court will review all previous orders connected with the decree, and affecting the merits; but on an appeal from a *final order*, the court is restricted to a review of so much of the proceedings, or to such orders, as are connected with the final order. *Ib.*

7. Upon an appeal from chancery, the jurisdiction of this court is confined to an examination of the errors found in the transcript; and the court cannot assume, as part of the case, facts not appearing in the transcript, though assumed by counsel in the argument, and though, in virtue of a parol admission, they were treated as a part of the case in the court below. *Bailey* v. *De Graff*, 169.

See CHANCERY, 5.

## ARREST.

See SHERIFF, 1.

## ARREST OF JUDGMENT.

See PLEADING, 3.

## APPRAISAL LAW.

1. The provision of the act of 1841, (S. L. 1841, p. 45, §§ 1, 2,) prohibiting the sale of property on execution unless it will bring two thirds of its value, as appraised by three disinterested freeholders, so far as it applies to the remedy to enforce pre-existing contracts, is unconstitutional and void. *Willard* v. *Longstreet*, 172.

2. But where an appraisal and sale of real estate was made under the provisions of this act, by virtue of an execution on a judgment upon contract rendered before the act took effect, and the plaintiff in the execution participated in the appraisal, and purchased the premises on the sale, at a sum exceeding two-thirds their appraised value: *Held*, that the plaintiff's rights not being affected by the appraisal, the sale was valid, and conveyed a good title. *Ib.*

3. The "Act to provide for the transfer of real estate on execution, and for other purposes," approved February 17, 1842, (S. L. 1842, p. 135,) does not authorize an appraisal and set off of mortgaged premises in satisfaction of the mortgage, without previous proceedings to foreclose, either in equity or by advertisement. *Buck* v. *Sherman*, 176.

## ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

See CORPORATION, 12.

## ATTACHMENT.

1. An attachment against a non-resident debtor, under R. S. 1838, p. 506, ch. 1, issued upon the filing of an affidavit sworn to on a day previous, is void; but will not be quashed on motion if the plaintiff file a new affidavit under S. L. 1839, p. 228, § 36. *Drew* v. *Dequindre*, 93.

2. An affidavit for an attachment, under R. S. 1838, p. 506, ch. 1, § 1, stated that the indebtedness sworn to was upon an *express* contract, without stating more particularly the nature of the contract: *Held*, sufficient. *Ib.*

3. To an attachment under R. S. 1838, p. 506, ch. 1, the sheriff returned that he had seized certain lands described therein, *in which the defendant had an interest as one of the heirs of A. D.*, but did not state the extent of the interest; and it appeared that the lands were appraised without reference to it: *Held*, sufficient. *Ib.*

4. Where, in addition to what is required by the statute, (R. S. 1838, p. 506, § 6,) it was erroneously stated in the notice of the pendency of a suit in attachment, that the writ was returnable in November *next*, instead of *instant*, it was *held*, that this did not vitiate the proceedings. *Ib.*

5. Attachment under R. S. 1838, p. 506, ch. 1, at the suit of J. D. *Receiver, &c.* The journal entries of the calling and default of the defendant at the first and se-

cond terms after the return of the writ omitted to state the special character in which the plaintiff sued. *Held*, no ground for quashing the proceedings; but that the circuit court would have power to permit such omission to be supplied by amendment, if, in fact, the defendant was properly called. *Ib.*

6. The statute of amendments, (R. S. 1838, p. 461, § 20,) applies to proceedings by attachment under R. S. 1838, p. 506, ch. 1. *Ib.*

7. The making and filing with the clerk, of the affidavit required by R. S. 1838, p. 506, ch. 1, § 1, is essential to confer jurisdiction upon the circuit court, over a proceeding by attachment under that statute. *Greenvault* v. *Farmers and Mechanics' Bank*, 498.

8. If a court act without authority, its judgments will be regarded as nullities; and the jurisdiction of a court exercising authority over a subject matter, may be inquired into, in every court where the proceedings of the former are relied upon by a party claiming the benefit of such proceedings. *Ib.*

9. Accordingly, where it appeared from the record of a judgment in attachment under ch. 1, of R. S. 1838, p. 506, that the preliminary affidavit required by § 1 of that chapter was sworn to before a person not authorized to administer oaths, *it was held*, that the proceedings were void for want of jurisdiction; and that a person claiming under and who was a party to them, could not maintain ejectment against a mortgagee of the defendant in attachment, in possession under a mortgage executed while they were pending. *Ib.*

10. An act of April 20, 1839, (S. L. 1839, p. 228, § 36,) amendatory of R. S. 1838, p. 506, ch. 1, declares, that "no writ" of attachment "shall be quashed on account of any defect in the affidavit on which the same issued, provided, the plaintiff, his agent or attorney shall, whenever objection shall be made, file such affidavit as may be required by law." *Held*,

(1.) That this act did not authorize the filing of a new affidavit, after judgment and sale of the attached premises, where the original affidavit, filed before the act took effect, was a nullity, in consequence of having been sworn to before an officer not authorized to administer oaths: and,

(2.) That if it did, such amendment would not render the title acquired under the proceedings in attachment valid, as against the claim under a mortgage executed by the defendant in attachment, while they were pending. *Ib.*

See DETROIT, CITY OF, 1.

## BAIL.

See NON-IMPRISONMENT ACT, 3. SHERIFF, 1.

## BANKRUPTCY.

B., against whom D. had recovered a judgment in the circuit court, removed the cause into this court by writ of error: soon afterwards he applied for and obtained his discharge under the bankrupt law of 1841, D. proving the judgment as a claim against his estate in bankruptcy. Supposing that by these proceedings the judgment had been *ipso facto* discharged, and that nothing remained to be done

to prevent its affirmance, B. neglected to advise with or instruct his attorney, who, after the discharge in bankruptcy, and in ignorance of it, moved the cause on to a hearing in this court, where the judgment below was affirmed, and execution issued thereon. B. now moved that the execution be perpetually stayed. The court, holding B.'s neglect to avail himself of the discharge before the judgment of affirmance, to be satisfactorily explained, granted the motion, on the terms of his paying the costs of all the proceedings in this court. *Bostwick* v. *Dodge*, 331.

See PARTNERSHIP, 1, 2.

## BAWDY HOUSE.

See DETROIT, CITY OF, 2, 3, 5, 6, 7.

## BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. Assumpsit upon a promissory note, endorsed by the defendant, to the plaintiffs, dated at Chicago, Illinois, and payable at St. Joseph, Michigan.—Plea that the note was made, endorsed and delivered, at Chicago, in the state of Illinois; that, by a statute of that state, particularly set forth, endorsers were discharged from liability, unless the degree of diligence therein specified, was used by the holder, in the institution and prosecution of suit against the maker; and that such diligence had not been used in this case, whereby the defendant was discharged.—Replication, that the note was made and endorsed for the purpose of being discounted, and was discounted, by the plaintiffs, at their banking house at St. Joseph, in the state of Michigan, and was there delivered to them, by the defendant, for the purpose of being so discounted; *without this*, that it was delivered at Chicago, in the state of Illinois, in manner and form as in the plea alleged.—On general demurrer, *Held*, that the replication was sufficient; for that,

   (1.) The inducement avers, in substance, that the defendant's contract of endorsement was made at St. Joseph, not only by the delivery there of the note endorsed, but by the negotiation of it there, by sale and receipt of the consideration by the defendant.

   (2.) The replication admits merely that the defendant wrote his name on the back of the note at Chicago—not that the contract of endorsement was made there—and this act alone, the note remaining in his possession, could not render him liable as endorser.

   (3.) The traverse is of the delivery of the note *with the defendant's endorsement upon it*, (and not of the delivery of the note merely,) at Chicago.

   (4.) If too narrow in being of delivery only, the inducement being a sufficient answer to the plea, this defect is aided by general demurrer.

   (5.) *Sed quære*, Whether delivery, or what in legal contemplation amounts to it, is not necessary to consummate the contract of endorsement.

   (6.) The replication would not be sustained by proof of delivery of the note endorsed, to the plaintiff, by some intermediate holder between him and the defendant. *Kinzie* v. *Farmers and Mechanics' Bank*, 105.

2. Where the holder of a note, striking out intermediate endorsements, declares against a remote endorser as on an endorsement directly to himself, he recovers on the contract of the defendant with his immediate endorsee. *Ib.*

## CONSTRUCTIVE NOTICE.

See LANDLORD AND TENANT, 8.

## CONTINUANCE.

See FORCIBLE ENTRY AND DETAINER, 13.

## CONTRACT.

1. The object of interpretation is to ascertain the intention of the parties. *Norris* v. *Showerman*, 16.

2. Such intention should be gathered from a consideration of all the parts of an agreement, and one clause should be interpreted by another. *Ib.*

3. The situation of the parties, and the subject matter of the transactions to which the contract relates, may be taken into consideration in determining the meaning of any particular sentence or provision. *Ib.*

4. A contract, the consideration or object of which is in violation of law, is void, and a court of justice will not lend its aid to enforce it. *Smith* v. *Barstow*, 155.

5. But a subsequent contract, if unconnected with the illegal act, and for a new consideration, is valid and will be enforced, although it may have grown out of the illegal transaction, and the party to whom the promise was made may have had a knowledge of it. *Ib.*

6. Assumpsit upon a promissory note for $1,000, made by the defendants and payable to the plaintiff. The origin and consideration of the note were as follows: The Farmers' Bank of Homer, an institution organized under the general banking law of this state, (S. L. 1837, p. 76,) drew certain drafts, on one W., to the amount of $12,000, payable four months after date, which drafts W. was induced to accept for the accommodation of the bank, by its depositing with him $15,000 of its own bills, to secure and indemnify him for such acceptances. The drafts were negotiated, and, the bank failing to provide for their payment at maturity, were dishonored. Afterwards, the defendants, (who, with others, were directors of the bank where the drafts were drawn, and as such individually liable for its debts, according to the terms of the general banking law,) in consideration of the delivery to them by W. of the $15,000 of bills of the bank deposited with him as above mentioned, made and delivered to the plaintiff the note in question, and also assigned to him certain other securities, upon the *trust* that he should collect the moneys due and to become due thereon, and apply the same to the payment of the drafts drawn upon W., and in indemnifying W. against his acceptances thereof, &c. *Held*, that, admitting the unconstitutionality of the general banking law, in so far as it purports to confer corporate powers, and the consequent illegality of the drafts and bills, yet, that the note and trust were untainted by such illegality, but were a new and separate transaction based upon the fact that the holder of the drafts had advanced a full consideration for them, which in justice and equity ought to be paid to him; and that the consideration of the note, viz: the delivery by W. to the defendants of the bills of the bank, and the object of the note and trust, viz: to provide for the payment of the the drafts, were legal and valid. *Ib.*

7. *Held*, also, (affirming *Rice* v. *Wheelock*, 1 Doug. Mich. R. 267,) that the plain-

## CORPORATION.

## DEDICATION.

See HIGHWAY.

## DEED.

See EXECUTION, 7. GUARDIAN, 7, HIGHWAY, 1—3, 8. LANDLORD AND TENANT, 1, 4, 5, 6. MORTGAGE OF LAND. TAX TITLES.

## DETROIT AND PONTIAC RAIL ROAD COMPANY.

See INQUEST OF DAMAGES.

## DETROIT, CITY OF.

1. The Mayor's Court of the city of Detroit, has no jurisdiction of proceedings against debtors by attachment under R. S. 1838, p. 506, ch. 1. *Welles* v. *City of Detroit*, 77.

2. The statute, (S. L. 1832, p. 40, § 3,) empowering the common council of the city of Detroit "to make all such by-laws and ordinances as may be deemed expedient for the purpose of preventing and suppressing houses of ill fame within the limits of the city," does not authorize the common council, by ordinance and resolution, to require the city marshal to demolish a house occupied as a house of ill fame, and adjudged by such council to be a common nuisance. *Welch* v. *Stowell*, 332.

3. Neither have individuals the right to abate the nuisance occasioned by the occupation of a building as a house of ill fame, by demolishing the building. *Ib.*

4. *It seems* that the power to abate a nuisance is limited to the removal of that in which the nuisance consists. *Ib.*

5. Indictment of the offenders is the appropriate remedy, both at common law and under the statute, for the suppression of houses of ill fame.

6. Keeping a house of ill fame, is a *criminal offence* within the meaning of article I, § 11, of the constitution of the state, which declares that "no person shall be held to answer for a criminal offence, unless on presentment of a grand jury; except," &c. *Slaughter* v. *People*, 334.

7. *Held*, accordingly, that an ordinance of the common council of Detroit, prescribing the punishment for keeping a house of ill fame within the limits of the city, and providing for the trial and conviction of offenders by the mayor's court, where the proceedings are by complaint, *without presentment of a grand jury*, was unconstitutional; and that a summary conviction, by the mayor's court, for violation of this ordinance, was void. *Ib.*

## DOMICIL.

How defined, and how, and from what facts and circumstances it may be inferred. *Rue High, Appellant*, 515.

See WILL, 2. 5, 7.

## DOWER.

1. In this state, a widow is entitled to dower in *wild lands*. *Campbell, Appellant*, 141.

1839, it was alleged that the bank was a body politic and corporate, in, &c.; that in March, 1839, the bank commissioners of the state filed a bill in chancery against the bank, charging insolvency and a violation of the law under which it was organized, whereupon receivers were appointed to take charge of the effects of the bank, &c., and that said receivers assigned the mortgage to the complainant. *Held*, that, upon these allegations, and the laws of this state of which the court were bound to take judicial notice, the court would assume that the bank was organized under the provisions of the general banking law. *Hurlbut* v. *Britain*, 191.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 3. COLLISION OF VESSELS, 1, 2. CONTRACT, 3, 10. CORPORATION, 1—6. FORCIBLE ENTRY AND DETAINER, 3, 4, 8, 10. FOREIGN LAW. FRAUD AND FRAUDULENT CONVEYANCES, 3, 4. HIGHWAY, 3—6. LANDLORD AND TENANT, 6. PROBATE COURT, 8—11. TAX TITLES. VARIANCE.

## EXECUTION.

1. A levy on real estate is not a *prima facie* satisfaction of the debt. *Semble*. *Spafford* v. *Beach*, 150.

2. As to the effect of a levy upon sufficient personal property, See BILLS OF EXCHANGE AND PROMISSORY NOTES, 5.

3. An *alias fi. fa.* issued on a return of a previous execution levied upon real estate which remained unsold for want of bidders, is irregular merely, but not void. *Spafford* v. *Beach*, 150.

4. So, also, non-compliance by the sheriff with the requirements of the statute in regard to the levy, advertisement, or sale of real estate, is mere irregularity. *Ib.*

5. And such irregularities must be complained of in due time, by motion, or they will be waived. *Ib.*

6. A motion to set aside an execution and proceedings under it for irregularity merely, made five years after sale of real estate by virtue of the execution, is too late. *Ib.*

7. The title of a purchaser of real estate sold on execution, is not affected by the insufficiency of the sheriff's return to the execution. The sheriff's certificate of sale and deed, and not his return, are the evidence of such title. *Ib.*

See APPRAISAL LAW, 1, 2. BANKRUPTCY. EXEMPTION LAW. JUSTICE OF THE PEACE, 3.

## EXEMPTION LAW.

1. The act of 1842, (S. L. 1842, p. 70,) exempting from execution property not exempted by previous statutes, operates upon the remedy to enforce contracts made before it took effect. *Rockwell* v. *Hubbell's Adm'rs*, 197.

2. It does not, in so far as it is thus retrospective, *impair the obligation of contracts*. *Ib.*

## FORCIBLE ENTRY AND DETAINER.

1. The summary remedy which the statute, (S. L. 1840, p. 84, § 5,) provides for obtaining possession, after redemption expired, of premises sold on mortgage fore-

gage as fraudulent and void as against him. On the hearing, which was upon bill and answer, it appeared that at the time of the execution of the mortgage, C was ignorant of B's indebtedness to A, and of the pendency of the suit for the recovery thereof; and that the consideration of the mortgage was C's execution of his five promissory notes, payable to B's order, in one and two years, to the amount, in all, of the sum secured by the mortgage, and his delivery thereof to B, for the purpose of enabling B to raise money by their negotiation: whether the notes had in fact been negotiated by B, did not appear; and, both B and C denied all fraudulent intent in executing the mortgage. *Held*, that the facts did not sufficiently establish the fraud, to authorize the court to decree a release of the mortgage. *Ib.*

3. Fraud will not be presumed upon slight circumstances: the proof should be so clear and conclusive as to leave no rational doubt on the mind as to its existence. *Ib.*

4. *Held*, that a *parol* ante-nuptial promise, by a husband, to hold money belonging to his wife at the time of marriage, as her trustee, and invest it in real estate in her name and for her separate use, could not be given in evidence to sustain a post-nuptial settlement upon the wife, as against creditors; such promise being founded solely upon the consideration of marriage, and therefore within the statute of frauds. R. L. 1833, p. 342, § 10. *Wood* v. *Savage*, 316.

5. *It seems*, that a voluntary post-nuptial settlement upon a wife, by a husband who was indebted at the time, is fraudulent and void as against existing creditors: And, that it is *prima facie* fraudulent, even as against subsequent creditors; but that, as against them, the presumption of fraud arising from the fact of indebtedness may be repelled by circumstances; as that the debts existing at the time were secured by mortgage, or in the settlement. If the husband was not indebted at the time, the settlement will be valid unless actual fraud is shown. *Ib.*

6. Bill to reach and have applied to the payment of a judgment of $1873.67, which complainants had recovered against B. & W., partners, in November, 1838, a farm, of which the title was in B.' wife and father.

The wife's title was this: She was married to B. in October, 1835: at the time, she had $1500 in money of her own; and it was agreed by *parol* between her and B., on the day preceding their marriage, that he should hold this money as her trustee, and invest it in real estate in her name and for her separate use, whenever a favorable opportunity offered; and a part of the money was then delivered to him, and the balance soon after the marriage. In November, 1837, B. purchased for, and procured to be conveyed to his wife, with her assent, the undivided half of said farm; paying therefor $1050 out of the partnership funds of B. & W. In June, 1839, a like purchase for, and conveyance to the wife, of the other half of the farm, was consummated, for the consideration of $1500, of which B. paid $500 down, and the balance was secured by a mortgage executed by the wife, and notes which B. signed with her as surety. At the time of the first purchase, the firm of B. & W. owed sundry debts which were not secured by mortgage or otherwise, but whether their indebtedness to the complainants then existed did not appear.

The only title of B.'s father, to the farm, was derived through a quit claim deed, executed to him by B. in 1840, in consummation of a purchase of B.'s interest,

supposed to be a life estate, made in good faith, and for a valuable consideration, but with full knowledge of all the facts.

*Held*, that, as to the complainants, the farm must be deemed the property of B. and subject to sale to satisfy their judgment against B. & W. *Ib.*

## FRAUDS, STATUTE OF.

See CONTRACT, 12, 13, 14. FRAUD AND FRAUDULENT CONVEYANCES. LANDLORD AND TENANT, 1, 7. MORTGAGE OF LAND, 1. PLEADING, 1, 2.

## GENERAL BANKING LAW.

The general banking law, (S. L, 1837, p. 76,) being unconstitutional and void in so far as it purports to confer corporate powers, (*Green* v. *Graves*, 1 Dougl. Mich. R. 351,) no foreclosure can be maintained upon a mortgage executed to a bank organized under its provisions. *Hurlbut* v. *Britain*, 191.

See CONTRACT, 6. EVIDENCE, 5.

## GRAND JURY.

See CRIMINAL LAW, 2, 3, 4.

## GUARANTY.

See PLEADING, 1, 2.

## GUARDIAN.

1. It is not necessary that the guardianship bond, required by R. S. 1827, p. 59, § 5, should be *executed* by the guardian; it is sufficient if a bond, with sufficient securities, is given. *Palmer* v. *Oakley*, 433.

2. The giving of the guardianship bond, under R. S. 1827, p. 59, § 5, is not a condition precedent to the execution of the trust of guardian. *Ib.*

3. *It seems* that where a married woman, appointed guardian, unites with her sureties in the guardianship bond, the bond will be good, notwithstanding her incompetency to execute it. *Ib.*

4. Both at the common law, and under the statute of 1827, (R. S. 1827, p. 56,) a married woman is competent to be a guardian, with the assent of her husband; but not without such assent. *Ib.*

5. The husband's assent may be presumed from his joining with his wife in the bond which R. S. 1827, p. 88, § 2, requires a guardian to give, before sale of the ward's real estate. *Ib.*

6. *It seems* that where a *feme covert* takes upon herself the office of guardian, during coverture, it will be presumed that it is with her husband's assent, unless his dissent expressly appears. *Ib.*

7. A *feme covert*, who is guardian, can convey the real estate of her ward, without her husband joining in the deed. *Ib.*

8. Non-compliance, by a guardian, with the requirements of the statute relative to the notice to be given of the sale of real estate of the ward, under license of the probate court, will not invalidate the title of a *bona fide* purchaser. *Ib.*

See PRACTICE, 5, 6. PROBATE COURT, 1—8.

## HIGHWAY.

## INFORMATION.

See PLEADING, 5, 6.

## INQUEST OF DAMAGES.

Where, on an inquest of damages under § 11, of the charter of the Detroit and Pontiac Railroad Company, (S. L. 1844, p. 44,) after six jurors had been stricken from the panel of eighteen—three by the corporation and three by the sheriff for the owner of the land who did not attend—one of the remaining twelve stated that he was not a freeholder, and was thereupon set aside, and one of the six who had been previously stricken from the panel was re-summoned, and, with the other eleven, proceeded to make the inquest, *it was held*, that the inquest was irregular, the sheriff having exceeded his authority in re-summoning the juror who had been previously stricken from the panel. In re, *Detroit and Pontiac Railroad Company*, 367.

## INSPECTORS OF ELECTIONS.

See ELECTIONS.

## IRREGULARITY.

See EXECUTION, 3—6. FORCIBLE ENTRY AND DETAINER, 11. PROBATE COURT, 1, 2.

## JACKSON, VILLAGE OF.

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## JUDGMENT.

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## JURY.

See CRIMINAL LAW, 2, 3, 4. FORCIBLE ENTRY AND DETAINER, 12. INFERIOR COURT. INQUEST OF DAMAGES.

## JUSTICE OF THE PEACE.

1. Under the justices' act of 1841, (S. L. 1841, p. 81, §§ 1, 39, 43,) a justice of the peace has no power to try a cause in which it appears by the pleadings that a question of title to real estate is involved, and the title is *disputed;* but where the title is *admitted*, as by demurrer to a declaration alleging it, the justice has jurisdiction. *Stout* v. *Keyes*, 184.

2. A justice's return to a *certiorari* showed a verdict rendered by a jury in the cause, its amount, and the amount of costs taxed; but it did not appear therefrom that the justice had formally entered judgment upon the verdict: *Held*, sufficient; the

finding a verdict in a justice's court, being, in legal effect, a judgment. *Gaines* v. *Betts*, 98.

3. The justices' act of 1841, (S. L. 1841, p. 31,) did not authorize the renewal of an execution on a justice's judgment returned unsatisfied for want of goods and chattels, but provided that a further execution might thereupon be issued, (§ 80;) and it repealed the statute previously in force authorizing such renewals, (R. S. 1838, p. 395, § 20,) with this saving clause: "The repeal shall not affect any act done, or any right accruing or accrued, or established, or any suit or proceeding commenced, in any civil case, but the proceedings in every such case shall be conformed, when necessary, to the provisions of this act." (§ 173.) *Held*, that, notwithstanding this saving clause, an execution issued before the act took effect, could not be *renewed* after that time. *Jackson* v. *Sheldon*, 154.

See CERTIARORI. FORCIBLE ENTRY AND DETAINER. INFERIOR COURT. WITNESS.

## LACHES.

See BANKRUPTCY. EXECUTION, 5, 6. PRACTICE, 8—12.

## LANDLORD AND TENANT.

1. A, by deed, leased premises to B, who afterwards assigned the lease to C:—A assented to the assignment, and agreed, by parol, to accept C as his tenant, and to look to him for the rent. *Held*, that there had been a sufficient surrender of the lease by operation of law, to satisfy R. L. 1833, § 9; and that A could not afterwards maintain covenant against B, for the rent. *Logan* v. *Anderson*, 101.

2. *Held*, that a suit against a lessee, to recover possession of the demised premises, on account of the non-payment of rent, &c., was properly brought by the lessor in his own name, although he had previously assigned the rents to accrue under the lease, to a third person. *Chamberlain* v. *Brown*, 120.

3. A tenant holding over after the expiration of his term, cannot set up title to the premises in a third person, in defence of an action by his landlord to recover the possession. *Falkner* v. *Beers*, 117.

4. Water was leased by the following words, viz: "The right and privilege of drawing from the west side of the race now making by the said party of the first part, in Ypsilanti aforesaid, and leading to his new saw mill, at any place within sixteen rods from the head gate of said race, as much water as will run through an aperture of two feet square, under a head of four feet from the top of said aperture, for the use of carrying machinery for iron works, provided so much shall be needed by the said party of the second part for such use:" And the lease further provided as follows: "That in case the two feet square of water should not be enough for the use of such iron works as the said party of the second part may hereafter erect, near said race, he shall have as much more as shall be necessary for such use, by paying therefor at the same rate as for the two feet square aforesaid;" and also, "That in case a sufficient quantity of ore cannot conviently be procured for carrying on said iron works to advantage, the said two feet square of water may be used for such other machinery as the said party of the second part shall think fit and proper." *Held*, that construing the words of demise by

## LIEN.

See MECHANICS' LIEN.

## LIMITATIONS, STATUTE OF.

An act of May 15th, 1820, (R. L. 1833, p. 570, § 6,) limited the time for bringing ejectment and other real and possessory actions, for causes of action thereafter accruing, to twenty years. An act of November 5, 1829, (Ib. 406,) limited the period to *ten* years where the cause of action *had then accrued*. The Revised Statutes which took effect August 31, 1838, repealed these acts, (p. 690,) and substituted a new limitation of *twenty* years, by Ch. 1, Tit. VI, Pt. 3d; the eighth section of which provided, however, that causes of action which should have accrued before the said 31st of August, 1838, should not be affected by that chapter, but should be determined by the law under which the same *accrued*. In ejectment, commenced in 1840, for a cause of action which accrued in 1822, *it was held*, construing § 8 above referred to, with reference to the other provisions of the Revised Statutes of 1838, relating to the same subject, (§ 7, p. 574, §§ 2, 3, p. 697, §§ 25, 27, p. 580,) that the action was barred by the act of November 5th, 1829. *Lastly* v. *Cramer*, 307.

## MARRIAGE SETTLEMENT.

See FRAUD AND FRAUDULENT CONVEYANCES, 4—6.

## MARRIED WOMAN.

See GUARDIAN, 4—7. HUSBAND AND WIFE.

## MAYOR'S COURT OF DETROIT.

See DETROIT, CITY OF, 1, 7.

## MECHANICS' LIEN.

1. The lien, under R. L. 1833, p. 406, of a mechanic or material man, for labor done or materials furnished in the construction of a building, attaches only upon the interest of the person for whom it was erected; and does not encumber any pre-existing right or title of any other person. *Scales* v. *Griffin*, 54.

2. If, therefore, when the lien attaches, the person causing the building to be erected, has no title to the premises on which it stands, but a mere right, resting in contract, to a conveyance on the performance of a condition precedent, and that right is afterwards lost by his failure to perform the condition, subsequent proceedings to enforce the lien, will convey no right or title to the purchaser. *Ib.*

## MINORS.

See PROBATE COURT, 3—10.

## MONUMENTS.

See EVIDENCE, 3.

## MORTGAGE OF LAND.

1. Where A was pardoned on condition he secured the payment of $1,000 to the county, and the county commissioners took a mortgage to themselves, instead of

## PRINCIPAL AND SURETY.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 5. PRACTICE, 4.

## PRESUMPTION.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 5. CERTIORARI, 2. CONTRACT, 10. COVENANT. FOREIGN LAW. FRAUD AND FRAUDULENT CONVEYANCES, 3. 5. GUARDIAN, 5, 6. PLEADING, 5.

## PROBATE COURT.

1. *It seems* that the decree of a probate court, appointing a *feme covert* guardian, who was incompetent to execute the trust on account of the coverture, would bind until reversed; and the acts of such guardian would be valid. *Palmer* v. *Oakley*, 433.

2. *It seems*, that letters of guardianship granted to a wife, without the husband's assent, would be *voidable* merely; not *void*. *Ib.*

3. R. S. 1827, p. 57, § 1, defines, and limits to the cases therein specified, the jurisdiction of the probate court over the appointment of guardians for minors, conferred in general terms by R. S. 1827, p. 55, § 1. *Ib.*

4. Under these statutes, the probate court has no power to *appoint* a guardian for a minor over fourteen, and within the territory, without first *citing* him to appear and choose his own guardian; *aliter*, if the minor is under fourteen. *Ib.*

5. And an *ex parte* application, representing that the minor is under fourteen, will not confer the jurisdiction to *appoint*, without citation, if, in fact the minor is over that age. *Ib.*

6. If, however, upon a hearing, after citation, the court find the minor to be under fourteen, and appoint a guardian for him as such, *it seems* that the decree will be valid until reversed, even though he was over that age. *Ib.*

7. But a decree of the probate court, appointing a guardian for a minor, who is over fourteen, without citation, is *void*, for want of jurisdiction; and a sale of land, by such guardian, will not divest the title of the minor. *Ib.*

8. Where the decree appeared, on its face, to have been made upon an application representing the minor to be under fourteen, and did not show citation of the minor, *it was held*, that it might be impeached, in a collateral action, by evidence showing that the minor was, at the time, over fourteen. *Ib.*

9. *It seems* that in support of such decree, citation might be shown by evidence *aliunde*. *Ib.*

10. *Held*, also, that such decree was valid until impeached by evidence showing want of jurisdiction, although it did not show, on its face, any formal finding of the fact that the minor was under fourteen. *Ib.*

11. *Held*, that the court of probate had power, under R. S. 1838, p. 435, §§ 28, 30, p. 385, §§ 6, 7, to issue a commission to take the deposition of a witness to a will, residing out of the state. *Rue High, Appellant*, 515.

See DOWER, 2. GUARDIAN. WILL.

END OF VOL. TWO.

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